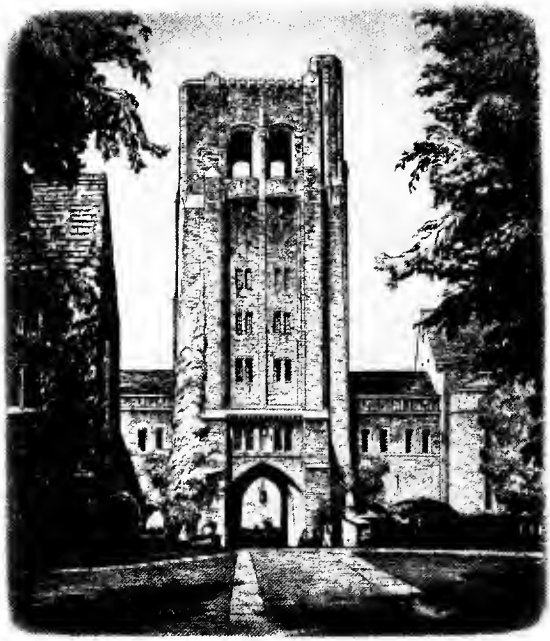

TITLES TO REAL ESTATE
IN THE STATE OF NEW YORK.

A

DIGESTED TREATISE

AND

COMPENDIUM OF LAW,

APPLICABLE TO

TITLES TO REAL ESTATE

IN THE STATE OF NEW YORK.

By JAMES W. GERARD, Jr.
COUNSELLOR AT LAW.

SECOND EDITION.

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PREFACE.

This volume is an amplification of one of a similar but informal character, printed a few years since, and which, at the request of the publishers, and upon the suggestion of many members of the profession, reappears in its present form.

The present edition includes many subjects of importance connected with realty not previously considered, and is otherwise much extended.

The aim in compiling this treatise, has been the exposition of the principal features of the real estate law of this State in a practical shape, under clearly distinguishing heads, and within the compass of a single volume. Such a succinct treatment of the real estate system of this State—now grown to formidable proportions under the mass of statute law that has been appended to the revision of 1830—will explain the somewhat terse style necessarily adopted in the reduction of the subject-matter into a comparatively small compass.

Since the production of the valued Commentaries of Blackstone and Kent, and the disquisitions of the English common law writers of the earlier portion of this century, the jurisprudence of this State has undergone great change and increase, imposing new labors on the profession. Real estate law, particularly, under the effect of legislation breaking away further and further from the common law system, and abolishing or modifying ancient principles under modern requirement, has grown into a system requiring not only study as such, but direction and guidance in its minute and special changes and provisions.

In connection with the extended statutory law bearing on

real estate, we have, in this State, a vast number of decisions expounding or interpreting it—decisions which have given the profession the accumulated mass of reports under which it is now laboring—often, under our modern elective system, the result of crude judicial thought, but which, whatever their various merits, the profession is required to recognize.

In carrying out the purpose of plain condensation of the above statutory and adjudicated law, the literary treatment of the subjects under review has been practical, with an endeavor to avoid unnecessary verbiage, and without aim at theoretic disquisition or more comment than is necessary for explanation.

A feature of the present volume is that it relates merely to the law of real estate in *this State*, with but an occasional reference to the adjudications of other States of the Union. Each State has now its statutory system, more or less variant from that of others, with voluminous decisions interpreting it. A review of the entire real estate law of the several States, however facile a task it might have been some years since, would be now one of extraordinary labor, and would result in a work so cumbrous in volume and confused in treatment as to be of little practical value.

Of course, in a treatise of this nature, wherein very many subjects of great importance are reviewed, it has been impossible to treat them exhaustively or profoundly. The general features only of the subjects under consideration have been, in the main, presented; and, to save space, much has been merely indicated that in a larger work, or in special treatises, would be properly considered at length. Besides the general principles affecting real estate, and an exposition of the various sources of title to land in this State, and of the instruments or legal agency by which lands vest or are transferred, the nature and legal incidents of estates have been considered, together with the different liens to which land has been made subject.

It has been the pleasure of recent legislatures, under a mistaken policy, and often moving in utter legal and intellectual darkness, to add to the burthens of real estate and the perplexity of the profession, by placing many quite obscure liens upon realty—legal pitfalls, into which even the experienced

conveyancer is in danger of falling, as he gropes his way through the tortuous mazes of a modern "Title to Real Estate." Such liens have been, it is hoped, fully indicated in this volume, how and when they arise, and how they may be removed. Though often petty in their nature, they are as necessarily a branch of legal knowledge concerning realty as were the most profound *arcana* of the common law system under its most mystical reign.

Although this volume is more particularly adapted to the wants of the conveyancer, it is hoped that it may be also of service to those in other walks of legal life; and with reliance upon the indulgence of the members of that laborious profession, whose cares and toil it is hoped this Treatise may somewhat relieve, it is to them deferentially submitted.

JAS. W. GERARD, JR.

New York, October, 1873.

MEMORANDA.

The initials "R. L." in the work refer to the Revised Laws of 1813. There had been a prior revision in 1801.

The initials "R. S." refer to the Revised Statutes, which, in most of their provisions, and unless the contrary was specified in the law of Dec. 10, 1828, took effect on the 1st of January, 1830. This act also made important provisions as to the construction of the Revised Statutes. A "general repealing act," repealing a large number of previous acts, which are specified at length, was also passed on the 10th of December, 1828, the repeal to take effect on the 31st December, 1829. The act was not to be construed as repealing statutes consolidated and published in the Revised Statutes, nor any act passed since 9th September, 1828, unless the act were consolidated in the Revised Statutes. The law also provided that the statutes of Great Britain should not be laws of this State, nor deemed to have any effect since the 1st May, 1788; and no statutes of the late colony were to be deemed laws of the State. This act also contained important provisions as to the effect of the Revised Statutes in the revival or repeal of prior acts. It also repeals an act of December 24, 1827, as to the Revised Statutes. Unless there is specification to the contrary, the reference to the Revised Statutes is to the 5th edition.

ADDENDA ET CORRIGENDA.

The following additions and corrections it is desirable to note in the body of the book. By so doing the State decisions *to and including 50th of New York, the 64th of Barbour's* and the *6th of Lansing's* reports, which were published during the progress of the work, will be included in it. Also the STATUTES of 1873.

Page 6. After "589," 4th line from bottom, insert "affirmed 41 N. Y. 397."

" 18. After "148," 10th line, insert "People v. City of Rochester, 50 N. Y. 525; s. c., p. 558."

" 19. After "Wall. 210," 11th line from bottom, insert "*In re* Central Park, 63 Barb. 182; The Chenango Bridge Co. v. Lewis, 63 Barb. 111."

" 27. At end of the chapter, insert "Dubois v. Kelly, 10 Barb. 496; Stokes v. Macken, 62 Barb. 145."

" 29. At bottom of the page, insert "The use, however may be public, although benefiting a particular community. Bloomfield, &c. Gas Co. v. Richardson, 63 Barb. 437; Hartwell v. Armstrong, 19 Barb. 166."

" 32. At bottom of page, add "*In re* Central Park, 63 Barb. 282."

" 34. After the 5th line from bottom, add "Judgment creditors are not owners entitled to compensation. Watson v. N. Y. C. R. R. 47 N. Y. 157."

" 36. Between the 3d and 2d lines from bottom, add "Land cannot be entered on and trees cut, under any railroad act, without compensation theretofore made. Blodgett v. Utica, &c. R. R. 64 Barb. 580."

" 38. After "39 N. Y. 171," 18th line, add "Provision for an assessment upon adjacent owners is not a compensation. 19 Barb. 166."

" 40. After "Penn. 424," add "The People v. Haines, 49 N. Y. 587; Norton v. Walkill, &c. R. R. 68 Barb. 77."

" 44. At end of 3d line, after "476," add "*Ib.* 63 Barb. 77."

" 47. After "7 Barb. 508," 16th line, add "Kellinger v. 42d St. R. R. 50 N. Y. 206."

" 102. After "White v. Howard, 52 Barb. 594," insert "affirmed, 46 N. Y. 144."

" 140. Insert after 17th line, "Lyon v. Adde, 63 Barb. 89, holds that any release of the rent charge must be by deed, disapproving Lyon v. Chase, 51 Barb. 14."

" 153. After 6th line, add "They cannot take soil or wood for manufacturing purposes. Livingston v. Reynolds, 2 Hill, 157."

" 157. At end of page, add "But it attaches on lands held in common. Smith v. Smith, 6 Lans. 113."

" 158. At end of 16th line, add "It attaches to a vested remainder, subject to be defeated. McStear v. Matthews, 50 N. Y. 161."

" 164. After "24 Wend. 193," 6th line from bottom, add "but the adultery must be found by a final judgment. Pitts v. Pitts, 18 Abb. N. S. 272; and no provision for dower can be made in any decree for a limited separation. Crain v. Cavana, 62 Barb. 109."

" 166. After "Maloney v. Horan, 58 Barb. 29," occurring twice on the page, insert "reversed, 49 N. Y. 112."

" 181. After the 13th line, add "This statute does not apply where the tenant knew the premises were to be made untenantable. Alsheimer v. Krohns, 45 How. P. 127."

" 184. At end of Title ii, add "Leases of Railroads, construction of, *In re* N. Y. Cen. R. R. 49 N. Y. 414."

" 192. At end of Title v, add "Law of 1873, ch. 588. By this act if the tenant carries on an illegal trade or business the lease is to become void; and the landlord may re-enter. If he assent, he becomes jointly liable."

" 199. 14th line, after "628," add "Doyle v. Gibbs, 6 Lans. 180;" after "749," 17th line, add "or where there is a mere license. Doyle v. Gibbs, 6 Lans. 180;" after "616," 19th line, add "Smith v. Littlefield, Commissioners of Appeals, 1878."

" 201. Middle of page, after "14 N. Y. 64," add Nims v. Sabine, 44 How. 252."

" 205. After "60 Barb. 39," 12th line, add "A parol agreement to terminate the lease is not valid without a surrender. Wilson v. Lester, 64 Barb. 431;" 14th line from bottom, after "15 Wend. 400," add Abell v. Williams, 3 Daly, 17;" after "863," 7th line from bottom, add "but see Wilson v. Lester, 64 Barb. 431."

" 206. At the end of Title x, add "As to implied surrender, see also, Wilson v. Lester, 64 Barb. 431;" after "will," 18th line from bottom, add "Clarke v. Rannie," 6 Lans. 210."

" 214. At end of chapter, add "*Leases by Special Partners.*—Such partners may lease to the general partners. Law of 1872, ch. 114."

Page 219. After "61," 5th line from bottom, add "Livingston v. Green, 6 Lans. 50."
" 239. 3d line, after "363," add "Robison v. Robison, 5 Lans. 165."
" 247. 17th line from bottom, after "445," add "*vide* Norsworthy v. Bergh, 16 How. 315; and Powers v. Barr, 24 Barb. 142, as to what land may be sold, and when."
" 281. 7th line, after "cited," add "and Buffalo v. N. Y. & E. R. R. 47 N. Y. 588; and Sturtevant v. Sturtevant, 20 N. Y. 39."
" 307. At end of Title viii, add "As to gifts of charities out of the State, *vide* Chamberlain v. Chamberlain, 43 N. Y. 432."
" 325. At end of page, add "As to the incidents of a partnership in lands, *vide* Chester v. Dickinson, 45 How. 326."
" 342. After "49 Barb. 455," in middle of page, add "The legislature may declare the acts of any two valid. *In re* Broadway, 63 Barb. 572."
" 348. At end of page, add "A provision that the grantor is to unite in the execution of the power, is valid. Kissam v. Dierkes, 49 N. Y. 602."
" 362. As a note to p. 362, add "*Vide* law of 1873, ch. 552, as to proof of descent to be made by heirs as presumptive evidence thereof."
" 365. 8th line from bottom, strike out "*etc.*"
" 396. After 3d line, add "A mutual will between husband and wife is valid. *In re* Diez, 50 N. Y. 88;" at bottom of page, add "Crolius v. Stark, 64 Barb. 112."
" 408. Before ¶ 4, add "No seal is necessary. *In re* Diez, 50 N. Y. 88."
" 452. After 5th line, add "See a case where the heirs were estopped from denying the executor's powers. Favill v. Roberts, 50 N. Y. 222."
" 475. After 7th line, add "*Vide* 5 Lans. 60; 44 Barb. 201." At bottom of page, add "A vendee is not bound to take a title resting upon adverse possession. Hartley v. James, 50 N. Y. 38."
" 479. At end of Title lv, add "If the title is defective, the vendee may recover payments made, without further tender. Hartley v. James, 50 N. Y. 38."
" 501. 23d line, after "15 J. R. 447," add "Winchester v. Osborn, 62 Barb. 338."
" 502. After the word "estoppel," 6th line, add "Bridges v. Pierson, 45 N. Y. 601; also, after 1 Lans. 481, same page."
" 511. Middle of page, add "As to covenant of warranty by estoppel, *vide* Tefft v. Munson, 63 Barb. 31.
" 519. After "16 N. Y. 560," middle of page, add "Marcy v. Johnson, 5 Lans. 365."
" 532. At end of Title l, insert "If the conveyance is set aside as fraudulent, it would not operate to merge another estate. Mallory v. Horan, 49 N. Y. 111."
" 537. Before "Tacking Mortgages," insert "See also, as to railroad mortgages, Stevens v. Watson, 45 How. 104."
" 554. At end of Title iii, insert "Acts of foreign corporations, *vide* act of 1878, ch. 684, as to validity of, here."
" 558. After 3d line from bottom, insert "Baptist Churches. Law of 1873, ch. 965." At end of 6th line, after "generally," add "amended by law of 1871, ch. 883."
" 559. 13th line, after "649," add "and 209."
" 560. At end of Title lv, add "Public libraries, law of 1872, ch. 721, 458."
" 562. At end of Title v, insert "Savings Banks, law of 1871, ch. 693, 907." In Title v, note, "laws of 1871, ch. 603; 1872, ch. 235." Under Railroad, Title vii, note, "law of 1871, ch. 560; 1872, ch. 81."
" 563. Under law of 1869, ch. 917, note, "this law amended, 1873, ch. 352; see also, law of 1872, ch. 843." Under "mortgages by railroads" note, "Stevens v. Watson, 45 How. 104."
" 564. At the end of page, add "Law of 1871, ch. 481, as to mortgaging; 1871, ch. 652, as to refiling certificates."
" 567. Under head of "Villages," note, "*vide* laws of 1871, pp. 1515, 1972."
" 567. Under "Gaslight Cos.," note, "law of 1871, ch. 951; 1872, chs. 374 and 116. Under "Social Clubs," note, "law of 1873, ch. 698."
" 568. At end of chap. note, "Trades Unions, law of 1871, ch. 375; Military Drill, 1871, ch. 705; Railroad Rolling Stock Cos. 1873, ch. 814."
" 596. At end of chap. add "These acts, as affecting evidence, only apply to federal courts. People v. Gates, 43 N. Y. 40."
" 630. At end of chap. add "1873, ch. 363."
" 640. Before the words "visible, distinct, &c.," add "Tompkins v. Snow, 68 Barb. 525."
" 642. At end of Title ii, add "Towle v. Palmer, 1 Abb. N. S. 31."
" 661. At end of note, add "See also law of 1872, ch. 315."
" 665. After "fences, &c.," insert "amended law of 1871, p. 1380." At end of Title vi, add "See also law of 1872, ch. 377, as to fences on lands bounded by a stream."
" 678. At end of chap. add "The legislature may remove the lien of a judgment before rights become vested. 47 N. Y. 157; 15 Wall. 610."

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CHAPTER I.

OF THE SOURCE OF TITLE TO LAND IN THIS STATE, AND ITS TRANSFER FROM THE COLONIAL AND STATE GOVERNMENTS.

TITLE I. OF THE SOURCE OF TITLE TO LAND IN THIS STATE.

THE original title to land on the American continent, as between the different European nations, was founded on the international right of discovery and conquest; a principle of title acquiesced in by all civilized powers. The title thus derived is the exclusive right of acquiring the soil from the natives, and of establishing settlements on it.

This title, to be perfect, has to be consummated by possession; and the discovery has to be made by persons under the authority of, or recognizing the government claiming. The discovered region thereupon becomes a part of the national domain, and is subject to disposal as such.

The discovery of North America was made under commission from the English crown;* and the first set-

* Newfoundland and the main continent were discovered 1497, by Sebastian Gabato, a Venetian in the service of Henry VII.

On the 10th of April, 1606, King James II issued the great North and South

tlement was made by the English, with a public declaration that they claimed, by virtue of that discovery and settlement, possession from the thirty-ninth to the forty-fifth degree of latitude. The subsequent Dutch invasion of this State was considered in hostility to those rights, and the reoccupation by the English was in vindication and under authority of their original title.

Although the Dutch occupation of a portion of the State was in opposition to the claim of the English, it is chronicled that, as early as 1613, the superintendent of the Dutch agency, at New Amsterdam, paid a small tribute to the governor of Virginia. The government of Holland, however, refused to recognize the jurisdiction of the English over the Dutch settlement.

Although the early Dutch occupancy of this island was considered by the crown of England an usurpation of right, and in opposition to the English paramount title, resulting from the prior conquest and discovery of the general coast, the Dutch patents and grants, both those to municipal bodies and to individual residents, were respected and confirmed by the English authorities. The Dutch title, also, whatever its validity, passed by specific treaty to the English crown. When Holland and England made peace with each other in 1674, under the Treaty of Breda, the island of Manhattan, together with all other possessions of the Dutch on this continent were ceded to the English crown.

Portions of the State, particularly what is now the city of New York (formerly New Amsterdam), and the island of Manhattan, were subject to the Dutch government from their earliest known history, about 1609, down to 1664, when the colony and Dutch possessions were surreudered to the English, by whom it was goverved until 1673, when the Dutch resumed possession. In 1674 the English re-established their rule and possession, which they continued until the independence of the State.

By the English common law, the king was the feudal

Virginian patents, one giving leave to the patentees to colonize between the 34th and 41st degrees of latitude, and the other between the 38th and 45th.

In 1608 Henry Hudson, under a commission from the English crown, discovered what is now Long Island, New York and the Hudson river, up which river, under a commission from the Dutch, he afterwards sailed, in the year 1609.

Hudson, it was claimed, afterward purported to sell his right of discovery, whatever it was, to the Dutch.

paramount proprietor and source of title to all land within his dominion, and it was considered held mediately or immediately of him. After the independence of the State, the title to land formerly possessed by the English crown in this country passed to the people of the different States where the land lay, by virtue of the change of nationality and of the treaties made. The allegiance formerly due, also, from the people of this country to Great Britain was transferred, by the revolution, to the government of the United States.

On the above subjects reference may be made to the following cases: Fletcher v. Peck, 6 Cranch, 87; Johnston v. McIntosh, 8 Wheat. 543; Martin v. Waddell, 16 Peters, 367; Clark v. Smith, 13 Pet. 195; Lattimer v. Poteet, 14 *ib.* 4; Shanks v. Dupont, 3 Pet. 242.

Declaratory Act of 1779.—By a declaratory act of the Legislature, passed Oct. 22, 1779, (1 Green, 31), all lands, properties, rights, etc., held by the crown prior to 9th July, 1776, were declared vested in the people of the State. By the treaties between Great Britain and the United States, (1782–3, and Nov. 19, 1794), which followed our revolution, the right to soil which had been previously in Great Britain, passed definitely to these States.

The actual paramount ownership of land, therefore, in this State was vested in the crown of England previous to the revolution, and in the people of the State afterwards, and has been from time to time made the subject of grant, through letters-patent, to individuals. The right of Indian occupancy in the various States has been, in general, protected by political power, and respected by the courts, until extinguished by treaty, or otherwise.

On the above subjects reference may be made to the following leading cases:—

United States v. Arredondo, 6 Peters, 691; Martin v. Waddell, 16 Peters, 367; Clark v. Peters, 13 Peters, 195; Lattimer v. Poteet, 14 *ib.* 4.

As to the Indian occupancy, *vide post*, ch. iii.

Jackson v. Ingraham, 4 Johns. 163; Jackson v. Waters, 12 *id.* 365; Le Frambois v. Jackson, 8 Cow. 590; Rogers v. Jones, 1 Wend. 237; Lansing v. Smith, 4 Wend. 9; Johnson v. McIntosh, 8 Wheat. 543;

Martin v. Waddell, 16 Peters, 367; The People v. Trinity Church, 22 N. Y. 44.

Various Colonial Acts as to titles and Citizenship.—If questions of title under the colonial government should arise, reference may be desirable to the following acts: "An act for settling and confirming unto the towns, etc., in this province, their several grants, patents, etc.," passed 6th May, 1691 (1 Van Schaick, p. 22). "An act for the better settlement and assurance of lands in this colony," passed 30th Oct. 1710, (1 Smith & L. p. 84; 1 Van Schaick, 82). An act relative to inhabitants of foreign birth (1 S. & L. p. 112), passed July, 5, 1715, declaring that all persons of foreign birth in the colony, and dying, seized of lands, etc., shall be deemed to have been naturalized, and providing for naturalizing protestant inhabitants of foreign birth. An act of January, 27, 1770, relative to naturalized citizens and aliens, (2 Van Schaick, p. 561), enabling subjects by birth or naturalization to inherit and hold real estate, notwithstanding any defect of purchasers made before naturalization within the colony.

Effect of Changes of Sovereignty.—It is a principle of international law that the dismemberment or change of sovereignty of a nation works no forfeiture of previously vested rights of property, and that the cession of a territory by its government passes the sovereignty only, and does not interfere with the rights of individuals in property; therefore titles to land of individuals were not changed when the new political sovereignty was established.

Vide Orser v. Hoag, 3 Hill, 79, and cases cited; Brown v. Sprague, 5 Denio, 545; Strother v. Lucas, 12 Peters, 410; The People v. Livingston, 8 Barb. 253; Jackson v. White, 20 Johns. 313; Peck v. Young, 26 Wend. 613; M. A. Society v. Watts, 1 Wheat. 279, 390.

The person claiming title under the new government, however, had to establish his allegiance by some act, at least of residence, otherwise the rights of citizenship are not acquired. Dawson v. Godfrey, 4 Cranch, 321; McIlvaine v. Cox, 4 Cranch, 211; 1 Dall. 58; Munro v. Merchant, 28 N. Y. 9; reversing, 26 Barb. 383; Inglis v. S. S. Harbor, 3 Pet. 99; Dent v. Emeger, U. S. S. Ct. Dec. 1871.

As a general rule, the character in which the American *ante nati* are to be considered, will be determined by the situation of the party, and the election made at the date of the declaration of independence, according to our rule, or the treaty of peace, according to the English rule, viz.: 3d Sept. 1783. Persons born out of the United States before July 4, 1776, or born here, and who left the country before July 4, 1776, and who continued to reside out of it, have been held aliens and incapable of taking by descent. Blight v. Rochester, 7 Wheat. 535; Inglis v. S. Snug Harbor, 3 Pet. 99; Dawson v. Godfrey, 4 Cranch, 321; Munro v. Merchant, 28 N. Y. 9; reversing, 26 Barb. 383; Blight v. Rochester, 7 Wheat. 535; Hunter v. Fairfax's Devisee, 7 Cranch, 603.

The right to inherit would depend upon the existing state of allegiance at the time of descent cast. Orr v. Hodgson, 4 Wheat, 453; Blight

v. Rochester, 7 Wheat, 535; 2 Hill, 67; Orser v. Hoag, 3 Hill, 79; Shanks v. Dupont, 3 Pet. 242; Dawson v. Godfrey, 4 Cranch, 321.

Infant's right of Election.—An infant, however, might have the right of disaffirmance or election, when of age, if made within a reasonable time. Inglis v. S. S. Harbor, 3 Pet. 99; Munro v. Merchant, 28 N. Y. 9; Jones v. McMasters, 20 Howard, U. S. 8; Ludlam v. Ludlam, 26 N. Y. 356; affirming, 31 Barb. 486.

Vide infra, as to the effect of the Treaties of 1783 and 1794.

French Grants and Treaties.—Claims to land founded on French grants under the treaty of 1760 or of 1763, or otherwise, are not a legal title that can be recognized by the courts.

Jackson v. Waters, 12 Johns. 365; Le Frambois v. Jackson, 8 Cow. 590; Jackson v. Ingraham, 14 Johns. 163, 182.

Dutch Grants.—Grants from the Dutch Government, while in possession, are held indisputable sources of title.

Vide post, Title III; North Hempstead v. Hempstead, 2 Johns. Ch. 324; Denton v. Jackson, 2 Wend. 110; *vide* also 5 Den. 225.

They were mostly confirmed by new grants or charters from the English Government, and generally reconfirmed by Gov. Andros' proclamation on the restoration of the English rule in 1675. By the articles of capitulation of 1664, also by Gov. Nichols, it was stipulated that the inhabitants should continue free denizens, and should enjoy and dispose of their lands as they pleased, and should enjoy their own customs as to inheritance. This compact was recognized by the Legislature. Act of 5th July, 1715.

The Change of Sovereignty and the Treaties made. Convention of 1776.—The act of the convention of July 16, 1776, affirmed that all persons abiding within the State, and deriving protection from the laws of the same, owed allegiance to the said laws, and were members of the State.

Constitutional Provisions.—By the constitutions of 1777; of 1822, art. 7, § 14; and of 1846, art. 1, § 18, all patents of lands in the State, granted by the crown subsequent to Oct. 14, 1775, are declared null. This impliedly confirmed those prior to that date.

The People v. Clarke, 10 Barb. 120; *ib.* 9 N. Y. 349.

By the constitution of 1846, subsequent charters or grants since made by the State, or those under its authority, were not to be affected by the above provision, nor were any rights of property, suits, or obligations to be impaired by it.

Treaty of 1783 *with Great Britain.*—By the treaty of 1783 with Great Britain, it was provided (art. VI) that there should be no further confiscations or prosecutions, by reason of the part taken by any person in the war; and that no person should, on that account, suffer any future loss or damage, either in his person, liberty, or property.

The case of Brown v. Sprague, 5 Den. 545, holds that the 6th article of the Treaty of 1783 not only barred the escheat of lands held by British subjects in this State, but gave them capacity to transmit them by descent; but the descent must be to a citizen. Also, that if a British subject holding lands here died previous to the treaty of 1794 (*infra*), leaving no citizen heirs, his land escheated; and the provisions of the treaty did not pass his lands to alien heirs. The law of 1845 (*post*, ch. iii) would not operate to confirm a title previously conveyed by an alien heir of one holding real estate.

Treaty of 1794 *with England after the Revolutionary War as to Rights of Subjects.*—By treaty of Nov. 19, 1794, with Great Britain, art. IX, it was mutually agreed that British or American subjects holding lands in each other's countries, shall continue to hold them according to the tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, as if natives; and that neither they, nor their heirs or assigns, as respects said lands, and the legal remedies incident thereto, should be regarded as aliens.

As to the construction of this treaty reference may be made to the following cases:—Harden v. Fisher, 1 Wheat. 300; Blight, &c. v. Rochester, 7 *ib.* 535; Hughes v. Edwards, 9 Wheat. 689; Munro v. Merchant, 28 N. Y. 9; reversing 26 Barb. 383; Watson v. Donnelly, 28 Barb. 653; Strother v. Lucas, 12 Peters, 410; The People v. Livingston, 8 Barb. 253.

Such subjects could alienate lands as if citizens. The People v. Snyder, 51 Barb. 589.

But the title must have been in them at the time of the treaty. The treaty only provided for existing titles. Harden v. Fisher, 1 Wheat. 300; Orser v. Hoag, 3 Hill, 79. See also The People v. Snyder, 41 N. Y. 397.

The rule is, that if parties were resident here at the time of the Declaration of Independence, although born elsewhere, and they freely yielded express or implied sanction and allegiance to the new government, they became citizens. This right of election has been held to exist as to all the inhabitants of the State, and a reasonable time for its exercise was conceded.

McIlvaine v. Coxe, 2 Cranch, 280; 4 *ib.* 209; Respublica v. Chapman, 1 Dallas, 33; Jackson v. White, 20 Johns. 313; Inglis v. The Trustees, &c. 3 Peters, 99; *vide ante*, p. 20.

It was held, even at first, that if a person was born here and left the country before the Declaration of Independence, and never returned, he had a right of citizenship. Ainslee v. Martin, 9 Mass. 454.

The principle of this case has been overruled, however, and the more reasonable principle maintained that an *ante natus* never owed allegiance to the United States if he had removed prior to the Declaration of Independence, and had not become redomiciled here prior to the treaty of peace. McIlvaine v. Coxe, 2 Cranch, 280; 4 *ib.* 209; Gardner v. Ward, 2 Mass. 236; Kilham v. Ward, 2 *ib.* 244; Calais v. Marshfield, 30 Maine, 511; Orser v. Hoag, 3 Hill, 79; overruling Jackson v. Lang, 3 Jack. Ch. 109.

The case of Bligh's Lessee v. Rochester (7 Wheat.) holds that, in general, British subjects, born before the revolution, are equally incapable with those born after, of inheriting or transmitting the inheritance of lands in this country, and that the treaties of 1783 and 1794 only provided for titles *existing at the time those treaties were made;* and not to titles subsequently acquired. Possession was not necessary, but the existence of the title. Also Hughes v. Edwards, 9 Wheat. 489.

It has been distinctly held, also, that a British alien, holding land within the purview of the treaty of 1794, possessed a capacity to transmit by descent to *alien heirs*, which an American citizen could not lay claim to. The case of Orser v. Hoag (3 Hill, 79), holds, however, that the title of the alien heir would not prevail, if the ancestor died before the treaty was signed.

The cases of Jackson v. Wright, 4 Johns. 75; Orser v. Hoag, 3 Hill, 79; Fairfax v. Hunter, 7 Cranch, 603, and Munro v. Merchant (*supra*), hold that the construction of this treaty is, that lands embraced within the purview of the 9th article of the treaty were indefinitely and perpetually heritable, and alienable to and among aliens of the two countries; in derogation of the laws respecting alienage, which were or should be established therein, until the lands should come to be held by citizens; after which they would lose the peculiar attribute imposed upon them by the treaty.

The case of Orr v. Hodgson, 4 Wheat. 453, also holds that the benefits of the treaty would not be extended to persons who were aliens to both governments—*i. e.*, Great Britain and the United States.

The English courts consider this treaty to have taken effect at the date of the exchange of ratifications—viz., Oct. 28, 1795, and hold that its provisions were continuous, and not abrogated by the war of 1812. Sutton v. Sutton, 1 Russ. & M. 663.

It has been held that although it is true, as a principle of international law, that, as respects the rights of either government under a treaty, it is considered as binding from the date of its signature, and the change of

ratifications has a retroactive effect confirming the treaty from its date; that a different rule prevails where the treaty operates on individual rights. There it is not considered as concluded until there is an exchange of ratifications. See Haver v. Yerker, 9 Wall, p. 32.

TITLE II. OF THE TITLE OF THE PEOPLE OF THE STATE.

As to the Period when this State Government had its Legal Inception.—When the people of this State, after the Revolution, took into their hands the powers of sovereignty, all estates, prerogatives, powers, and royalties which before belonged either to the crown or parliament, became immediately vested in the State. From the time they declared themselves independent, and not from the date of the treaty recognizing their independence, the rights and powers of the States are considered as established as sovereign, and their colonial dependence and legal action as colonies ceased. Thence it is held that the laws or grants of the several State governments passed or executed after the Declaration of Independence, were the acts of sovereign States, and as such obligatory and effectual.

Vide McIlvain v. Coxe, 4 Cranch, 209; Bernett v. Boggs, 3 Cir. N. J. Baldw. 60.

The organization and legal commencement of the government of this State took place on the 20th of April, 1777, when the constitution was adopted.

Vide Jackson v. White, 20 Johns. 313.

Constitution of 1777.—By this constitution (as *infra*, Title III) grants made by the crown subsequently to Oct. 14, 1775, are declared void. So also provided in the constitutions of 1822 and 1846.

Act of 1779, *Vesting Colonial Property in the State.*—By act of the State, of Oct. 22, 1779 (1 Greenleaf, p. 31), it was declared that the absolute property of all lands and

hereditaments, and of all rents, royalties, franchises, prerogatives, privileges, escheats, forfeitures, debts, dues, duties, and services, and all right and title to the same, which next and immediately before the 9th of July, 1776, did vest in or belong, or was or were due to the crown of Great Britain, be, "and the same and each and every of them are hereby declared to be, and ever since the said 9th of July, 1776, to have been, and forever hereafter shall be vested in the People of this State, in whom the sovereignty and seigniory thereof are and were united and vested on and from said 9th day of July, 1776."

It is held that a right to impeach a patent for fraud would not pass under this law. People v. Clarke, 9 N. Y. 5 Seld. 349.

Declaration of the Title of the People.—By early enactment and constitutional declaration in this State, the people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all land within the jurisdiction of the State, and all lands, the title to which may fail from defect of heirs, revert or escheat to the people.

1 R. L. of 1813, p. 380, § 2; 3 Rev. S. p. 2, § 1; Constitution of 1846, Art. 1, § 11.

Lands Allodial.—All lands within the State are declared to be *allodial*, the entire property thereof being vested *in the owner*, subject to the liability to escheat to the *People*, and all feudal tenures and their incidents are abolished, such abolition, however, not to discharge rents or services certain imposed.

1 Rev. Laws, p. 70; 3 R. Stat. 5 edit. p. 2.

Mines.—The State has also, through its right of sovereignty, all mines of gold and silver in the State, and other mines on land of aliens; also, mines on land of citizens containing, on an average, less than two-thirds of copper, tin, iron and lead.

1 Rev. Stat. p. 684 (5 edit.).

All patents are to contain a reservation of all gold and silver mines. *Ib.* p. 541.

Various provisions are also made by statute as to bounties and the pre-emptive rights of working discovered mines of gold and silver. *Ib.* 684.

It results from the above review that the title of all lands in this State must have originally emanated from the existing sovereign power in the State, whether through grants from the Dutch or English officials administering the government by authority of their home government, by letters-patent or charter directly from those governments, or by grant from the "People of this State," after their sovereignty was established.

The absolute property of all land, and all right and title to the same, that on the 9th of July, 1776, vested in or belonged to the crown of Great Britain, became from that date vested in the people of this State in their sovereign capacity. But with respect to lands that before October 14, 1775, had been legally granted to individuals by the crown, or to which the title had been legally acquired by individuals in any other way, neither the revolution, nor the change of the form of government, nor the declaration of the sovereignty of the people, worked any change or forfeiture in the ownership of such property.

Treaties with other Nations as to Citizenship.—As to these, *vide post*, ch. iii.

Alien Laws of the State.—As to these, *vide post*, ch. iii.

Title III. Transfer of Title from the Colonial and State Governments.

Transfer from the State.—It is well settled by authority that a State has the right to dispose of the unappropriated lands within its own limits, and that when a grant has been made the title becomes vested, without any power in the State to rescind the grant for fraud, or

otherwise, when the land granted has passed into the hands of a *bona fide* purchaser for value, without notice.

Nor without fraud can it be revoked at all if its conditions are performed.

Vide Fletcher v. Peck, 6 Cranch, 87; Terret v. Taylor, 9 Cranch, 52; Town of Pawlet v. Clark, Ib. 292; Dartmouth College v. Woodward, 4 Wheat. 518; Benson v. Mayor, 10 Barb., 223.

Mode of Transfer of Title.—Property of a State is transferred usually by charter or by letters-patent.

A grant, however, may be made by a *law*, as well as by letters-patent, pursuant to a law—a *confirmation*, also by a law, is as fully a grant as if it contained a grant in terms.

Rutherford v. Green, 2 Wheat, 196; Strother v. Lucas, 12 Peters, 410. It is not a valid objection to a patent that it is not signed by the Governor, provided the great seal is attached. It is the great seal which authenticates the patent, and the fact of the seal being attached is *prima facie* evidence that the patent was approved by the Governor and issued by his direction. The People v. Livingston, 8 Barb. 253.

Grants where the State has no Title.—Where the State has no title to the thing granted, the grant is void. State grants are not considered as *warranties*, and no estate would pass to the grantee except what was at the time in the State. Nor can a State constutionally confirm a void patent so as to divest a title legally acquired before the attempted confirmation.

The Mayor, &c. v. The United States, 10 Peters, 662; Polk's Lessees v. Wendell, 5 Wheat. 293; Green v. Watkins, 7 Wheat. 27; Rice v. Railroad Co. 1 Black. 358; United States v. Arrendondo, 6 Peters, 738; People v. Schermerhorn, 19 Barb. 540; People v. Van Rensselaer, 9 N. Y. 321; Sherwood v. Fleming, 25 Texas (supp.), 408; Wright v. Hawkins, 25 Texas, 452.

When Patents from the State take Effect.—A patent takes effect from the time it is approved by the land office, and passes the office of the Secretary of State. Its date is not conclusive.

Jackson v. Douglas, 5 Cow. 458.

Colonial Grants.—The colony, as a part of the king's dominions, was subject to the control of the British Par-

liament; but its more immediate government was vested in a governor, council, and general assembly.

The governors were appointed by the king's commission, under the great seal of Great Britain.

The governor's council was appointed by the crown, or confirmed on the governor's nomination. All temporary vacancies were to be filled by the governor.

By the royal commissions to governors, the governor, with the advice of the council, was authorized to make grants of the public lands on such terms as might be deemed proper. Which grants, on being sealed with the colonial seal and recorded, were to be effectual.

The Colonial Act Restricting Grants by Governors.—By a colonial act passed in May, 1699, it was declared that all future grants of government lands by any governor for a longer term than his own term of government should be null and void. This act was repealed by another act passed on Nov. 27, 1702, but this repealing act was disaffirmed and annulled by Queen Anne, in council, in June, 1708, who thereupon confirmed the act of 1699. (1 Van Schaick, Laws, 31, 51.)

It is considered, however, that acts done under the law before being annulled by the crown were valid and effectual. People v. Rector of Trinity Church, 22 N. Y. 44; Bogardus v. Trinity Church, 4 Sand. Ch. 737.

Presumption of Authority as to Colonial Grants.—The grants of colonial governors before the revolution have always been taken as plenary evidence of the grant itself, as well as of authority to dispose of the public lands. The actual exercise of the authority without any evidence of disavowal, revocation, or denial by the crown, and its consequent acquiescence and presumed ratification, are sufficient proof, in the absence of any to the contrary, of the royal assent to the exercise of the crown's prerogative by its local governors. Courts do not require proof that there exists authority in the officers or tribunal who exercise it, by making grants; and it is considered that it is fully evidenced by occupation, enjoyment, and

transfer of property, had and made under the grants without disturbance by any superior power, and respected by all co-ordinate and inferior officers and tribunals throughout the State, colony, or province where it lies.

See United States v. Arredondo, 6 Peters, 728; Bogardus v. Trinity Church, 4 Paige, 178; People v. Livingston, 8 Barb. 253; People v. Schermerhorn, 19 Barb. 540; Rogers v. Jones, 1 Wend. 37.

The death of the king before the patent was issued will not vitiate it. 4 Sand. Ch. 63.

Confirmatory Act.—In May, 1691 (1 Van Schaick, 2), an act was passed by the Governor and Assembly, confirming all prior patents, charters, and grants to bodies and individuals in the colony under prior kings—notwithstanding deficiencies of form or nonfeasance. Saving rights to be asserted in five years, and rights of infants, lunatics and married women.

Patents under the English crown subsequent to 1775.—By the constitution of 1777, § 53, constitutions of 1822, and of 1846, all grants of lands in the State granted by the king, or those under him, subsequent to October 14, 1775, are declared null and void; no prior grants or charters, however, were to be considered affected. Nor any grants or charters since made by the State, or those under its authority by this provision. This impliedly confirmed those prior to that date.

The People v. Clarke, 10 Barb. 120; affirmed, 9 N. Y. 349.

By the constitution of 1846 subsequent charters or grants since made by the State, or those under its authority, were not to be affected by the above provision, nor were any rights of property, suits or obligations to be impaired by it.

Presumption of Validity.—The patents are evidence *prima facie* that they were regularly issued, and that all preliminary requisites have been complied with.

The validity of patents cannot, in general, be impeached in collateral actions; yet objections showing that they were issued without authority, or were absolutely void from the beginning, or prohibited by law,

would be considered. In a collateral action they cannot be assailed for any other cause.

Brady v. Begun, 36 Barb. 531; The People v. Mauran, 5 Den. 389; The People v. Van Rensselaer, 9 N. Y. 321; The People v. Livingston, 8 Barb. 253.

Seals and preliminaries of law will be presumed. Williams v. Sheldon, 10 Wend. 654.

Patents to persons deceased before 1826.—By law of 1826, ch. 320, these were made valid.

Effect out of the State.—A conveyance by virtue of a statute cannot strictly operate beyond the local jurisdiction, although its effect may be extended by State comity.

Oakey v. Bennett, 11 How. 33; Van Horn v. Dorrance, 2 Dall. 304.

So held with respect to a transfer of real estate out of the United States, by virtue of the bankrupt act.

Oakey v. Bennett, 11 How. 33.

Grants to Public Corporations.—Although the legislative body is considered to have continual control over the action of public corporations, and has a right to alter or modify their delegated powers and authority, it is a principle of law that grants of property, and of franchises coupled with an interest, even to public or political corporations, are beyond legislative control or interference, equally as in the case of property of private corporations.

The People v. Platt, 17 Johns. 195; Dartmouth College v. Woodward, 4 Wheat. 697-700; Hooper v. Scheimer, 23 How. 235; Benson v. The Mayor, 10 Barb. 223; *vide post*, "FRANCHISES."

Dutch Grants.—As to these, *vide post*, p. 22.

Presumption of Title in the State.—The declaration of the constitution, in asserting that the people are deemed to possess the original and ultimate property in all lands, merely affirms a principle of *political sovereignty*, and is not a rule of *evidence* establishing a legal presump-

tion of title in favor of the people against the actual occupant of the land, until it is shown that the possession has been vacant within forty years.

The fact of possession presumes a grant from the sovereign power of what was once the State's.

Vide Wendall v. Jackson, 8 Wend. 183; The People v. Dennison, 17 *id.* 312; The People v. Rector of Trinity Church, 22 N. Y. 44; and see above cases, page 29.

Effect of a Patent as to Patentee's right to take.—A patent to persons, or their descendants, not qualified to take, would confer the right upon them,—*e. g.*, as to heirs of an alien, &c. *Vide post*, "ALIENS."

Jackson v. Etz, 5 Cow. 314.

So a patent to a body of men gives them a *quasi* corporate capacity.

People v. Schemerhorn, 19 Barb. 540.

Conclusiveness of Patent.—A patent appropriates the land called for, and is conclusive against rights subsequently acquired; but when an equitable right, which existed before the date of the patent is asserted, it may be examined.

Brush v. Ware, 15 Peters, 93.

Such a patent is conclusive as against a title founded on mere adverse occupancy.

Gibson v. Choteau, U. S. S. Ct. Dec. 1871.

Title against the State by Adverse Possession.—By the Code (ch. 2, §§ 75–77) the people of the State will not sue any person with respect to real property unless their right has accrued within forty years, or unless they, or those under whom they claim, shall have received some rents thereof within forty years. This limitation was also enacted, in substance, by laws of 1788 (2 Green, 93), and of 1801 (1 Web. 619).

There is no presumption of title in favor of the peo-

ple against the actual occupant of land until it is shown that the possession has been vacant, some time within forty years. If the premises are vacant the legal presumption, however, is that the people are the owners.

On this subject see The People v. The Rector of Trinity Church, 22 N. Y. 44; The People v. Van Rensselaer, 5 Seld. (9 N. Y.) 291, reversing, 8 Barb. 189; The People v. Clarke, *ib.* 349; The People v. Arnold, 5 Com. 508; The People v. Livingston, 8 Barb. 253.

Grants where Land is under Adverse Possession.—It is supposed that States have no more right to convey and pass title to lands held adversely than has an individual, and that such sale would be illegal.

Woodworth v. Jones, 2 Johns. Cases, 417; Whitaker v. Cone, *ib.* p. 57. A contrary opinion is hinted in Candee v. Hayward, 37 N. Y. 653.

Conditions in Patents.—No one but the State can take advantage of an omission to comply with the conditions of a grant from the State.

William v. Sheldon, 10 Wend. 654; Welch v. Silliman, 2 Hill, 491.

Deed by a Public Officer.—A deed by a public officer in behalf of a State is the deed of the State, although the officer is the nominal party.

Sheets v. Selden, 2 Wall. 177.

Forfeiture under Letters-Patent, and Vacation thereof.—By the code (§ 433) an action may be brought by the attorney-general to vacate letters-patent from the State where there has been fraud, or concealment, or mistake, or ignorance of facts; or where there has been a *forfeiture* of the patentee's interest by non-compliance with the terms or conditions thereof, or otherwise.

Where letters-patents are vacated, a copy of the judgment-roll is to be filed with the Secretary of State (§ 45), and an entry shall be made in the records of the Commissioners of the Land office, who may dispose of the property (§ 446).

Actions of forfeiture of property to the people, or for their use, must be brought in the *Supreme Court*, by the proper officer (§ 447).

The above proceedings to forfeit and vacate letters-patent are held to be applicable only to letters-patent granted by *The People* of the State, and do not extend to letters-patent granted by the king of Great Britain before the revolution. The People v. Clarke, 10 Barb. 120; affirmed, 9 N. Y. (5 Seld.) 349.

Proceedings to enforce a forfeiture must be strictly followed.

Further as to *Forfeiture, vide post,* ch. 33.

Commissioners of the Land Office of this State.—As to grants by these officials, *vide post* ch. 44.

Record of Patents.—By laws of April 28, 1845, ch. 110, letters patent from the State granting lands, may be recorded in the county where the lands are situated, in the same manner, and with the like effect as are deeds when duly acknowledged.

Acts appropriating Public Property, &c.—By the constitution of 1846 (art. VII, § 14), on the final passage in either house of the legislature, of every act which imposes, continues, or revives a tax, or creates a debt or charge, or makes, continues, or revives any appropriation of public or trust money or property, or releases discharges, or commutes any claim or demand of the State, the question shall be taken by ayes and noes, which shall be duly entered on the journals; and three-fifths of all the members elected to either house shall in all such cases be necessary to constitute a quorum therein.

The *presumption* is that such a law was correctly passed as above. Amendments to such acts must be passed in the same manner. The fact that the bill was passed as required may be shown by other evidence than as required by the laws of 1847, *infra.* The People v. The Supervisors, 4 Seld. 317.

By the law of May 12, 1847, ch. 253, no bill is to be deemed passed as above required unless so certified by the presiding officer of each house. In the publication of laws where the act is so as above certified the words "three-fifths being present," are to be added to the act, and shall be presumptive evidence that the bill was so certified, and their omission shall be presumptive evidence to the contrary.

Bills for Private or Local Purposes.—By the constitution of 1846, art. 1, § 9, the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

The words "*private* purpose," within the above act, is held to be a

purpose referring to an object for the benefit of an individual, or a limited number of men, and a *local* purpose is interpreted as one for the benefit of a particular place or limited locality. The purpose need not be necessarily for the universal benefit of the whole community, though it may be considered so if there is no restriction as to the use. To bring the purpose within the act, the direct benefits flowing from the improvement must be exclusively and necessarily local.

An appropriation for the improvement of the navigation of a river is, within the above principles, held not to be for a *local* purpose under the above act. The People v. Allen, 1 Lans. 248.

Franchises.—Under the head of grants from the State, franchises may be briefly alluded to. They are privileges or immunities of a public nature conferred generally by legislative grant or action, such as the right to build and operate railroads, wharves, toll bridges, markets, ferries, &c.

These rights, it is held, *cannot be extended by implication*, and are *not the subjects of assignment or transfer.*

The grant of a franchise, it has been generally understood, contained an implied covenant, on the part of the government, not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant.

The government, it has been held, cannot resume them at pleasure, or do any act to impair the grant, without a breach of contract. Where, therefore, in an act of the legislature granting a franchise, no right of repeal is reserved, a subsequent act repealing the first has been held unconstitutional, as impairing the obligation of a contract.

Every interference with a franchise, so as materially to impair its value, was held in violation of the grant, as by granting a competing franchise. Remedy would lie on *the case*, or by injunction in chancery.

McRoberts v. Washburne, 10 Minn. 23; Yard v. Ford, 2 Saund. 172; Keeble and Hickeringall, Holt, 20; Newburgh Turnpike Co. v. Miller, 5 Johns. Ch. 111; 4 *Ib.* 160; Dartmouth College v. Woodward, 4 Wheat. 518; Huzzy v. Field, 2 Cromp. Mees. & Ros. 432; Minturn v. La Rue, 23 How. U. S. 435.

In the cases of roads, ferries and bridges, however,

the general rule has undergone modifications, as suggested or required by public convenience or necessity; and particularly within or in the vicinity of large towns. The legislature, by the grant of one franchise, is held, by recent decisions, not restricted by any implication from the creation of another, where public convenience or necessity requires. The more modern doctrine is further extended to hold that nothing passes under them against the State by implication, and that franchises are to be construed according to their terms.

Auburn, &c. P. R. Co. v. Douglass, 5 Seld. 444; Dyer v. Tuscaloosa Bridge Co. 2 Porter (Ala.), 296; Jones v. Johnson, 2 Ala. N. S. 746; The People v. The Mayor, 32 Barb. 102; The Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Charles River Bridge v. Warren Bridge, 11 Peters U. S. 420; Tuckahoe C. Co. v. Tuckahoe R. R. Co. 11 Leigh (Va.), 42; Enfield Toll Bridge Co. v. Hartford & N. H. R. R. 17 Conn. 454; Thompson v. N. Y. & H. R. R. 3 Sandf. Ch. 625; Oswego Falls Bridge Co. v. Fish, 1 Barb. Ch. 547; East Hartford v. Hartford Bridge Co. 10 How. U. S. 511; Richmond R. Co. v. Louisiana, 13 How. U. S. 71; *In re* Hamilton Av. 14 Barb. 405; Boston, &c. R. R. v. Salem R. R. 2 Gray, 1; Toledo Bk. v. Bond, 1 Ohio, 622; Shorter v. Smith, 9 Geo. 517; Benson v. The Mayor, 10 Barb. 223; Gales v. Anderson, 13 Ill. 413; Norris v. Farmers' Co. 6 Cala. 590; Bush v. Peru Bridge Co. 3 Ind. 21.

It is held, however, by the courts, that if a company receive an exclusive privilege, within a locality specified for the exercise of its franchise, it is a contract on the part of the State, and inviolable. It is otherwise, however, if the privilege is not specified as exclusive.

The Binghampton Bridge, 3 Wall. 51; The Turnpike Co. v. State, 3 Wall. 210.

The grant of a franchise for the building and operating of railroads, and other internal improvements in a State must emanate from the Sovereign—*i. e.*, the State. A competing road, therefore, established by others not so authorized will be enjoined.

Raritan R. R. Co. v. Delaware Co. 3 Green N. J. 546.

Contracts by a State.—As to contracts made by a State, it is held that if the contract when made was valid by the constitution and laws of a State, as then expounded by the highest authorities, whose duty it was to

administer them, no subsequent action by the legislature or judiciary can impair its obligation.

Gelpcke v. City of Dubuque, 1 Wall. 175; Havemeyer v. Iowa Co. 3 Wall. 294; Thompson v. Lee Co. *Ib.* 327.

Effect of Treaties.—By the Constitution of the United States, article 6, § 2, the constitution and the laws of the United States which shall be made in pursuance thereof, and all *treaties made, or which shall be made, under the authority of the United States*, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Under this provision of the constitution, a treaty is held to be the supreme law of the land, and when addressed to the courts supplies the rule governing their proceedings.

An act of congress, passed subsequent to a treaty cannot affect titles acquired under it, and congress is held to have no power to settle rights under treaties in cases purely political. The construction of them is the peculiar province of the judiciary, in a case arising between individuals.

Matter of Metzyer, 1 Edm. N. Y. Sel. cases, 399; Wilson v. Wall, 6 Wall. 83.

As regards the binding effect of treaties as laws upon the parties to them, and affected by them, in the case of Ropes *v.* Clinch, (8 Blatch. 304), a different opinion has been promulgated from that hitherto entertained by jurists in this country. In that case it is held, that congress may pass any law, otherwise constitutional *notwithstanding it conflicts with an existing treaty with a foreign nation*, and that the courts are bound to follow such legislation of congress in preference to the provisions of the treaty. The only rights or remedy left to parties injured by a violation of a treaty, therefore, under this novel view of the obligation of parties to such solemn compacts, are the reclamations that may be made by the injured government or its subjects, through political channels or by active belligerency.

There will appear, if the above decision is upheld, a remarkable inconsistency in the action of our legal tribunals in not extending protection to compacts made between such high contracting parties as nations, when, as between individuals, the judicial ægis is ever earnestly interposed to preserve the inviolability of contracts, and save them from legislative interference.

Rights of the United States, and of the Public as Controlling State Action.—The right of the public is considered superior to that of the State, where a nuisance or encroachment is authorized, as where there is an abridgment of the common right of navigation.

In a proper case of excess of action by the State in authorizing encroachments, for example, on the common water highway, there would be a remedy in the United States courts in behalf of the public against official bodies or others, and for the abatement of an undue encroachment as a nuisance.

Under the Constitution of the United States, the proprietary right of the State, and its grantees is subject to the authority of congress over navigation and navigable waters.

This is a restriction on the State power.

Congress may interpose, whenever it shall be deemed necessary, by general or special laws; and whenever State laws militate against its constitutional provisions or authority for the regulation of commerce, they will be deemed inoperative by the United States courts, at the instance of individuals, corporations, or States, where damage is shown.

Offending bridges or other obstructions over navigable waters may he enjoined or removed by judicial action.

Gibbons v. Ogden, 9 Wheat. 1; The People v. The Rensselaer, &c. R. R. Co. 15 Wendell, 114; The People v. Tibbetts, 5 New York, 523; Hart v. The Mayor, 9 Wend. 607; Fort Plain Bridge Co. v. Smith, 30 N. Y, 44; Baird v. Shore Line R. R. 6 Blatch. 276; U. S. v. Duluth, 1 Dill, 469; Siliman v. The Hudson R. B. Co. 4 Blatch. 395.

See the Passenger cases, 7 How. U. S. 283; State of Pennsylvania v. Wheeling Bridge Company, 9 How. U. S. 647, and 17 Wheaton, 518, and

also 18 How. U. S. 421; Renwick v. Morris, 3 Hill, 621; affirmed, 7 Hill, 525; People v. Central R. R. of New Jersey, 42 N. Y. 468.

An act of congress declaring a bridge a lawful structure legalizes it, and it cannot be removed as obstructing navigation. Gray v. Chicago R. R. U. S. Supreme Ct. 1870.

As to when a bridge would be considered as obstructing navigation, *vide* Gilman v. Philadelphia, 3 Wall. 713, and also p. 782 of said Reports.

The legislature of a State however, it is held, may in the absence of any restraint by congressional legislation, authorize the erection of a bridge over its navigable waters, subject to any prohibition by Congress, or direction, as to what facilities may be afforded for the navigation of the river.

The mere grant of power by the constitution to congress, to regulate commerce among the several States, is not considered *per se*, and without any exercise of the power by congress, an absolute inhibition of all State legislation, which may interfere with the inter State commerce of the United States. The State also has the power to legislate in regard to turnpike roads, railroads, ferries, and the public health, and generally in regard to the internal commerce, and police of the State. Woodman v. The Kilbourne Manfg. Co. 1 Abb. U. S. 188; Silliman v. The Hud. R. B. Co. 4 Blatch. 395.

Grants under the Dutch Government.—The colony, when under the Dutch, was governed by a director-general and council, the former being appointed by the "States-General," in Holland. A municipal government was subsequently granted to the city of New York in 1652, under a "*Schout, Burgomaster and Schepens.*"

In 1623 the Dutch "States-General" made a grant to the "Dutch West India Company" of all the lands situated on the Island of Manhattan.

The land grants, and other transfers from the Dutch company, were subsequently recognized by the English governors as valid foundations of title, and generally confirmed.

The Indian Title.—The Dutch West India Company, who had control of the settlement, under the dominion of the home government, in 1626, extinguished the Indian title to the Isle of Manhattan (now the City and County of New York), by purchase from the "*Manhattoes*," a tribe of the aborigines, for the sum of sixty guilders.

Dutch Grants and Title and Confirmation.—The titles under the Dutch dominion generally emanated from the

above company; which was invested with most of the functions of a distinct and separate government, having authority to enact laws, to establish courts, to settle the forms of administering justice, to make Indian treaties, and to arrange the form of municipal government.

By the articles of capitulation of 1664 with the English Colonel Nicolls, Deputy Governor under the Duke of York, it was stipulated that the inhabitants should continue free denizens, and should enjoy their houses, lands, and goods in the country, and dispose of them as they pleased, and that the Dutch should enjoy their own customs as to inheritance.

This compact was recognized by the legislature, Act of 5th July, 1715.

These Dutch grants, or "Ground Briefs," as they were also called, ran in the name of the "Director-General and Counsellors on behalf of the States-General, the Prince of Orange, and the Managers of the Incorporated West India Company in New Netherlands residing."

They were signed by the Director-General and countersigned by the Secretary.

They contained conditions of allegiance to the States-General and Managers, and submission to imposts, etc.

The "*Confirmatory*" grants recited the ground brief in question, and ratified and confirmed it in terms, to the patentee and his assigns, "to have and to hold, to them, their heirs and assigns forever."

The condition of allegiance to the Dutch government was of course subsequently abrogated *ipso facto*, as submission to the English government was one of the conditions of capitulation by Nicolls on the surrender in 1664.

Governor Andros, in his proclamation in 1675, on the second surrender to the English, confirmed all prior grants, concessions, and estates.

These original Dutch grants, were usually made to settlers who claimed pre-emptive rights.

Validity and Confirmation of the Dutch Grants.—They were reconfirmed by Governor Andros' proclamation on the restoration in 1675, and have been also judicially established as valid scources of title (*vide* North Hempstead v. Hempstead, 2 Johns. Chan. 324; Denton v. Jackson, 2 Wend. 110; see, also, 5 Den. 225.

Under William and Mary, in 1691, a colonial act was passed, confirming prior charters and grants by former sovereigns.

The Duke of York's Charter.—By letters patent issued March 12, 1664, by Charles II to his brother the Duke of York, his heirs and assigns, a large territory was granted, including New York and New Jersey, and all the appurtenant rivers, harbors, lakes, waters, etc., with

all the rights, royalties, profits, and all the royal estate, right, title and interest in free and common soccage, with power to the duke, his deputies, agents, etc., to govern the inhabitants according to such laws, ordinances, etc., as might be by the duke established, or in defect thereof, according to the discretion of his deputies, etc.; the said laws to be agreeable to the laws of England, and, reserving an appeal to the crown, with power to appoint and revoke appointment of governors.

Other full powers are given. This patent was to be exclusive of any other patents not consistent with it.

A charter was granted by the Duke of York, on October 30, 1683, to the province of New York, regulating the administration of the government through a governor, council, and a general assembly, and determining the various rights and liberties of the inhabitants of the province.

It is held that, under the above charter, the estate and rights of the king passed to the duke in the same condition in which they had been held by the crown, and upon the same trusts. They were not to be held or enjoyed by the duke as private property, apart from and independent of the political character with which he was clothed by the charter.

Martin v. Waddell, 16 Peters, 368.

The charter granted by the Duke of York to the city, it has been held, was abrogated by the English revolution of 1688—so far, at least, as its general provisions were concerned.

Vide Jackson v. Gilchrist, 15 Johns. 89.

The patent to the Duke of York was for all that part of New England beginning at a place called St. Croix, next adjoining New Scotland, in America, and from thence extending along the sea coast unto a place called Pennaquie or Pennequid, and so up the river thereof to the furthest head of the same as it tendeth northward, and extending from thence to the river Kimbequin, and so upwards by the shortest course to the river Canada northward. And also that island or islands called Meitowacks or Long Island, situate west of Cape Cod, and the narrow Higanssetts, abutting upon the main land between the two rivers, there called by the several names of Connecticut and Hudson's river, together also with said river called Hudson's river. And all the land from the west side of Connecticut river to the east side of Delaware Bay, and also all these several islands called Martin's Vineyard or Nantuck's, otherwise Nautuchet, together, &c.

Upon the conclusion of peace with the Dutch, in 1674, the duke obtained a new patent from the crown confirming the above.

The Dongan and Montgomerie Charters.—The Dongan charter of 1686 confirms all grants made to inhabitants of the city of New York by former officials of the province, or from the mayor, &c., by deed or otherwise. It also confirms all previous grants, franchises, &c., to the city.

The Montgomerie charter of 15th January, 1730, ratifies and confirms the above, and all grants &c. to inhabitants and freeholders, their heirs and assigns.

The above charters were confirmed by the confirmatory act of 14th October, 1732, and also by the first constitution of 1777, and again by the constitutions of 1822 and 1846.

The Public Lands.—Congress is invested by the constitution with the power of disposing of the public lands belonging to the United States, and making needful rules and regulations respecting them; and a State has no power over the public lands within its limits. Title passes from the United States by letters patent, issued under authority of an act of congress, or by its confirmation, accompanied by a sufficient description or survey.

Title III. The Common Law of England and the Colonial Laws, and their Effect in this State.

By a declaratory statute of 6 May, 1691 (1 Brad. 2), the legislative power of the colony was declared to be in a governor-in-chief and council, appointed by the crown, and in the people, by their representatives in general assembly.

The colonial laws passed by the provincial legislature under the English sovereignty were passed through the houses of council and assembly, subject to the governor's *veto*, and approval by the king. The commissions to the different governors gave them power to make laws and ordinances for the peace and good government of the province, by and with the consent of the council and assembly; said laws were not to be repugnant to the statutes of Great Britain. Within three

months after the making, they were to be transmitted to the king for approval. If the laws were disapproved by the king, and the *disapproval was signified to the governor, then and from thenceforth the law was to be void.*

The colonial statutes, therefore, had the force of laws without the expressed approval of the home government, and until they were annulled or disapproved. The power of assenting to or withholding assent to colonial statutes was conferred on the governors. If approved by them, they were to be transmitted to the home government for examination, with the *proviso*, however, that they were to be valid and binding until disapproved and rejected by the crown.

Vide 3 Colonial Doc. 331, vol. v. pp. 94, 393; Smith's History of New York, v. i. p. 353, ed. of 1830.

All grants made and actions done and titles vested under any act *ad interim*, and before it was annulled by the crown, would not be void or become divested in consequence of the subsequent disapproval by the Crown.

Vide The People v. Trinity Church, 22 N. Y. 44.

Declarations as to the Colonial and Common Law in the State Constitutions.—By the constitution of 1777, § 35, such parts of the common law of England, and also of the statutes of Great Britain and the colonial legislature, as formed the law of the colony on 19 April, 1775, also all colonial resolutions, shall be the law of the State, subject to alterations and provisions by the legislature.

All temporary and sectarian acts, however, and those concerning any allegiance to the crown, are made null.

By the constitution of 1822, such parts of the common law and of colonial laws as formed the law of the colony on April 19, 1775, and also the resolutions of the congress of said colony, and of the convention in force on 20 April, 1777, and laws of the State legislature not expired, repealed or altered, or repugnant to the

constitution, are declared laws of the State, subject to alteration by the legislature.

This was repeated in the constitution of 1846, art. 1, § 17. But all parts of the common law or said acts as are repugnant to the constitution were abrogated.

Any repealing act, however, would not disturb rights vested under those laws.

By law of 27 Feb. 1788 (2 Green, 116), and by law of March 30th, 1801, ch. 90, § 28, it was provided that none of the statutes of Great Britain or England should be considered as laws of this State; and by law of Dec. 10, 1828, that they should not be deemed to have had any force or effect in the State since May 1, 1788. So also law of April 5, 1813, ch. 56, they were not to be laws of the State. Nor were the laws of the late colony law of 1828, *supra*.

It is held that only such parts of the common law as, with the acts of the colony in force on April 19, 1775, formed part of the law of the colony on that day, were adopted by the State; and only such parts of the common and statute law of England were brought by the colonists with them as suited their condition, or were applicable to their situation. Such general laws thereupon became the laws of the colony until altered by common consent, or by legislative enactment. The principles and rules of the common law as applicable to this country are held subject to modification and change, according to the circumstances and condition of the people and government here.

Myers v. Gemmel, 10 Barb. 537; Bogardus v. Trinity Church, 4 Paige, 178; Morgan v. King, 30 Barb. 9; Depeyster v. Michael, 2 Seld. 468.

CHAPTER II.

THE RIGHT OF EMINENT DOMAIN, AND ITS EXERCISE.

TITLE I. GENERAL PRINCIPLES REGULATING THE RIGHT OF EMINENT DOMAIN AND ITS EXERCISE.

THE theory of the right of eminent domain is based upon the fact of sovereignty in the people, and their supreme power to act for the public interest, safety or advantage, and is a right necessarily incident to all government. It recognizes the existence of sovereign power in the people of the State, as authorizing them to resume possession of private property for public use in cases not only where the public safety and interest, but even where the public convenience is concerned.

To justify the exercise of the right, there must be a necessity, or at least an evident utility on the part of the public. It is also a principle controlling this right, that land under its exercise cannot be taken and donated for private benefit. It must be taken and applied for a public use and for no other purpose.

The right is exercised either directly through the legislature, when a public improvement is made by the State, or through the medium of a corporation (and it may be even a foreign corporation), or others, to whom

may be delegated the power of making the selection and appropriation of the land required.

It is in the exercise of this right by delegation that municipal and other bodies appropriate private lands for highways, streets, canals, railroads, wharves, ferries, bridges, &c.

By the general law of European nations, and the common law of England, it was a qualification of the right of eminent domain that compensation should be made for private property thus taken or sacrificed for public use; and the constitutional provisions of the United States, and of the several States, which declare that private property shall not be taken for public use without just compensation, were intended to establish this principle beyond legislative control.

This power of the legislature in respect to taking private property, therefore, is limited to ordaining that it may be taken upon *compensation*. The legislature is to judge of the necessity of the taking, but the amount of the compensation or value of the land is to be determined by consent of the parties, or through modes prescribed by the legislature within the constitution. The compensation to be made must be represented by *money* or its equivalent.

For a verification of the above general principles, reference may be made to the following cases; Livingston v. Mayor, 8 Wend. 85; Bloodgood v. Mohawk, etc. R. R., 18 Wend. 9; Beekman v. Saratoga, etc. R. R. Co., 3 Paige, 45; Matter of Central Park, 16 Ab. 56; Buffalo and N. Y. R. Co. v. Brainard, 9 N. Y. 100; The People v. Smith, 21 N. Y. 595; Taylor v. Porter, 4 Hill, 140; *In re* Townsend, 39 N. Y. 171; Commissioners Central Park, 51 Barb. 277; Thatcher v. Dartmouth B. Co. 18 Pick. 501; Embury v. Conner, 3 Com. 511.

Land taken for the United States.—It is held that the use of the United States is such a public use as will enable a State to take private property for it. Redall v. Bryan, 14 Md. 444; Gilmer v. Lime Point, 18 Cal. 229; Morris Canal Co. v. Townsend, 24 Barb. 658.

The Use to be of a General Nature.—The use must be for the people at large; it must be compulsory, also, with the public, and not optional with the delegated person or corporation. A mere convenience, therefore, such as the taking of property to enable a company to build railroads to haul, load and unload their freight has been held not such a necessity as would authorize the exercise of the powers. Memphis Freight Co. v. Memphis, 4 Cold. (Tenn.) 419.

Streets and Roads.—No new road or street can be laid out without the authority of the legislature; and whenever it has been necessary to open any new street or avenue not laid down on a city map authorized by the legislature, or otherwise permitted by statute, an act of the legislature is necessary, and the limits of the street or road are to be fixed by the act. Commissioners of Central Park, 51 Barb. 277.

Mill Purposes.—Authorizing the flowing of land for mill purposes, under certain circumstances, has been held a public use. Olmstead v. Camp, 33 Conn. 532.

To be Strictly Exercised.—A corporation can exercise the power to take private property only so far as the statute strictly confers it. East St. Louis v. St. John, 47 Ill. 463; Hatch v. Cincinnati R. R. 18 Ohio, 92.

Franchises.—Franchises may be taken under this right, but they cannot be vacated under claim of a public use without just compensation. Alabama, &c. R. R. v. Kenney, 39 Ala. 307; Harding v. Goodlet, 3 Yerger, 41.

Disabilities of Owner.—The right to exercise the power of eminent domain is not restricted by any disabilities of the owner whose land is taken. East Tennessee v. Law, 3 Head (Tenn.), 63.

Change of a City's Limits.—To extend the boundaries of a city, by which taxation is imposed on the new part for city debts and taxes, is not a taking of private property for public purposes. Wade v. Richmond, 18 Gratt. (Va.) 583.

Statutes Regulating the use of Property.—Statutes of the order of police or sanitary regulations, prescribing or regulating the use of landed property, *e. g.*, wharves, for the general good, are held not to be acts depriving owners of the use of property, nor limiting or changing its use. Rosevelt v. Godard, 52 Barb. 533.

Use of Roads, &c. by the United States.—Under the authority in the constitution given to congress, to establish post roads, and to regulate commerce, etc., it is held, that congress has power to make repair, keep open and improve post roads in the different States. But in the exercise of the right of eminent domain on this subject, the United States have no right to adopt and use roads, bridges and ferries owned by States or individuals without their consent or without compensation.

Otherwise the roads, etc., are used as if by individuals, subject to tolls and other regulations. Dickey v. Turnpike Co. 7 Dana, 113.

Other important principles and distinctions that govern or restrict the exercise of this right will now be briefly adverted to, with the adjudicated cases which elucidate or recognize them. The constitutional provisions that affect the right will be first given.

Title II. Constitutional Provisions.

Constitution of the United States.—The amendments to the Constitution of the United States of 1789, Art.

V., provided that no person should be deprived of life, liberty, or property, without due process of law; nor should private property be taken for public use without just compensation. The 14th amendment also provides that no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws. Ratified, 20 July, 1868.

The earlier provisions, are held to be restrictive, and applicable only upon the general government and its officers. Livingston v. The Mayor, 8 Wend. 85; Withers v. Buck, 20 How. U. S. 84.

The State Constitution of 1822.—The constitution of 1822 contained a clause, Art. VII., that no member of the State should be deprived of any of the rights or privileges secured to any citizen thereof, unless by law of the land or the judgment of his peers. The trial by jury in all cases as theretofore used, should be inviolate forever. It also provided that property should not be taken without due process of law, nor private property be taken for public use without just compensation.

State Constitution of 1846.—By the provisions of the constitution of 1846, Art. I., § 6, no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. The right of trial by jury was also reserved as above.

By § 7, when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law. Private roads may be opened in any manner to be prescribed by law; but in every case the necessity of the road, and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury of freeholders. Such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited.

TITLE III. JUDICIAL INTERPRETATION OF THE RIGHT.

Determination as to the Necessity or Utility of the Exercise of the Right.—It belongs to the legislature to determine whether the benefit to the public from a proposed improvement is of sufficient importance to justify its right to the exercise of the power of eminent domain in interfering with the private rights of individuals. The legislature also is sole judge as to what extent the public use requires the extinguishment of the owner's title, *e. g.*, as whether a fee or an easement should be taken. The courts have no power to review either determination; they may inquire if the intended use is public or private, but where it is ascertained that the purpose is public, there the inquiry stops. The expediency or policy of the taking, is held not a judicial question but one of political sovereignty, to be determined by the legislature either directly or by delegating the power to public agents, proceeding in such manner and form as may be prescribed within the constitution.

Therefore, where the right has been delegated to a municipal corporation, the *policy* of an improvement contemplated is a matter resting in the discretion of the corporation—neither the commissioners nor the courts have anything to do with it.

Although the legislature, or its delegates are the exclusive judges of the degree and quality of interest which are necessary to be taken, the courts, may judge as to the necessity of the appropriation of the lands taken, and to what extent.

Varick v. Smith, 5 Paige, 137; Beekman v. Sar. R. R. 3 Paige, 45; Bloodgood v. Mohawk, etc. R. R. 18 Wend. 9; Harris v. Thompson, 9 Barb. 350; The People v. Crowell, 36 Barb. 177; *In re* Peter Townsend, 39 N. Y. 171; De Varigne v. Fox, 2 Blatch. 95; The People v. Smith, 21 N. Y. 595.

The Rensselaer & Sar. R. R. Co. v. Davis, 43 N. Y. 137.

This last case holds that an appeal from an order appropriating land lies to the Court of Appeal.

The Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234; *In re* N. Y. & Har. R. R. v. Kip, 46 N. Y. 547; Clark v. Blackman, 47 N. Y. 150.

Taxation and Assessment.—It has been questioned whether assessment for benefit on the opening or paving or grading of streets was constitutional, inasmuch as it apparently operated under lien and sale of property to compel payment of the assessment, as a taking of property for a public use without just compensation.

The cases, however, which upheld this position, viz., The People v. The Mayor, etc. (5 Barb. 209), The People v. The Same (9 Barb. 535), and others, were overruled by the decision in the second of the above cases, decided in the Court of Appeals, in 4 Comstock, 419. It is considered that where the value of the land taken for a public use is set off against the benefit assessed on the remaining land of the same owner specially benefited by the improvement, the compensation is made. This assessment and taking of property for a public improvement is an important province of the right of eminent domain. Under the right of taxation, no return compensation is specifically made; otherwise, under the right of eminent domain special compensation is intended. The general taxpayer receives, or is supposed to receive, just compensation in the benefits conferred by government, and in the proper application of the tax or assessment.

The general power to tax and to exercise the sovereign right of domain implies the power to apportion the tax or assessment as the legislature shall see fit in the exercise of a sound discretion. It may be general, so as to embrace all taxable persons, or it may be apportioned according to the benefit which each tax or assessment-payer is supposed to receive from the object on which the tax is expended. Under the above principles also a statute authorizing a municipal corporation to appropriate private property for opening a street, square, etc., in which provision is made for compensating the owners, is constitutional, if it be required by public convenience, although the moving cause be to promote the benefit of a portion only of the community. The ex-

pense, also, of such improvements which, though for public use, may be specially beneficial to neighboring property, may be lawfully assessed upon the property thus benefited.

For other cases on this subject, *vide* Livingston v. The Mayor, 8 Wend. 85; Town of Guildford v. Board of Supervisors, 3 Ker. 143; Le Roy v. The Mayor, 20 Wend. 438; Betts v. City of Williamsburgh, 15 Barb. 255; Brewster v. City of Syracuse, 19 N. Y. 16; Litchfield v. McComber, 42 Barb. 88; People v. Lawrence, 36 Barb. 177; Litchfield v. Vernon, 41 N. Y. 124; Booth v. Woodbury, 32 Conn. 118.

It is a principle of law, also, that the legislature cannot by any enactment alter or change laws so as to affect vested interests, and thus give the laws a retroactive effect.

Therefore, any enactment giving validity to titles or sales made under void or illegal assessments, or taxes imposed, and so conflicting with interests otherwise created or vested, would be unconstitutional.

A mere legislative act is not considered due process of law within constitutional provisions, and cannot operate to divest rights of property which had been previously unaffected by any proceedings legally impairing them. But proceedings imposing a valid tax or assessment, and providing for a future sale of the property assessed for non-payment of them, would be considered as due legal process within the constitution.

Striker v. Kelly, 7 Hill, 9; People v. the Mayor of Brooklyn, 4 Coms. 419; Matthews v. The Mayor, N. Y. Com. Pl. Sp. T. 1872.

The Land to be Taken.—In the exercise of this right only the land actually required for the public purpose can be taken; even if the law authorizing the exercise of the right require compensation to be made for all land taken. Any law making provision for the king land not so actually required would be held void.

In re Albany street, 11 Wend. 150; Embury v. Connor, 3 Coms. 511; Bennett v. Boyle, 40 Barb. 551; *In re* Commissioners of Central Park, 51 Barb. 277.

If proceedings, however, have been taken under the statute with the consent of the owner of the land (as under a street opening), and have been duly confirmed, and the damages awarded have been paid and received under the statute, such proceedings would be held to operate as a conveyance, and would vest the title to the whole lot as well that taken for the street as the rest in the corporation.

Sherman v. McKeon, 38 N. Y. 266.

So also land of the public, or of one citizen, cannot be taken and transferred, or donated to another individual, even for a full compensation.

It must be applied to the use of the public, and

their interest or advantage must be promoted by the transfer; otherwise any such action would be void.

Wilkinson v. Leland, 2 Peters, 653; Varick v. Smith, 5 Page, 137; Embury v. Connor, 3 Coms. 511; Powers v. Bergen, 6 N. Y. (2 Seld.) 358; Taylor v. Porter, 4 Hill, 140; White v. White, 5 Barb. 474; Rice v. Parkman, 16 Mass. 330; Coster v. Tide W. Co., 3 Green (N. J.), 54.

The owner of the land, however, might waive his right, and consent to the transfer. His assent might be shown by parol, or by acts evidencing it. Baker v. Braman, 6 Hill, 47; Embury v. Connor, 3 Com. 511.

Reversionary Interest.—Where lands have been taken under this right for a public purpose, there is no reversionary interest left in the original owner, even if the public use should cease or fail.

Hayward v. The Mayor, 3 Sel. (7 N. Y.) 214; affirming, 8 Barb. 486; Rexford v. Knight, 1 Ker. 308; De Varigne v. Fox, 2 Blatch. 95.

Disposition of Land on closing a Street, Road, &c.—Nor after the land has once been taken for the public purpose, can it be taken from the public and re-vested in the former owner without compensation to the public, *e. g.*, as by reducing the width of a highway; or, doubtless, in closing a street and donating the land.

The People v. The Commissioners, etc. 53 Barb. 71; *In re* John and Cherry streets, 11 Wend. 149.

On closing any street or road, therefore, for which the public has paid, or which has been taken by law, under the exercise of the right of eminent domain, it cannot be taken from the public and donated to a former owner, without compensation, by any act merely closing the road; nor is it supposed would the legislature have the right, even for a public purpose, to close a street in the city, and so destroy the public easement, without compensation to the municipality at least, if not to land owners who have been assessed on the opening.

This principle would especially be just in its application where lot owners had been assessed for benefit on the opening of an adjacent square, and where the City or State closed it, to the detriment of such owners.

Dower Rights.—Where land is taken under this right it is taken in fee, free from contingent interests as of inchoate dower.

Moore v. The Aldermen, etc., 4 Sand. 456; affirmed, 4 Sel. 110.

Judgments.—So the land is taken freed from the lien of judgments; and judgment creditors are not "owners" to be notified.

Watson v. N. Y. C. R. R. 47 N. Y. 157.

What is Land.—Where a statute authorizes land to be taken for a public use, everything included in the general term "*land*" may be taken, including the buildings of a permanent character thereon, but not that part of them beyond the land actually taken for the public use.

Baker v. Clogher, 2 Hill, 342; Bennet v. Boyle, 40 Barb. 551.

When the improvements, however, are allowed, and intended as part of the compensation to the party whose lands are taken, they belong to him, and he may sever them from the land.

Schuchardt v. The Mayor, Gen. Term, 71st Dist., May, 1870.

Land under Water.—The right of the legislature to convey or use land under water in front of riparian owners, without compensating them for the loss of their riparian advantages, will be considered hereafter, ch. "Land under Water."

The Compensation.—Any acts of the legislature that authorize the taking of private property for public use, without making a just compensation, are considered by the courts of this State not only unconstitutional, but in violation of principles of natural right and justice, and such acts are held null and void.

Bradshaw v. Rogers, 20 Johns. 103; *In re* John and Cherry streets, 19 Wend. 659; Taylor v. Porter, 4 Hill, 140.

Public corporations are equally within the protection of the law. Any change in their property, fran-

chises, or interests, so as to interfere with their vested estate, would be void, notwithstanding the general reservation in their act of incorporation authorizing the legislature to make changes therein. But the legislature might subject them to new restrictions or increased burdens without such compensation.

Vide Miller v. N. Y. & E. R. R., 21 Barb. 513; modified by Albany R. R. Co. v. Brownell, 24 N. Y. 345; *In re* Kerr, 42 Barb. 119; Benson v. The Mayor, 10 Barb. 223; The Brooklyn Park Commissioners v. Nichols, 45 N. Y. 729; *vide ante*, ch. I, *Franchisse*, and street railroads *infra*.

Streams.—A statute declaring a private stream on which riparian owners have vested interests a public highway, without compensation to the owners, would be null and void. The same rule, doubtless, would prevail as to private streets.

Morgan v. King, 35 N. Y. 454, reversing, 46 Barb. 340; The People v. The Commissioners, etc., 53 Barb. 71.

Property Destroyed, to prevent the extension of a conflagration, is not taken under the right of eminent domain, and a party cannot recover therefor.

Russell v. The Mayor, 2 Den. 461.

Compensation, however, is provided for by laws applicable to several of the cities of the state.

Turnpikes, Highways, and Streets.—Turnpike roads cannot be taken or closed for public use without compensation. Bradshaw v. Rogers, 20 Johns. 103. Nor a part of a highway or street that has been dedicated for such use only. The Trustees, etc., v. The Auburn, etc., R. R. 3 Hill, 567; Kelsey v. King, 3 How. P. 39; Williams v. N. Y. C. R. R. 16 N. Y. 97; People v. Board of Supervisors, 4 Barb. 64; Knox v. The Mayor, 55 Barb. 404. But public rights in a highway or street may be taken without compensation to an individual as one of the public, for resulting damages.

The People v. Kerr, 37 Barb. 357; 27 N. Y. 188.

And see *post*, as to street railroads, etc., over highway.

But authorizing a highway road-bed, to be used as a turnpike, has been held not a taking of land requiring compensation to the owners of the road-bed.

Streams—*Vide supra*, this page.

Mode of Ascertaining Compensation.—If a law authorize the compensation to be ascertained otherwise than through a jury, or commissioners to be appointed by a court of record, under the constitution, the law and any

assessment under it would be void; unless the compensation is made by the State.

House v. City of Rochester, 15 Barb. 517; Clark v. City of Utica, 18 *ib.* 451; Clark v. Miller, 42 *ib.* 255.

Even any provision authorizing the supreme court to increase or reduce the amount of damages reported by the commissioners would be unconstitutional. The Rochester Water Works v. Wood, 60 Barb. 137.

Although, in case of error or fraud, the court could set aside the appraisal and appoint new commissioners. *Ib.*

As before seen, the constitutional provisions which may control in respect to the mode of *ascertaining the compensation* to be made to the citizen upon taking his property, do not apply to the question whether it is needed for public use.

The People v. Smith 21 N. Y. 595; and cases cited *supra.*

It would be otherwise, however, where the damage *has been sustained,* and the law is retroactive in its effect. In such a case the party cannot be deprived of his right to trial by jury.

In re Peter Townsend, 39 N. Y. 171.

Limit as to Time.—The State may limit the time for which compensation may be claimed.

Rexford v. Knigbt, 1 Kern. 308.

Waiver.—The right to compensation may be waived or compromised.

Arnold v. Hudson R. R. 49 Barb. 109.

Notice.—Property cannot be taken as above, without due notice to every owner as regards fixing the compensation; and it is competent for the legislature to direct the mode of giving the notice. Where the matter to be inquired into, however, is not as to the amount of the compensation, but as to the propriety of taking the land in question, no notice need be given. The notice when requisite may be waived by acts of the parties.

Vide Owens, etc. v. The Mayor, 15 Wend. 374; Dyckman v. The Mayor, 1 Sel. 434; The People v. Smith, 21 N. Y. 595.

Norton v. W. V. R. R. 61 Barb. 476. Only land can be taken that is described in the notice *in re* Central Park Commissioners, 51 Barb. 277.

A reasonable notice sufficient to apprise is sufficient. Happy v. Mosher, 48 N. Y. 313.

For what may Compensation be Required.—The prohibition in the constitution has reference to property actually taken for the public use. Therefore injuries or damages, or disturbances of rights or easements that

may accrue to property not actually taken, but in the vicinity of land taken (*e. g.*, the propinquity of a railroad), or contingent future damages or incidental or consequential injuries not capable of estimate, do not come within the rule.

A person or corporation, however, would of course be liable for any injury to others by not using proper precautions in the exercise of their right of ownership of property, or for a nuisance created.

Snyder v. Penn. R. Co. 55 Penn. 340; Drake v. Hud. R. R. R. 7 Barb. 508; Brown v. Cayuga R. R. 2 Ker. 486; Bellinger v. N. Y. C. R. R. 23 N. Y. 42; Arnold v. Hud. R. R. 49 Barb. 109.

Matter of Union Village R. R. 35 How. P. 420.

Benedict v. Goit, 3 Barb. 459; Swett v. City of Troy, 12 Abb. N. S. 100; Graves v. Otis, 2 Hill, 466; Radcliff v. Mayor, 4 Com. 195; Laurence v. The Great N. R. R. 16 Ald. & Ell. 643; Hudson, &c. Canal Co. v. N. Y. & E. R. R. 9 Paige, 323.

And see further, *infra*, as to consequential damages.

Another important principle is to be considered with reference to the question of compensation—viz., that in the exercise of this right reserved to the sovereign power; its administration will be regulated and interpreted by the courts upon the basis of a broad and liberal equity, as to the right or estate of which the citizen is deprived. The taking of property, therefore, for public advantage, as construed by those principles, will not be held to be confined merely to its conversion and transfer from the subject to or for the public, but also such an utter destruction of, or interference with, private property for the public weal as will materially impair its practical value to the citizen, or inflict permanent or irreparable injury upon it.

The courts, therefore, in sustaining the above doctrine, as applicable to legislative interference with private property, hold that any serious interruption to the common and necessary use of property may be equivalent to the taking of it; and that, therefore, under the above constitutional provisions, it is not necessary that the land should be absolutely *taken*.

On this head, *vide* Gardner v. Newburgh V. 2 Johns. Ch. 162; Charles

R. Bridge v. Warren Bridge 11 Pet. 638; Angell on Water-courses, § 465*a*; Hooker v. N. Haven, &c. R. R. Co. 14 Conn. R. 146; Rowe v. Granite Bridge Co. 21 Pickering, 344; Canal Appraisers v. The People, 17 Wend. 604; Lackland v. N. Missouri R. R. 31 Missouri, 180; Stevens v. Proprietors of Middlesex Canal, 12 Massachusetts, 466; Pumpelly v. Greenbay & Miss. Land Co. U. S. Supreme Court, Dec. Term, 1871; 13 Wall. 166; McKean v. Del. Co. 49 Penn. 424.

In accordance with the above views, and as a modification of the general principle that for a mere consequential injury to the property of an individual arising from the prosecution of improvements of roads, streets, rivers and other highways for the public good, there may be no redress; it is now the doctrine that where there is an actual invasion of land by superinduced additions of water, earth, sand or other material, or through having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a *taking* within the equitable meaning of the constitution, and compensation must be made.

The diversion of a water course whereby the value of property is impaired would come within the same rule.

Navigable Streams.—The government of a State, under its reserved, or the government of the United States, under its constitutional powers to regulate commerce, may make alterations in the course, width, &c., of a navigable stream; and for this purpose may take the river bed which, under the principles of law hereafter stated, may be vested in the riparian proprietor; or may divert the stream in which, by law, he has a peculiar or special right by reason of his acquarian location. Such property or right can only be taken, however, on making provision for compensation to such proprietor for the land taken, or for the diversion of the stream.

And although courts cannot directly restrain the President or Congress of the United States, or a State legislature, they can restrain and prevent the action of their agents, if the property is taken as above without consent, or compensation duly provided.

Vide post ch. 43.—Land under Water.

See Avery v. Fox, W. Dist. Mich. 1868; reported, 1 Abb. U. S. 246.

The Rule of Compensation.—The rule of compensation in this State is the actual value of the property taken in money, without any deduction for estimated profit or general advantages accruing to the owner from the public use of the property, unless it is of peculiar advantage to the land taken. And this seems to be the principle generally maintained throughout the United States, although the decisions are not altogether harmonious on the subject.

Jacob v. City of Louisville, 9 Dana, 114; Rogers v. R. R. Co. 35 Maine, 319; St. Louis R. R. v. Richardson, 45 Mo. 496; State v. Moller, 3 Zabr. 383; People v. Mayor, 6 Barb. 209; Hatch v. R. R. 25 Vermont, 49; Moale v. Baltimore, 5 Md. 314; People v. Mayor, 4 Coms. 419; Rexford v. Knight, 15 Barb. 627; 1 Ker. 308; R. R. v. Doughty, 2 Zabr. 495; McMicken v. Cincinnati, 4 Ohio, N. S. 394. See, also, 25 Mis. 258; 5 Ohio, 250; N. S. *ib.* 140.

Neither, as above observed, can contingent future damages or incidental or consequential injuries be taken into account—as the proximity of a railroad, or a change of grade in a street from the level of surrounding land. But allowance will be made for special injury in the case of a railroad, &c., according to the manner in which the land is cut, the difficulty of access, noise, smoke, &c. The general measure of damages is the difference between the market value of the land, with and without the improvement.

Troy & B. R. R. v. Lee, 13 Barb. 169; Sidener v. Essex, 22 Ind. 201; Wilmington R. R. v. Stauffer, 60 Pa. 374; Goodin v. Cinn. Canal Co. 18 Ohio, 169; Jacot v. City of Louisville, 9 Dana, 114; Drake v. Hud. R. R. R. 7 Barb. 508; Radcliffe's Exrs. v. Mayor of Brooklyn, 4 Com. 195; Concord R. R. v. Greely, 23 N. H. 237; Carpenter v. Landaff, 42 N. H. 218; East Penn. R. R. v. Hottenstine, 47 Penn. 28; Hatch v. Vermont C. R. R. 25 Vt. 49; Matter of Utica R. R. 56 Barb. 456.

It is sufficient if the act makes provision for future compensation. The assessment and payment of damages need not precede the compensation.

Smith v. Helmer, 7 Barb. 416; Rexford v. Knight, 11 N. Y. 308; Bloodgood v. M. & H. R. R. 18 Wend. 9; Baker v. Johnson, 2 Hill, 342; People v. Hayden, 6 Hill, 359; Fletcher v. The Auburn R. R. 25 Wend. 462; Case v. Thompson, 6 Wend. 634; Nichols v. R. R. Co. 43 Maine, 356; Walther v. Warner, 25 Miss. 277; Francisco v. Scott, 4 Cal. 114; Rexford v. Knight, 1 Ker. 308.

Contra, Avery v. Fox, 1 Abb. U. S. 246.

If the law taking the land is repealed, the right to compensation ceases. Hampton v. Commonwealth, 19 Penn. 329.

No possible or prospective or contingent advantages are to be estimated against the owner of the land taken. Alabama R. R. v. Burkett, 42 Ala. 83.

As to the Use of Dedicated Streets.—Vide post, ch. xxxv.

Land under Water, generally.—As to the taking of land under water, *vide post,* ch. 43.

Action of the Commissioners of Appraisement.—All the commissioners must meet and act in making the appraisement and estimate of damages.

Board of Water Commrs. v. Lansing, 45 N. Y. 19.

Appeal.—No affidavits can be used on a motion to confirm the report of the commissioners, nor on the appeal from the order of confirmation. The court in such case must act solely on the report of the commissioners.

In re Rondout, &c. R. R. 36 How. P. 187.

Franchises.—The taking away or destruction of franchises for a public use is held to fall under the principle requiring compensation to be given, equally with any other private property; and they cannot be vacated under claim of public advantage or use without just compensation.

West River Bridge Co. v. Dix, 6 How. U. S. 507; Alabama R. R. v. Kenney, 39 Ala. 307; *in re* Flatbush Avenue, 1 Barb. 286; White River T. Co. v. Vt. R. R. 21 Vermont, 590; County of Richmond v. County of Laurence, 12 Ill. 1; Albany U. R. v. Brownell, 24 N. Y. 345; Lafayette Pl. R. v. New Albany R. 13 Ind. 90; Harding v. Goodlet, 3 Yerger, 41.

See, however, the subject "Franchise," and the cases cited as to the exclusive rights impliedly conferred by the State grant creating them. *Ante,* ch. i.

It has been held, also, that if the damage be consequential or indirect, as by the creation of a new and rival franchise, in a case required by public necessity, compensation is due. Bonaparte v. C. & A. R. R. 1 Bald. C. C. U. S. 205; Glover v. Powell, 2 Stock. N. J. 211.

TITLE IV. RAILROADS AS PUBLIC IMPROVEMENTS.

Railroads as Public Improvements.—Railroads for the transportation of merchandise and passengers from one part of the State to another are considered to be public improvements, and for the public benefit, for the construction of which private property may be taken under the authority of the legislature, upon payment of a just compensation to the owner.

Acts, therefore, authorizing railroad companies to take private property for the purposes of the road have been held constitutional; and the legislature may lawfully delegate to such corporations or companies the right or power of eminent domain for the above object.

Provisions, also, authorizing the taking of such property, and assessing damages through commissioners to be appointed by the legislature or governor, are also held constitutional, and not repugnant to the clause of the constitution declaring the right of trial by jury to be inviolate. Such provision is held to apply to the trial of civil and criminal cases in courts of justice, and has no relation to assessments for damages to owners of property taken for public uses. Such acts would not be valid, however, unless provision is made in them for compensation. The money need not be actually paid before the property is taken, but provision must be made upon some adequate fund. This is a condition precedent to taking the property.

Vide Livingston v. Mayor, 8 Wend. 85; Beekman v. Saratoga, etc., R. R. Co. 3 Paige, 45; Bloodgood v. The Mohawk, etc. R. R. Co. 16 Wend. 9; Smith v. Helmer, 7 Barb. 416; *In re* Kerr, 42 Barb. 119; The People v. Law, 34 Barb. 494; The People v. Smith, 21 N. Y. 595; Clark v. City of Rochester, 24 Barb. 446.

The legislature may grant the above powers to railroad companies by a general act.

Buffalo and N. Y. C. R. R. v. Brainard, 9 N. Y. 5 Seld. 163. Further as to compensation, vide *post. supra.*

It has been held, however, that the acquisition of lands for speculation or sale, or to prevent competition by other lines, or in aid of collateral enterprises, however beneficial to the road, are not such purposes as authorize the condemnation of private property therefor.

Alby. & Sar. R. R. v. Davis, 43 N. Y. 137.

But land may be acquired for the purposes of necessary structure, &c.

In re N. Y. & Har. R. R. v. Kip, 46 N. Y. 547.
As to the determination of the route, and the *modus* of taking the land *vide* Norton v. W. V. R. R. 61 Barb. 476.

As to railroads over the streets of a city, *vide infra.*
The general rule in this country is that railway companies, by virtue of the compulsory powers conferred on them in taking lands, acquire no absolute fee simple, but only the right to use the lands for their purposes; and where compensation is to be made for the value of the use appropriated, in estimating the value, what, if anything, would be left to the landowner of value, subject to the easement, should be considered.
Alabama R. R. v. Burkett, 42 Ala. 83.
As to the fee still remaining in the landowner, *vide* also Hatch v. Cinn. R. R. 18 Ohio, 92; Morris v. Schallsville, 6 Bush. (Ky.) 671.

The Use of Streets for Railroads.—A variety of statutes from 1831 have been passed conferring upon railroad companies the right to lay tracks over the public streets or highways of cities and towns.

In some of them the grantees were to obtain a prior consent of the city corporation, in others not. By law of April 4, 1854, ch. 140, the corporations of cities were not to allow railroad tracks which commenced and ended in the city to be constructed, without the consent of a majority in interest of owners of property on the streets over which the road was to run, as per assessed valuation. On such consent being obtained, grants might be made, after due notice by the common council, on proper security being given, and under proper conditions. The act was not to affect roads already begun.

Many special acts have been passed by the legislature, however, subsequently, granting railway franchises without any such consent.

New York City.—Act of January 4, 1860, ch. 10.—By this act no railroad was to be built in or along any of the streets or avenues of the city of New York, except under the authority and subject to the restrictions of the legislature. The act was not to affect roads already begun, or for which grants had been made. Inconsistent acts were repealed.

Judicial Determination as to Railroads over Streets.—The decisions as to the rights acquired in and the authority of the State and city to bestow easements over the

public streets and highways for railway purposes, have been numerous and somewhat variant.

The general views of the courts are that a railroad in the street of a city, when constructed under proper legal authority, is not, *per se, a nuisance*, nor an injury to contiguous land-owners, nor an infringement of private rights, provided that such use does not interfere with the free use of the streets by the public as a highway.

The courts, also, at first held that municipal corporations in the State, subject to all positive legal restrictions, had a right, without previous grant from the legislature, and as an incident to their authority or title, to allow the privilege or license of such use over the streets to individuals or companies, if the license was revocable at the will of the municipal corporation; otherwise, if not revocable, but a surrender of the whole power and duty of the corporation over the streets, the license would be invalid.

Plaint v. L. I. R. R. Co. 10 Barb. 26; Adams v. Saratoga, etc. R. R. Co. 11 Barb. 414; Drake v. Hudson R. R. Co. 7 *Ib.* 508; Milhau v. Sharp, 15 Barb. 193; Milhan v. Sharp, 17 Barb. 435, affirmed; in some particulars, 27 N. Y. 611; State v. City of N. Y. 3 Duer, 119.

It was also at first held that the legislature could not confer on railway companies any right over the public streets without compensation to the corporation for the land appropriated.

The principles laid down as above, and asserted in the cases quoted, have been generally sustained, except so far as the right to compensation and the powers of the corporations are concerned. The tendency of the courts has been to recognize more fully the authority of the legislature over municipal property, and to diminish the authority and estate of municipal corporations.

The later cases hold as to streets in which municipal corporations have the fee under acts appropriating it, that having been taken by them as delegates of the legislature, in the exercise of the right of eminent domain, the legislature may apply them to a public use

without compensation to the city or adjacent land-owners, and that the legislature has entire control of any public rights in the highways or streets.

They hold, also, that the owners of property bounded on streets have no private or exclusive right to, or property in, the use or enjoyment of such streets.

The courts also hold that notwithstanding the various city charters, the legislature has the paramount right to make grants of railroad privileges and franchises over the streets and avenues of a city, and that when this power is exercised it is superior to and exclusive of any power which previously resided in the local authorities; and that the local government has no right to grant railway privileges, or establish or extend railroads in cities, independent of legislative action and approval. That in general a municipal corporation, as such, has no franchise in connection with the use of the streets for the transportation of passengers; and that, if it ever had such a franchise, it is not one that is irrevocable, as being a mere grant of governmental powers.

The People v. N. Y. & H. R. R. Co. 45 Barb. 74; People v. Third Av. R. R. Co. 45 Barb. 63; Wetmore v. Story, 22 Barb. 414; Davis v. The Mayor (4 Ker. 506), 14 N. Y. 514; The People v. Kerr, 27 N. Y. 188; affirming, 37 Barb. 375; Wetmore v. Law, 34 Barb. 515.

In a case decided (October, 1870), in the Supreme Court of the United States, (The People's Passenger R. R. Co. etc. v. John Park, Mayor, etc. of Memphis), it is held that a municipal corporation has no right, by virtue of its general powers, to give to an association of persons the right to construct and maintain for a term of years, a railway in one of the streets of the municipality, and that any ordinance or resolution granting such a right is void.

As to Compensation to the City or Contiguous Owners.— Under the above principles it is settled that the legislature may confer upon a company the privilege of building and using a horse railroad in the streets of the city, without the consent of adjacent street owners or of the city authorities, and without compensation to them.

Lexington & Ohio R. R. v. Applegate, 8 Dana, 289; Phil. v. T. R. R. 6 Whart. 25; Drake v. Hudson R. R. R. 7 Barb. 508; Brooklyn City, etc. R. R. Co. v. Coney Island, etc. R. R. Co. 35 Barb. 364; Wetmore v.

Storey, 22 Barb. 414; Corey v. Buffalo, R. R. 23 Barb. 482; N. Y. & H. R. R. v. The 42d st. R. R. 50 Barb. 309; English v. N. H. R. R., 32 Conn. 240.

Action by those Specially Injured.—The case of Milhau *v.* Sharp, reported in 28 Barb. 228, holds that individuals owning lots fronting on a public street may maintain an action to enjoin the construction in such street of a railway which would be *specially injurious to their property*, or may bring an action against the company for damages.

Affirmed, 27 N. Y. 611; Davis v. Mayor, 4 Kern. 506; Anderson v. Rochester, etc. R. R. 9 How. 555; Clark v. Blackmar, 47 N. Y. 150.

But the danger of special damage must be great and imminent to adjacent owners before the Court would interfere.

Drake v. Hudson R. R. R. 7 Barb. 508.

Railways over Dedicated Streets.—As to this branch of the subject, *vide* XXXV.

Railways over Highways.—In view of the ownership of the road-bed or highways, under the principles adverted to hereafter, it has been held by the courts that the legislature has no power to authorize the construction of a railway over a highway, or take it for any other public use, without providing for compensation to the owner of the land over which it passes.

Mason v. N. Y. C. R. R. 24 N. Y. 658. The Trustees, etc. v. The Auburn, etc. R. R. 3 Hill, 567; Carpenter v. The Oswego, etc. R. R. 24 N. Y. 655; Williams v. N. Y. C. R. R. 16 N. Y. 97; reversing, 18 Barb. 222; Kelsey v. King, C. of Appeals, 33 How. 39; Wager v. The Troy Union R. R. Co. 25 N. Y. 526; The People v. Board of Supervisors of Westchester Co. 4 Barb. 64.

By-laws of 1864, ch. 582, railroads may be constructed over any public highway.

The above cases seem only to apply to railroads authorized to run with steam-power over the highway. The People v. Kerr, 27 N. Y. 188, draws a distinction

between such cases and where an ordinary street railroad with horse-cars was authorized. In the latter case, the railroad over the highway, as in the case of a dedicated street, would probably be held merely a new mode of using the easement.

The consent of Highway Commissioners, is not requisite neither is a steam railway crossing a nuisance. Baxter v. The S. R. R. 11 Ab. N. S. 72; 61 Barb. 428.

Land taken in a street for a railway operated by steam, must be compensated for. Jersey C. R. R. v. Jersey City, &c. 20 N. J. Equity 61, *alited* as regards a horse railway. *Ib.*

CHAPTER III.

THOSE CAPABLE BY LAW OF HOLDING AND CONVEYING LANDS.

TITLE I. CITIZENS OF THE UNITED STATES.

BY law of this State it is provided, that every citizen of the United States is capable of holding land within this State, and of taking the same by descent, devise and purchase. Every person capable of holding lands, except idiots, persons of unsound mind, and infants, seized of or entitled to any estate or interest in land, may alien such estate or interest, at his pleasure, with the effect, and subject to the restrictions and regulations provided by law.

1 Greenleaf, 358; Law of 1787; 1 Rev. L. p. 70, § 1, and p. 74, § 5; 3 Rev. Stat. 5 edit. p. 3.

Change of Sovereignty and Antenati.—*Vide ante* p. 4, 5, 6.

Expatriation.—Under the English common law it was held that natural born subjects owe an allegiance, which

is intrinsic and perpetual, and which could not be divested by any act of their own, without the assent of the State.

In this country expatriation, under the more recent decisions and legislation, is considered a fundamental right, and a citizen may transfer his allegiance elsewhere, and become an alien.

Act of July 17, 1862, *infra;* Act of July 27, 1868, ch. 249; 15 Stat. at Large, 223. As to the former rule in this country, following the English common law, *vide* The Trinidad, 7 Wheaton, 283; Juando v. Taylor, 2 Paine C. C. 652; *In re* Isaac Williams, 2 Cranch, 64; *Ib.* 82; Talbot v. Jansen, 3 Dall. 383; United States v. Gillies, 1 Peters C. C. 159; Inglis v. Trustees of Sailors' Snug Harbor, 3 Peters, 99; and see *infra*, p. 51.

In many cases this right is made the subject of treaty, and a return to and residence for a certain term in the native country is made evidence of expatriation from the adopted one.

Vide infra a list of treaties more or less bearing on the subject.

Citizens.—As a general rule, according to the common law principle, all persons born within the jurisdiction and allegiance of the United States are native citizens. The special regulation of the *status* of citizenship as changing the common law rules, is one appertaining to the nation as such, and not to these States severally; and the right of citizenship, as distinguished from alienage, is a national right, or condition. The principle of the English law, that birth within the jurisdiction of and under allegiance to a country creates citizenship thereof, was the law of the colonies, and continued the law of each State respectively, on the Declaration of Independence, until the federal constitution was established, when exclusive jurisdiction of the subject passed to the general government. Where, however, the constitutional or statute law is silent as to the political status of an individual, the principles of the common law are still the recognized law of the land as it existed, irrespective of English statutes, at the adoption of the federal constitution.

Vide Lynch v. Clarke, 1 Sandf. Ch. 583; Ludlam v. Ludlam, 31 Barb. 486; affirmed, 26 N. Y. 356.

Exceptions; Children of Ambassadors.—An exception to the above common law rule is found in the case of the children of ambassadors or other emissaries born out of a country, who are born in theory within the allegiance of the foreign power represented by the ambassador or his diplomatic family. Calvin's case, 7 Co. 1; Lynch v. Clarke, 1 Sand. Ch. 584.

Those Born within Hostile Occupation.—Also an exception exists where a person is born in a foreign country, during war with it, within a portion held by conquest by the forces of his own country; or if he be born within the armies of his State while abroad, unless the parents adhere to the enemy as subjects *de facto*. Calvin's case, 7 Co. 18; Craw v. Ramsey, Vaugh. R. 281; Dyer's Rep. 224.

As a general principle, also, of the common law, a subject travelling or sojourning abroad, either on the public business, or on lawful occasion of his own, with the express or implied license or sanction of the sovereign, and with the intention of returning, continues under the protection of the sovereign power, and retains the privileges and continues under the obligation of his allegiance. His children, therefore, though born in a foreign country, are not deemed to be born under foreign allegiance, and are an exception to the rule which makes the place of birth the test of citizenship. On the same principle, a child born on an American ship in a foreign port is a citizen.

Vide Lynch v. Clarke, 1 Sand. Ch. 583; U. S. v. Gordon, 5 Blatch. 18; Ludlam v. Ludlam, 31 Barb. 486; affirmed, 26 N. Y. 356.

Treaties Regulating Expatriation and Alienship.—Before the acts of July 17, 1862, and July 27, 1868, *infra*, the decisions throughout the State and federal courts (*ante* p. 50) had been to the effect that every citizen owed allegiance to the government; and that where there was no legislative act or treaty, the English common law doctrine prevailed, and the citizen had no right, intrinsically, to renounce his citizenship and allegiance to the government, without the consent of the government, nor until he arrived at full age. In the case of Ludlam v. Ludlam, *supra*, a doubt was expressed as to whether a citizen is capable of renouncing his allegiance without the consent of his government, or whether he may not

do so when his government has not prohibited such an act. It was held by the court, however, that he could not divest himself of his citizenship until he became the citizen of another country, and that he could not do that until he was of full age.

That case further intimated that a child born abroad of a citizen sojourning in a foreign country for an indefinite time, might be subject to a double allegiance; and, upon arriving at majority, might elect to retain the one and repudiate the other; but that until such election, he retained the rights of citizenship in both countries, though discharging its duties in but one.

It may be remarked, that a person's commercial domicil might also give him rights appurtenant to the country where he was domiciled in a commercial point of view: and thus he might acquire a double political *status*. The law on this head, however, is not applicable to this treatise.

Various conventions and treaties have been made with foreign States with reference to the alien *status* and right of expatriation of the citizens of the United States, and of the foreign States, respectively. These treaties are important, as bearing upon the right to, and transmission of real and personal property by the alien in the alien country, and as being, in many cases, inconsistent with the State laws regulating the title to land and its transfer.

The terms of these treaties are various. In some, the citizens and inhabitants of either of the two countries, who become heirs of lands or other property in the other, are to succeed to their estates without obtaining letters of naturalization, and without succession duty. In others, the rule applies only to the heirs of an alien dying within the jurisdiction of the foreign country. In other treaties where land descends, parties are to have a reasonable or specified time to sell and remove the proceeds, without molestation. Some of the treaties (*e. g.*, that with France of Feb. 23, 1853,) are made subject to the provisions of the State alien laws.

The effect which the political privileges created by

these treaties may have upon the title to property within the States respectively, is a subject of judicial construction. The question arising is, whether the treaty-making power can, by its political action, vary or regulate what is supposed to be peculiarly a matter of State jurisdiction, and so virtually abrogate the State sovereignty in matters connected with the disposition of and title to property within each State.

The case of the People v. Gerke, (5 Cal. p. 381,) which sustains the view that the government of the United States has the constitutional power to enter into treaty stipulations with foreign governments, for the purpose of restricting or abolishing the property disabilities of aliens or their heirs in the several States, has been virtually overruled by the subsequent case of Siamessan v. Bofer, (6 Cal. R. 250,) in which the court holds that the treaty-making power can never be extended by implication to the reserved powers on matters which belong to State sovereignty, or to the right each State has to regulate its domestic concerns.

Judge Story, in the case of Prevost v. Grenveaux, with reference to a treaty with France of 1853, which placed citizens of France on a par with citizens of Louisiana, and all States of the Union whose laws permit it, held that, inasmuch as the treaty did not conflict with the laws of the State, or claim for the United States the right of controlling the succession of real or personal property in a State, its provisions would be carried out; but otherwise the courts might not do so. 19 Wheat. 1.

In a case recently decided in this State, as to the effect of the United States internal revenue law, which required a stamp to be affixed to conveyances, in order to give them validity in the State, the broad principle was asserted that the federal government had no power to prescribe any rule for a State, affecting the transfer of property within it, so as to render void any mode of transfer otherwise valid in the State.

Moore v. Moore, 47 N. Y. 67.

The same principle, if extended conversely to the operation of the treaties in question, would render their provisions ineffective to confer upon aliens the privileges of citizens with relation to property, if such provisions were not harmonious with the State legislation.

The question, however, may be considered as not yet to have received a full judicial investigation. Reference is now made to the treaties that have been made for the above purposes.

The following are the treaties bearing on the subject:

Netherlands.—Treaty, Oct. 8, 1872,—8 U. S. Stat. p. 36.

Belgium.—July 30, 1869.

Sweden.—Treaties, Ap. 3, 1783; Sept. 4, 1816; July 4, 1827,—8 U. S. Stat. pp. 64, 240, 354.

Hanseatic Towns.—Treaty, Dec. 20, 1827,—8 U. S. Stat. p. 370.

Hanover.—Treaty, May 20, 1840,—8 U. S. Stat. p. 556; June 10, 1846, —9 U. S. Stat. p. 865; March 10, 1847,—Vol. IX, p. 602.

Hesse Cassel.—March 26, 1844,—Vol. IX, p. 818.

Hesse.—Aug. 1, 1868.

Saxony.—May 14, 1845,—Vol. IX, p. 831.

Nassau.—May 28, 1846,—Vol. IX, p. 849.

Mecklenberg-Schwerin.—Dec. 9, 1847,—Vol. IX, p. 919.

Brunswick Luneberg.—Aug. 21, 1854,—Vol. IX, p. 602.

Treaty with France.—Feb. 6, 1788. Declared repealed by Act of Congress, Feb. 6, 1798,—7 Stat. at Large, p. 18. Convention, Sept. 30, 1800-1, expired in 1808,—7 U. S. Stat. p. 182. Treaty, Feb. 23, 1853,—10 U. S. Stat. p. 992-996. As to treaty of 1853, *vide* Prevost v. Greneau, 19 How. U. S. 1. As to the treaty of 1778, *vide* Chirac v. Chirac, 2 Wheat. 259. A title once vested under this treaty held not divested by its abrogation. Carneal v. Banks, 10 Wheat. 181.

Bavaria.—Jan. 21, 1845,—Vol. IX, p. 826; May 26, 1868, and protocol therewith of same date.

Baden.—July 19, 1868.

Hesse Darmestadt.—Concluded August 1, 1868.

Wurtemburg.—Treaties of April 10, 1844,—*Vide* Frederickson v. Louisiana, 23 How. U. S. 445; July 27, 1868.

Prussia.—Treaties, July, 1785; July 11, 1799; May 1, 1828,—U. S. Stat., Vol. VIII, pp. 88, 166, 384.

North German Confederation.—Feb. 22d, 1868. Citizens of either the said Confederation or of the United States, who have resided continuously five years within each other's territory respectively, and become naturalized citizens thereof, shall be deemed citizens of that territory where they are so naturalized.

Mexico.—April 5, 1831,—Vol. VIII, p. 414. July 10, 1868.

Belgium.—Nov. 16, 1868.

Great Britain.—*Vide* treaties 1783 and 1794, *ante*, p. 22, and The People v. Snyder, 41 N. Y. 397. Protocol of Oct. 9, 1868, between the United States and Great Britain. British Naturalization Act of 12 May, 1870,—35 Victoria, ch. xiv. Convention with Great Britain of May 13, 1870. Convention with Great Britain of Feb. 23, 1871, ratified May 4, 1871. This treaty provides that any person, being originally a citizen of

the United States, who had previously to May 13, 1870, been naturalized as a British subject, who at the date first aforesaid had been naturalized as a citizen within the United States, may, at any time before May 12, 1872, publicly declare his renunciation of such naturalization by subscribing an instrument, in writing, substantially as per form appended to the treaty, according to certain directions given.

Austria.—Aug. 27, 1829 (personal property); May 8, 1848,—Vol. IX, p. 944; July 11 (Sept.), 1870; Sept. 20, 1870. Ratifications exchanged, July 14, 1871.

Sweden and Norway.—May 26, 1869, ratified 14 June, 1871.

Portugal.—Aug. 26, 1840.

Naples.—Dec. 1, 1845 (personal property),—Vol. IX, p. 836; Oct. 1, 1855,—Vol. XI, p. 644.

Spain.—Oct. 27, 1795; Feb. 22, 1819,—Vol. VII, pp. 144, 262.

Nicaragua.—June 21, 1867,—Vol. XV, p. 554.

Columbia.—Oct. 3, 1824,—Vol. VIII, p. 310.

Guatemala.—March 3, 1849,—Vol. X, p. 878.

Central America.—Dec. 25, 1825,—Vol. VII, p. 326.

Hawaiian Government.—Dec. 20, 1849,—Vol. IX, p. 979.

Brazil.—Dec. 12, 1828,—Vol. VIII, p. 39.

Chili.—July 4, 1831,—Vol. IX, p. 436.

New Granada.—Dec. 12, 1846,—Vol. IX, p. 886; May 4, 1850,—Vol. X, p. 904.

Mexico.—July 10, 1868.

Russia.—Dec. 6, 18, 1832,—Vol. IX, p. 450.

Costa Rica.—July 10, 1851,—Vol. X, p. 918 (personal property).

Venezuela.—Jan 20, 1836,—Vol. IX, p. 472; Aug. 27, 1860,—Vol. XII, p. 1146.

San Salvador.—Jan. 2, 1850,—Vol. X, p. 893.

Peru-Bolivia.—Nov. 13, 1836,—Vol. VIII, p. 489; Bolivia, May 13, 1858.

Peru.—July 26, 1851,—Vol. X, p. 933.

Sardinia.—Nov. 26, 1838,—Vol. VIII, p. 520.

Argentine Confederation.—July 27, 1853,—Vol. X, p. 1009.

Ecuador.—June 13, 1839,—Vol. VIII, p. 538.

Switzerland.—May 18, 1847,—Vol. IX, p. 903; Nov. 25, 1850,—Vol. XI, p. 590.

Act of July 27, 1868, *relative to Expatriation.*—By act of this date, all naturalized citizens of the United States, while in foreign states, are to receive the same protection of person and property as if native-born citizens. This act also recognizes the right of foreign-born citizens to throw off their foreign allegiance.

U. S. Stat. 1867-8, p. 223. See also Act of July 17, 1862, *infra.*

Colonial Acts relative to Citizenship.—The Colonial Act of July 5, 1715.—An act of the colonial government of this province was passed on this date declaring that all persons of foreign birth, theretofore inhabiting within the colony, and dying seized of

any lands, &c., should be deemed to have been naturalized. The act also provided that protestants inhabiting the colony should, on taking the oath of allegiance, be deemed subjects; and makes provision for naturalizing others by act of assembly. Other provisions are made as to foreign denizens prior to 1683, and since.

1 Van Schaick, 9; 1 Smith & L. p. 112. See also p. 4, *ante*, as to other colonial laws, and particularly Act of Jan. 27, 1770, correcting defects in purchases made theretofore before naturalization.

Original Powers of the States.—Before the adoption of the present Constitution of the United States, the power of naturalization resided in the several States; and naturalization was provided for by the respective State constitutions or laws. In default of which the common law rules prevailed.

Vide ante ch. i, pp. 4, 6, as to citizenship in this State after the revolution, and *ante* p. 50.

United States Laws as to Admissions of Aliens as Citizens.—Various acts have been passed by the general government enabling aliens to become citizens of the United States, a digest whereof is here given.

Since the adoption of the Constitution of the United States, it is considered that no State can by any subsequent law, make foreigners or any other description of person citizens of the United States, nor entitle them to the rights and privileges secured to them by that instrument.

It would be lawful, however, for a State, by its laws, passed since the adoption of the constitution, to put a foreigner, or any other description of persons, upon a footing with its own citizens, as to all the rights and privileges enjoyed by them within its dominion, and by its laws. But that would not make him a citizen of the United States, nor entitle him to any of the privileges and immunities of citizens within the other States.

The right of naturalization, therefore, since the establishment of the federal government, is exclusively in congress.

Chirac v. Chirac, 2 Wheat. 259; Scott v. Sandford, 19 How. U. S. 393; Lynch v. Clarke, 1 Sand. ch. 583.

Act of April 4, 1802, 2 *Stat.* 153.—By this act, an alien, being free and white, may be admitted to become a citizen on certain prescribed conditions, for the details of which reference must be made to the statute. He is to declare on oath or affirmation, before certain State, federal or territorial courts, his intention to become a citizen, and to renounce all foreign allegiance. This declaration has to be made three years (now two years) before his admission. On his application, he is to swear to support the United States constitution, and renounce foreign allegiance.

Before admission, the court is to be satisfied, by oath other than the applicant's that he has resided at least five years in the United States, and one year within the State or territory where application is made; that he is a person of good moral character, and attached to the constitution. He is also to renounce titles of nobility. No alien of a country at war with the United States is to be admitted.

Aliens Residing in the United States before 29 *January*, 1795.—Such aliens, by said act, may be admitted citizens, on proof of two years residence in the United States, and one year in the State. Also, aliens having a two years' residence between 29th January, 1795, and 18th June, 1798, may be admitted within two years after passage of the act.

The Courts.—Every State court of record having common law jurisdiction, and a seal, clerk, or protho notary, is to be a district court within the act.—*Ib.*

Vide amendment of 1824, *infra*, allowing the declaration to be made before clerks of courts.

Children of Naturalized Citizens, and of Citizens.—(Law of 1802).—By the 4th section of this act of 1802,

children of naturalized citizens, or of those who, previous to the federal laws on the subject, had been admitted citizens of any State, being under twenty-one at the time of the parent's naturalization, or admission, shall, if dwelling in the United States, be considered citizens thereof.

Children born abroad, Act of 1802.—By the same act of 1802, children of persons who *now are or have been* citizen of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered citizens, provided the right of citizenship shall not descend to persons whose fathers have never resided within the United States. Exclusion is also made of British soldiers or proscribed persons during the late war without consent of the respective legislatures. This provision has been considered not prospective.

In Ludlam v. Ludlam, 31 Barb. 486; affirmed, 26 N. Y. 356, the doctrine was maintained that the status of all children born abroad of American parents temporarily absent after 1802, and who were not within the terms of the act of 1855, *infra* (*i. e.*, all children of citizens born abroad between 1802 and 1855) is to be determined according to the principles of the common law, which makes the children of a subject travelling abroad, although such children are born abroad, citizens.

These cases hold also that the child of an American citizen temporarily absent, though the child be born abroad of an alien mother, is by the common law an American citizen.

See, also, Lynch v. Clark, 1 Sandf. Ch. 659, holding that the children of American citizens, born abroad, though not within the provisions of the act of 1802, are citizens under the rules of the common law. West v. West, 8 Paige, 433.

If the father alone is naturalized it is supposed sufficient for the law. See Peek v. Young, 26 Wend. 613, as to an infant child born abroad of a citizen and remaining an infant till after 1783 (peace with Great Britain), and not coming to this country until 1830, held a citizen, affirming, 21 Wend. 389.

Under this act infant children of aliens, though born abroad, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization. West v. West, 8 Paige, 433.

Earlier Acts before 1802, *now Repealed.*—Prior to the above act of 1802, viz., March 26, 1790, January 29, 1795, and June 18, 1798,—laws similar to that of 1802 had been passed, making the probationary term of resi-

dence two, five and fourteen years respectively. All prior acts, however, were repealed by the act of 1802, § 4.

Indians.—The statutes of naturalization have been construed not to apply to Indians. 7 Op. Atty.-Gen. 746; *vide infra*, constitutional amendments, 14 and 15.

Jurisdiction of State Courts.—The process of naturalization is a judicial act which congress cannot authoritatively confer on a State court; but it may be exercised by the State courts if not prohibited by the exclusive jurisdiction of the courts of the United States, and congress may give the State courts jurisdiction in the matter, as their delegated agents, to exercise the power.

State v. Penney, 5 Eng. 621; Morgan v. Dudley, 18 B. Monroe, 693; Ramsden's case, 13 How. P. R. 429; Rump v. Commonwealth, 6 Casey, 475.

Action of State Courts.—It has been held in this State that the powers conferred upon the courts in admitting aliens to the right of citizenship are judicial, and not ministerial or clerical, and consequently cannot be delegated to the clerks, but must be exercised by the court itself. An examination must be made in each case sufficient to satisfy the court of the requisite facts.

In re Clark, 18 Barb. 444.

State interference.—It has been held that a State law restricting its courts and their clerks from entertaining jurisdiction for the naturalization of aliens, under the acts of Congress, is not contrary to the constitution of the United States. Stephen's case, 4 Gray, 559.

Residents between 1798 *and* 1802—*Act of March* 26, 1804, 2 *Stat.* 292.—By this act any free white person residing in the United States between June 18, 1798, and April 14, 1802, and who has continued his residence, may be admitted without making the first declaration as above.

Widows and Children of Aliens.—Widows and children of an alien who has made the declaration and application, as per act of 1802, and who shall die before

naturalization, are to be deemed citizens on taking the prescribed oaths. *Same act.*

Five Years' Residence required.—Act of March 3, 1813, 2 *Stat.* 811.—No one who arrives in the United States after the act takes effect shall be naturalized who shall not have resided within the United States five years continuously [without being at any time thereof out of the territory of the United States]. The clause within brackets was repealed by law of June 26, 1848, 9 Stat. 240. Even now there has to be a continuous *legal* residence.

In re Hawley, 1 Daly, 531.

The repealed clause while in force was strictly construed, and a few minutes stoppage in Canada was held to disqualify.

In re Paul, 7 Hill, 56.

Penal Provisions.—This act also makes penal provisions against persons forging or counterfeiting evidence or certificates of citizenship.

Held repealed by act of 1870, *infra*, U. S. v. Tynen, 11 Wall. 88.

An Act of July 30, 1813, relates to aliens who were enemies during the war of 1812, providing that persons resident in the United States on June 18, 1812, who before that had made the declaration, or who on that day were entitled to become citizens, without making such declaration, may be admitted citizens notwithstanding they were alien enemies; provided that any alien enemy may be apprehended and removed previous to such naturalization.

Residents between 1798 *and* 1802—*Act of March* 22, 1816, 3 *Stat.* 259.—Free white persons residing within the United States between June 18, 1798, and April 14, 1802; and who have continued such residence, without having made the declaration, may be made citizens

under the act of March 26, 1804, on proof of the above residence. A previous residence of five years is to be proved by the oath, &c., of citizens.

Minors—Act of May 26, 1824, 4 *Stat.* 69.—Minors (free whites) who shall have resided in the United States three years next before they are twenty-one years of age, and shall reside there until their application, after a residence of five years, including the three years of minority, may, without having made the previous declaration, be admitted by taking the oath of allegiance, &c., as in other cases.

They shall prove, also, that three years preceding the application it was their *bona fide* intention to become citizens.

Amendment of Law of 1802.—This act of 1824 also provided that the declaration might be made before the clerks of courts; and that the declaration, per act of 1802, might be made *two* years, instead of *three*, before admission.

Residents between 1802 *and* 1812—*Law of May* 24, 1828, 4 *Stat.* 310.—By this law, free white aliens residing within the United States, between Ap. 14, 1802, and June 18, 1812, and who have continued such residence, may be admitted without previous declaration. A residence of at least five years before the application must be proved.

Children of Citizens Born Abroad—Act of Feb. 10, 1855, *vol. X, p.* 604.—By this act, persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were, or shall be at the time of their birth, citizens of the United States, shall be deemed citizens; but the rights of citizenship shall not be deemed to descend to persons whose fathers never resided in the United States.

Wife of Alien.—A woman who might be naturalized under existing laws, who is married or shall be married to a citizen, shall be deemed a citizen.—*Same act.*

Under this act, it has been held that an alien widow of a naturalized citizen, although she never resided within the United States, during the life-

time of her husband, is entitled to dower in his real estate. Burton v. Burton, 1 Keyes, 359; reversing, 26 How. P. 474.

This act has been held to confer the privilege of citizenship to free white women only, married to citizens of the United States. The terms "married," or "to be married," in the act, do not refer to the time when the ceremony of marriage is celebrated, but to a state of marriage; and the citizenship of the husband when it occurs, confers citizenship upon her, without the necessity of any application on her part. Kelly v. Owen, 7 Wall. 496.

Discharged Alien Soldiers—Act of July 17, 1862, 12 *Stat.* 597.—By this act, any alien of the age of twenty-one, who has enlisted or shall enlist in the regular or volunteer forces of the United States, and has been or shall be honorably discharged, may be admitted a citizen upon his petition, and shall not be required to prove more than one year's residence in the United States previous to his application.

Expatriation.—This act also declares the right of expatriation to be a natural and inherent right of all people, and abrogates all past judicial or legislative action inconsistent therewith. The act of July 27, 1868, 15 Stat. 223, reasserts the right, and provides for the protection of naturalized citizens in foreign States.

Declaration of Citizenship as to Negroes—Act of Ap. 9, 1866, 14 *Stat.* 27.—By this act, all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, leave, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens; and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordi-

nance, regulation or custom to the contrary notwithstanding.

The other sections of the act impose penalties for depriving any citizen of his civil rights, by reason of his color or race; and give jurisdiction of to U. S. District Courts over the same. Provision is also made for carrying out the purposes of the act, through the courts and federal officers; and the President may employ the land and naval regular or militia forces to carry out the act. Final appeal in questions arising under the act is given to the Supreme Court of the United States.

This act has been held constitutional, and as naturalizing all persons of color within the United States. U. S. v. Rhodes, 16 Am. L. R. 233; *ex parte* Turner, 6 Int. R. Rec. 147; People v. Washington, 3 Am. L. Rev. 574.

So far as the act prescribes rules of evidence for the State courts, however, it has been held unconstitutional. State v. Rash, 15 Pitts. L. J. 61; Carpenter v. Snelling, 97 Mass. 458; Craig v. Dimock, 9 Int. R. Rec. 129; Quinn v. Lloyd, 2 Balt. L. Tr. 760.

Declaration of Citizenship—Fourteenth Constitutional Amendment.—§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Other sections of the amendment provide the apportionment of representatives; and impose certain civic disabilities upon persons who have been engaged in the rebellion, giving congress the power, however, by a two-third vote of each House, to remove disability. Power is given to Congress to legislate to carry out the purposes of the act.

Declared ratified, July 28, 1868, 15 U. S. 711.

Right to Vote—Fifteenth Constitutional Amendment.—The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude. The congress shall have power to enforce this article by appropriate legislation.

Ratified by the States and so proclaimed, March 30, 1870.

To carry out the provisions of the above two amendments, an act was passed May 31, 1870, 16 U. S. S. p. 140. This act also reenacts the Civil Rights Bill of Ap. 9, 1866.

Right of Expatriation, Act of July 27, 1868.—By act of this date the right of expatriation is declared a natural and inherent right of all people. The act further declares that all prior orders, opinions and decisions of government officers contrary to such view is inconsistent with the fundamental principles of the government.

Protection is to be extended to naturalized citizens in foreign States.

Vide also *ante* pp. 50, 51, 62.

Penalties for Perjury and Fraud.—By act of July 14, 1870, ch. 254, various penalties are prescribed for perjuries and fraud in connection with naturalization.

This act held to repeal the provisions of the act of 1813 on the subject. U. S. v. Tynen, 11 Wall. 88.

Negroes and Africans.—By law of July 14, 1870, ch. 254, the naturalization laws are extended to aliens of African nativity, and to persons of African descent. Free negroes born within the allegiance of the United States have always been regarded as citizens, U. S. v. Rhodes, 1 Abb. U. S. 28, and are so emancipated slaves, *ib.*, Matter of Turner, 1 Abb. N. S. 84. In the Dred Scott case (19 How. U. S. 393) it was held that a negro whose ancestors were brought here as slaves is not a citizen.

Retroactive effect of Naturalization.—Naturalization before "office found," it has been held, has a retroactive effect so as to confirm a former title. No title in cases of alienism vests in the people until after office found.

Osterman v. Baldwin, 6 Wall. 116; Jackson v. Beach, 1 Johns. Ca. 399.

Not so, however, as to other titles, so as to vest title to lands, which by reason of alienage a person could not inherit.

Jackson v. Green, 7 Wend. 333; Heeney v. The Trustees, &c. 33 Barb. 360; affirmed, 39 N. Y. 333.

The naturalization of a married woman would not have a retroactive effect so as to entitle her to dower in lands of which her husband was seized during coverture, and which he had aliened previous to her naturalization. Priest v. Cummings, 20 Wend. 338.

Record of Naturalization, Effect of.—The record of a competent court, reciting the necessary facts, is deemed conclusive, without any evidence thereof being set up, and it cannot be impeached by proof contradicting those recitals. In collateral proceedings it is conclusive. McCarthy v. Marsh, 1 Seld. 263; Ritchie v. Putnam, 13 Wend. 524.

Traitors.—Mere traitors, so called, do not, *ipso facto*, lose their citizenship.

11 Op. Atty. Gen. 317.

Forfeiture of Citizenship by Deserters.—The act of March 3, 1865, provided for forfeiture of citizenship in case of desertion from the military or naval service of the United States. This act held constitutional, but there must be legal evidence of conviction before a court-martial.

Gotchens v. Matheson, 40 How. Pr. 97.

Political Disabilities.—By act of May 22, 1872, all political disabilities imposed by the 3d section, 14th article of amendments to the constitution, are removed from all persons except senators and representatives of the 36th and 37th congress, officers in the judicial, military and naval service of the United States, heads of departments and foreign ministers of the United States.

Title II. Indians.

The aborigines of this country, commonly called "Indians," are considered to have a right to enjoy the land which they occupy, until that right becomes extinguished by a voluntary cession to the government; but they are excluded from the right of treating with any other power. The United States government, as against foreign countries, claims the exclusive right to extinguish the Indian title, by purchase or conquest from the aborigines, asserting a right of pre-emption

with respect to them, and the sovereignty with respect to all other nations.

Cherokee Nation v. State of Georgia, 5 Pet. 1; Worcester v. State of Georgia, 6 Pet. 515; Kent, Vol. III, p. 384; 8 Opinions Att. Gen. 255; Goodell v. Jackson, 20 Johns. 693; Mitchell v. United States, 9 Pet. 711.

They have not been considered as citizens, however, but as dependent tribes or political societies under domestic subjection, entitled to be governed by their own usages and rulers, but placed under the tutelary protection of the United States, and subject to government coercion so far as the public safety requires. They are also recognised to have a *quasi* national status; and their existence, rights, and competence as distinct political bodies are recognised through various treaties made with them, both by the colonial, federal and State governments.

Goodell v. Jackson, 20 Johns. 693; overruling 15 *Ib.* 264; Cherokee Nation v. State of Georgia, 5 Pet. 1; Worcester v. State of Georgia, 6 Pet. 515.

The general statutes of naturalization have been held not to apply to them. Nor do they become citizens of the United States, through being declared electors by any one State.

Under the United States statute of Apr. 9, 1866, *ante*, *p.* 62, and the above constitutional amendment (amend. XIV, *ante*, *p.* 63). Indians would now seem to be classed as citizens of the United States, and of the State where they reside.

For an instance of a law authorizing a treaty with the Indians in this State, *vide* Laws of 1813, 36th sess. ch. 130.

In this State the Indians are considered to hold their lands as *quasi* owners or occupants, except that they cannot sell without the assent of the State. Charters or patents, therefore, issued, bearing on the title to lands occupied by Indians, before their right is extinguished, only give the preemptive or ultimate fee. Such preemptive proprietors, previous to their acquiring the Indian title to the land, have merely an exclusive right to purchase from the Indians their lands, but not a right

to interfere with or control the use and enjoyment of them, while the title remains with the Indians.

Ogden v. Lee, 6 Hill, 546; affirmed, 5 Denio, 628; Wadsworth v. Buffalo Hydraulic Ass'n, 15 Barb. 83; The People v. Snyder, 51 Barb. 589; affirmed, 41 N.Y. 397; Blacksmith v. Fellows, 7 N. Y. 401; 19 How. U. S. 366.

Subject to this right of possession or usufruct, the ultimate fee of land in the State became, on discovery and conquest, as stated in the first chapter of this treatise, vested in the crown or its successors; and the crown or the subsequent State government could confer it, subject to the Indian possession. A purchaser from Indians therefore could acquire only the Indian title. They could not convey a complete title nor one paramount to the crown or State.

Vide Mitchell v. United States, 9 Pet. 711; Johnson v. McIntosh, 8 Wheat. 543. The State, it is held, can appropriate to public use the lands of Indians only upon making compensation therefor. Wadsworth v. Buffalo, &c. 15 Barb. 83.

Sales by Indians in this State.—As early as 1763, the king, by proclamation, prohibited purchases of Indian lands, unless at a public assembly of the Indians, and in the name of the crown, and under the superintendence of the colonial authorities.

By the constitutions, and by various early enactments in this State, no purchase of or contract with Indians, for the sale of land therein, made since October 14, 1775, or which might be made thereafter, was held valid, unless by consent of the legislature; and a conveyance without such consent is treated as void. Parties were to be punished for infringement of the provisions enacted; and intruders are to be removed.

Constitutions of 1777 and 1822; Act of March 17, 1788, 2 Green, 194, 195; Law of 1793, 3 Green, 72; 1 Rev. Law. of 1801, p. 464; 1 R. L. of 1802; 2 R. L. of 1813, p. 153;—which last contains a summary of all laws then in force with reference to Indians in the State, and the rights and titles of the various tribes;—Law of 1821, ch. 204, p. 183; 3 R. Stat. of 1830, 5 edit. p. 5. Exception was made as to sales in favor of Indian patentees of land granted for military service. They might take by descent, and, after March 7, 1809, convey to citizens, with the approval of the State surveyor. 2 R. L. 175; 3 R. S. p. 3. See, also, Laws, 1825, ch. 257.

By the above law of 1813, Indians residing in the State were prohibited

from making contracts with respect to lands in the State, and forbidden in any way, to give, sell, devise, or otherwise dispose of any such lands, or any interest therein, without the authority and consent of the legislature, except as provided in the act. Re-enacted, 3 Rev. Stat. of 1830, p. 3.

Vide Goddell v. Jackson, 20 Johns. 693; St. Regis, Ind. v. Drum, 19 Johns. 127.

Law of 1843.—By law of 1843, ch. 87, any native Indian was authorized to purchase, take, hold and convey lands in this State, in the same manner as if a citizen; and whenever he became a freeholder to the value of one hundred dollars, he is to be liable on contracts, and subject to taxation and to the civil jurisdiction of courts of law and equity in the State, as if a citizen.

This is in conflict with the constitutional provisions, *supra*, and also the constitution of 1846.

Constitution of 1846, *Art.* 1, § 16.—This provides also that no purchase or contract for the sale of lands in this State, made since the 14th day of October, 1775, or which may thereafter be made, of or with the Indians, shall be valid, unless made under the authority and with the consent of the legislature.

Partition of Indian lands. Law of 1849, *ch.* 420.—By law of this date nations or bands of Indians owing and occupying Indian reservations in the State, and holding lands as common property, may, by acts of their respective goverments, partition the same, so that they may hold the same in severalty in fee simple, according to the laws of the State. But no lands occupied and improved by any Indian, according to the laws and usages of the nation, shall be set off to any person other than the occupant, or his or her family. Deeds are to be executed by agents to be appointed by the respective governments, as approved by the commissioners of the land office. Before the deeds are executed, the proceedings are to be proved to his satisfaction before the county judge where the lands lie, and recorded in the county clerk's office. Deeds are to be acknowledged before such county judge, who is to see that they are in due form and under the authority as above. He is to

indorse on the deed his certificate, which shall authorize the county clerk to record it.

The lands thus distributed and partitioned shall be inalienable by the grantees thereof, or their heirs, for twenty years after the day of the recording of the deed thereof, but they may be partitioned among the heirs of the grantee thereof who may die. They shall not be subject to any lien or incumbrance by way of mortgage, judgment, or otherwise.

Laws of 1849, ch. 420. This act of 1849 made also other provisions as to marriages of Indians.

Construction of above Laws.—The above restrictions against sales by "Indians" have been held to apply to one Indian.

Goddell v. Jackson, 20 Johns. 693.

Sales and conveyances against the above provisions are held void, no matter how the Indian acquired title.

Jackson v. Wood, 7 Johns. 290; Lee v. Glover, 8 Cow. 189.

Removal from the State after void Sale.—It is supposed that if Indians lease or sell lands without authority, and then remove from the State, their removal will be held an abandonment, and their title will vest in the United States, or the State, as the case may be; or their grantees by operation of law.

Vide 3 Opin. Att. Gen. 230.

Proceedings to Remove Intruders from Indian Lands.—*Vide* The People v. Tracy, 1 Den. 617; The People v. Soper, 3 Seld. 428; The People v. Dibble, 16 N. Y. 203—affirmed, 21 How. U. S. 366. Persons occupying Indian lands without legal authority may be removed as intruders under the law of 1821, *supra.*

Vide, also, Strong v. Waterman, 11 Paige, 607.

Patent to an Indian and his Heirs.—Under a patent to an Indian and his heirs, they would take whether aliens or not.

Goddell v. Jackson, 20 Johns. 693.

Entry without Legal Title.—Any entry by a person not an Indian, upon land included within the bounds of an Indian reservation, which is in the general occupation of a band of Indians, is an intrusion subjecting the offender to summary removal under ch. 204 of 1821, notwithstanding the intruder entered peaceably, with the assent of the Indian to whose possession he succeeded. Such an intruder, before the Indian title has been extinguished, and they have removed or been removed by act of the government, can acquire no such right as would extend to him the constitutional right of trial by jury.

See The People v. Dibble, 16 N. Y. 203; affirmed, 21 How. U. S. 366.
An act of March 9, 1821, relative to certain powers of district attorneys in the premises, was repealed by the general repealing act of 1828.

Tonawanda Band of Senecas.—*Vide* acts collected, 2 R. S. pp. 360, 371; also act of Apr. 7, 1863, ch. 90, repealing act of Apr. 17, 1861.

Vide, also, Laws of 1867, ch. 839; 1860, ch. 491;

Allegany and Cattaraugus Reservations.—Act 1847, ch. 365, and of Apr. 15, 1859, giving the peace makers jurisdiction to grant divorces, and to determine differences between Indians involving the title to real estate on said reservations. As to marriages among them, *vide* 3 R. S. 231; *Id.* 238.

As to taxes and sales of lands for, Laws of 1864, ch. 81.

The Seneca Indians.—See act of May 8, 1845, ch. 150, as to the protection and improvement of the Seneca Indians residing on the Cattaraugus and Allegany reservations. As to the title of the Seneca Indians to the Cattaraugus reservation, *vide* Ogden v. Lee, 6 Hill, 546; affirmed, 5 Den. 628.

As to their constitution, Laws of 1865, ch. 124; 1848, ch. 208; 1849, ch. 378. Taxes—Laws of 1857, ch. 45.

Oneida Indians.—As to these Indians, in Madison and Monroe counties, *vide* Laws of 1843, ch. 185; 1847, ch. 486; and statutes collected in 3 Rev. S. 5th edit. pp. 3, 4, based on 2 Rev. Laws of 1813, p. 153.

See, also, Laws of 1839, ch. 58.

Jurisdiction over Indians in this State.—By law of 1822, p. 202, incorporated in the Revised Statutes of 1830, the courts of this State are to possess the sole and exclusive jurisdiction of punishing Indians, as well as others, for offenses committed within the State boundaries, except what are exclusively cognizable by United States tribunals.

Onondaga Indians.—Contracts with, as to timber, bark, &c. on their lands, highways, &c.

Law of 1855, ch. 26; 1857, ch. 659; Law of 1845, ch. 309; 1857, ch. 659.

Tonawanda Reservation.—Law of Ap. 16, 1860, ch. 439; Ap. 7, 1863, ch. 90. Provisions were also passed with reference to lands, taxes, disputes, &c., among the Indians generally, by the Law of Ap. 10, 1813, ch. 29, above referred to, particularly with reference to the Brothertown, Stockbridge, Oneidas, Onondagas and Cayugas. Section 11 being repealed by Law of 1821, ch. 204; §§ 27, 29 amended by Laws, 1841, ch. 234; and 1847, ch. 486; § 44 repealed by Laws of 1841, ch. 234; and § 47 by Laws of 1839, ch. 40. *Vide*, also, Shinecocks, Law of 1816, ch. 133; Stockbridge, Law of 1817, ch. 152; 1823, ch. 40; 1824, ch. 177; Onondagas, 1822, ch. 205; St. Regis, Laws of 1841, ch. 143; 1859, ch. 364; Oneidas, St. Regis and Caughnawaga, Laws of 1841, ch. 234; Brothertown, *Ib.*; Cayugas, 1851, ch. 198; Tuscaroras, Laws of 1854, ch. 175.

Railroads over Indian Lands.—Laws of 1836, ch. 316.

TITLE III. MARRIED WOMEN.

By the common law a married woman could not make a valid contract relative to real property, nor could she convey her lands by deed, either with or without the concurrence of her husband.

By the common law, the only mode in which a married woman could alienate her lands was by fine and recovery.

Shepherd's Touchstone, article Fine; 4 Cruise's Digest, tit. 32, Deed, ch. 11, § 29; 1 Blk. Com. 444; 2 Kent's Comm. 150; Jackson v. Gilchrist, 15 Johns. 109; Fire Ins. Co. v. Bay, 4 Com. 4 N. Y. 9; Constantine v. Van Winkle, 6 Hill, 177.

It will be seen *infra* that this rule was modified in the colony of New York.

A married woman and her husband also constituted but one person in law; and where land was conveyed or devised to them *together* they did not take by moieties.

Both were seized of the entirety, and not as joint tenants, or tenants in common; and the survivor took the whole; and the deed of one without the other (if living) was inoperative.

Vide Jackson v. Stevens, 16 Johns. 510; Jackson v. Suffern, 19 Wend. 175; Barber v. Harris, 15 Wend. 615; Torrey v. Torrey, 4 Kern. 14 N. Y. 430; Doe v. Howland, 8 Cow. 277.

This is the law as to joint ownership of husband and wife, even since the acts of 1848, 1849 and 1860, *post.*

Goelet v. Gori, 31 Barb. 314.

Alien Husband.—An alien husband would take by survivorship lands conveyed jointly to him and wife, subject to being dispossessed by the people. Wright v. Saddler, 20 N. Y. 320.

Conversion into Money.—When an estate so held as above by husband and wife is converted into money, the same belongs to the husband exclusively, in virtue of his marital rights. The Farmers', &c. v. Gregory, 19 Barb. 155.

Habendum Clause.—So even if the habendum clause was express that they should hold as joint tenants, the above common law rule would still prevail. Dias v. Glover, 1 Hoffm. Ch. 76, and cases cited.

Husband's Right in the Joint Tenancy.—Where husband and wife hold the entirety, with right of survivorship, neither he nor she could alien the entire estate; but the husband could execute a mortgage of his interest, or he might make a lease in his own name, for the purpose of bringing ejectment. Jackson v. McConnell, 19 Wend. 175.

Under the common law also he might even alien or incumber the estate, subject to the right of entry of his wife and her heirs after his death, discharged from his debts and engagements, he having the control of the estate during his life; and if it were a term for years, the husband might alien the entire term or estate. 2 Kent Com. 132; Grote v. Locroft, Cro. Eliz. 187; Jackson v. McConnell, 19 Wend. 175; Barber v. Harris, 15 *Id.* 615; Dias v. Glover, 1 Hoff. Ch. R. 71; Goelet v. Gori, 31 Barb. 314.

If a grant were made to a husband and wife and a third person, the husband and wife have only one moiety, and the third person the other. Barber v. Harris, 15 Wend. 610.

Husband's Life Estate in Wife's Lands.—By the principles of the common law also, if the wife, at the time of or during marriage, were seized of an estate of inheritance in land, the husband, upon the marriage, became seized of the freehold *jure uxoris*, and he took the rents and profits during their joint lives. After her decease, if entitled to it, he had his estate by the curtesy therein. If she survived him, she took the estate in her own right. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate.

2 Kent, 130, 133; 2 Blacks. 126; Vartie v. Underwood, 18 Barb. 561.

This right of the husband applied also to an estate held by the wife for her life, or for that of another person. Also to her chattels real, such as leases for years, unless the wife held them by way of settlement. If he made no disposition of the same in his lifetime he could not devise the chattels real by will; and the wife, after his death, took the same in her own right, without being executrix or administratrix to her husband.

If he survived the wife, the law gave him her chattels real by survivorship.

Marriage Settlements.—In order to give control to married women over their lands, it was usual to give them powers of appointment to make dispositions in the nature of a will, and to provide for them by marriage settlements through trusts. These settlements, if made *bona fide*, and in consideration of the marriage, would be sustained even as against creditors and purchasers; and even a post-nuptial voluntary settlement, upon the wife or children, if made without fraudulent intent, would generally be valid as against subsequent, but not existing, creditors.

Vide Reade v. Livingston, 3 Johns. Ch. 481; Sexton v. Wheaton, 8 Wheat. 229.

And if the wife parts, *bona fide*, with a full consideration, or if the settler is in prosperous circumstances, and the settlement is a reasonable provision, according to his state in life, post-nuptial settlements have been held good as to existing creditors; and even a deed between husband and wife has been sustained in equity under such circumstances.

Simmons v. McElwain, 26 Barb. 420; Babcock v. Eckler, 24 N. Y. 623; Dygert v. Remnscheider, 32 N. Y. 629; Seward v. Jackson, 8 Cow. 422; Parish v. Murphy, 13 How. U. S. 92; but see Case v. Phelps, 39 N. Y. 164; Savage v. Murphy, 35 N. Y. 508.

Vide subjects DOWER, WILLS, TRUSTS, FRAUDULENT CONVEYANCES, &c., in subsequent chapters.

Secret settlements made before marriage in derogation of the husband's marital rights, *e. g.*, curtesy, would be under certain circumstances held void as to him.

Settlements between the husband and a third person as trustee, though originating out of and relating to a

separation of husband and wife, are upheld, although such agreements are invalid between husband and wife directly.

Champlain v. Champlain, 1 Hoff. Ch. 55; Shelthar v. Gregory, 2 Wend. 422; Wilson v. Wilson, 31 Eng. L. & Eq. 29; Rogers v. Rogers, 4 Paige, 516; Mercein v. The People, 25 Wend. 77; Hamilton v. Hector, 18 Eq. Ca. E. L. R. p. 511.

Deeds between Husband and Wife.—A deed between husband and wife was void by the common law and passed no title, and transfers between them had to be made through a third person. A deed or contract between them under certain circumstances, however, might be sustained in equity.

Jackson v. Stevens, 16 Johns. 110; Livingstone v. Same, 2 Johns. Ch. 537; Graham v. Van Wyck, 14 Barb. 531; Voorhees v. Presbyterian Church, 17 Barb. 103; Simmons v. McElwain, 26 Barb. 419; Lynch v. Livingstone, 6 N. Y. 422; Barnum v. Farthing, 40 How. P. 25; White v. Wager, 32 Barb. 250; 25 N. Y. 259; Hunt v. Johnson, 44 N. Y. 127.

This is still the law, notwithstanding the subsequent statutes of 1848–9, 1860, below referred to; and the rule which forbids a husband to take lands directly by conveyance from his wife is considered still extant.

White v. Wager, 32 Barb. 250; affirmed, 25 N. Y. 328; The Farmers &c. v. Gregory, 49 Barb. 155; Savage v. O'Neil, 42 Barb. 374; Winans v. Peebles, 32 N. Y. 423, overruling, 31 Barb. 371.

Release of Dower.—The above rule has been held to apply even to a woman's dower right in her husband's real estate, which cannot be released directly to him, even under the acts of 1848–9, 1860. Graham v. Van Wyck, 14 Barb. 530.

Purchases and Gifts between them Upheld in Equity.—See Wickes v. Clarke, 3 Edw. Ch. 59; and Crosby v. Berger, *Ib.* 538, as to a purchase by the wife of the husband being upheld in equity, so as to support a post-nuptial settlement, or other agreement. Also Simmons v. McElwain, 26 Barb. 419; Jacques v. Trustees of Methodist Church, 17 Johns. 548, for instances of conveyances of such a nature being sustained and enforced in equity.

The cases hold that the relation of husband and wife, and his duty to provide for her an assured and comfortable support, are a meritorious consideration, which will uphold a gift by conveyance of real estate from him to her for such purposes, except as against creditors. *Vide* above cases, and Hunt v. Johnson, 44 N. Y. 27, reviewing the leading cases in England and this country on the subject.

Conveyances by Married Women.—The sole deed of a *feme covert* was not only inoperative at common law, but it was of no force in this State, *and could not pass title*

even if executed jointly with her husband, until it was duly "acknowledged" by her.

There seems to have been a modification of the "common law" in this colony and State, resulting from the laws and usages of the colony of New York; so that it was not necessary for the husband to join in a conveyance by a married woman residing within this State, of lands therein. Her "*acknowledgment*" separate and apart from her husband was alone necessary to pass title.

Albany Fireman's Ins. Co. v. Bay, 4 Barb. 407; affi'd, 4 Com. 9; Kelly v. McCarty, 3 Brad. 7; Curtiss v. Follet, 15 Wend. 337.

If the deed was not acknowledged by the married woman, as required by the statute, it was void at law, and no title passed.

Jackson v. Stevens, 16 Johns. 110; Martin v. Dwelly, 6 Wend. 9; Gillet v. Stanley, 1 Hill, 121; Ryers v. Wheeler, 25 Wend. 434.

And parol evidence of her acknowledgment could not be given. Without a proper certificate of acknowledgment, the deed could not take effect for any purpose.

Elwood v. Klock, 13 Barb. 50.

Prior to the act of 1771, however, below cited, the acknowledgment by the married woman was not necessary to pass the title. Except that in 1683 a colonial act was passed, which was re-enacted on May 6, 1691 (1 Brad. 2), which provided that no estate of a *feme covert* could be sold or conveyed but by deed acknowledged by her in some court of record, the woman being secretly examined as to her doing it freely, without threats or compulsion.

This act of 1691 was repealed by the king in 1697.

Van Winkle v. Constantine, 6 Hill, 177; 6 Seld. 422.

Subsequent Acknowledgments.—A subsequent acknowledgment by the wife would not revert back so as to make valid a deed not acknowledged by her, as against intervening titles. Jackson v. Stevens, 16 Johns. 110; Doe v. Howland, 8 Cow. 277. Her acknowledgment of the deed, however, would revert back so as to make it valid from the time of such acknowledgment. 8 Cow. 277, *supra.*

Act of 1771.—The following are the acts of 1771 and others, by which the acknowledgment of married women was rendered necessary to pass title.

By law of February 16, 1771 (2 Van S. 611), it is recited that it was the ancient practice of the colony to record deeds upon the acknowledgment by the grantors, or proof by subscribing witness before a member of the council, a judge of the supreme or county court, or a master in chancery, and sometimes before a justice of the peace; and also that certain deeds had been executed by married women not so acknowledged, &c. The act makes valid all deeds *theretofore made by married women where they had not been privately examined before such officers; but provides that, to make title thereafter*, there must be a private acknowledgment by her, apart from her husband, before one of the council, a judge of the supreme court, a master in chancery, or a judge of the inferior court of common pleas (other than mayor's courts) for that county where the lands lie. A certificate thereof, purporting that she had been privately examined, and confessed that she executed the conveyance freely, without any fear or compulsion of her husband, was required to be indorsed on the deed, and signed by the officer.

Act of 1773.—By law of March 8, 1773 (2 Van S. 765), all deeds executed by married women, out of the colony, since February 16, 1771, or thereafter to be so executed in conjunction with her husband, will be valid if acknowledged before any officer mentioned by said act of 1771, or the act of 1773, and the acknowledgment be written on the conveyance and signed by the officer. It shall specify that she was examined by him separate from her husband, and that she confessed that she executed such conveyance as her act and deed, freely, without any fear or compulsion of her husband. The act provided that the execution of the deed by the husband be proved, or acknowledged and certified, as required by said act of 1771 or 1773.

By Power of Attorney.—By said law of 1773, conveyances by married women out of the State since 1771, or thereafter, by a power of attorney, shall be valid if the power is acknowledged by her and her husband, as before directed, and be certified as above. Such deeds and powers may be read in evidence. See further as to acknowledgments by married women, ch. xxvi, *post*. *Vide*, also, ch. vii, DOWER.

Constitutionality of the above Act of 1771.—With respect to the constitutionality of the above act of 1771, and similar acts, it has been determined that a legislature has a constitutional power to declare deeds valid which are defective—*e. g.*, through the failure of an officer to affix his seal to the acknowledgment, or other formal defects—but has no right to pass a law making valid conveyances which were not sufficient to pass title when made, under then existing laws.

Maxey v. Wise, 25 Ind. 1; Alabama Ins. Co. v. Blykin, 38 Ala. 510; Journeay v. Gibson, 56 Penn. St. 57; Orton v. Noonan, 23 Wis. 102. It could, however, make valid previously executed powers of attorney by married women to convey their estates, and the conveyances which had been made by virtue of said powers. Deutzel v. Waddie, 30 Cal. 138.

The above act of 1771 has been held not to be one either vesting or divesting titles, but an act confirming

and quieting the title of *bona fide* purchasers. Before that act, there was no statute or charter in force here declaring the acknowledgment of the married woman to be necessary to pass title; but a loose and unsettled practice, as regards taking such acknowledgment, prevailed, as set forth in the recital to the above act of Feb., 1771. Consequently, it has been held by the courts of this State that deeds executed before its enactment, by husband and wife, were valid and operative as against those claiming under the wife, although not acknowledged by her in any form.

Jackson v. Gilchrist, 15 Johns. 89; Constantine v. Van Winkle, 6 Hill, 177; 6 Seld. 422; Hardenburgh v. Lakin, 47 N. Y. 109.

It has been held, however, that this act does not recognize or affirm the right of a *feme covert* to appoint or act by agent or attorney; therefore deeds executed by her through attorney before the subsequent act of 1773, *supra*, were void, a married woman having no power by the common law to appoint an attorney.

Hardenburgh v. Lakin, 47 N. Y. 109.

What possession necessary under Act of 1771.—A constructive possession was enough, under this law of 1771, to cure the title to lands held before 1771. Jackson v. Gilchrist, 15 Johns. 89.

Act of 1792 *as to Dower.*—By law of April 6, 1792 (2 Greenl. 452), it was provided that when married women, non-residents of the State, should join with their husbands in the conveyance on sale of lands, tenements, or hereditaments, they should be barred of dower therein.

See *post*, ch. vii. "DOWER."

Provisions in subsequent statutes as to the necessity of "acknowledgments" by married women to pass real estate. —By the provisions of the laws of February 26, 1788; April 6, 1801; and Revised Laws of 1813 (vol. I, p. 369); and by the Revised Statutes of 1830, vol. III, p. 56, it is also provided that no estate of any married woman residing in this State, shall pass by any conveyance not acknowledged by her on a private examination apart from her husband, as provided by those laws. Acknowledgments by married women not residing in the State, of lands

therein, may be taken as if she were sole, to deeds executed with her husband.

See particularly, as to the provisions of these laws, the form of acknowledgment; and as to conveyances by married women not residing in the State, post, ch. xxvi. And see "POWERS OF ATTORNEY," *post*, ch. xiii, as to powers of attorney executed by married women out of the State; and see as to "*Powers*" executed by married women, *post*, ch. xii.

Transfer of her Separate Estate—Although at common law a husband was required to join with his wife in executing a conveyance of her real estate, as to her separate estate, secured to her through trustees, she was treated in equity as a *feme sole*, and could dispose of it unless specially restrained by the instrument; and a mortgage executed by a woman upon her separate estate, even prior to the subsequent acts of 1848–9 and 1860, would be upheld in equity. Such disposition is in the nature of an appointment.

The Fire Ins. Co. v. Bay, 4 Barb. 407; 4 Com. 11; Jaques v. The Trustees, &c. 17 Johns. 548.

And it has been held by the courts that the wife may dispose of such estate without the acknowledgment or private examination, such disposition being held in the nature of an appointment.

Albany Fire Ins Co. v. Bay, 4 Com. 9.

Effect of the above recited Common Law Rules.—It is to be remarked that the rules of the common law, as above set forth, are in force, except so far as modified by subsequent statutes.

Modification of the Laws relative to Married Women, 1848, 1849, 1860, 1862.—*Act of April 7*, 1848, *ch.* 209.—§ 1. By law of this date, the real and personal property of any female who may *thereafter* marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts; and shall continue her sole and separate property, as if she were a single female.

§ 2. The real and personal property, and the rents, issues and profits thereof, of any female now married shall not be subject to the disposal of her husband, but

shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted.

§ 3. It shall be lawful for any married female to receive by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof; and the same shall not be subject to the disposal of her husband, nor be liable for his debts.

§ 4. All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place.

Law of April 11, 1849, *ch.* 375.—By law of this date, the 3d section of the above law of 1848 was amended so as to read:

"Any married female may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband, nor be liable for his debts."

This law of 1849 further provides, in its second section, as follows, as to her trust estate:

"Any person who may hold, or who may hereafter hold as trustee for any married woman, any real or personal estate, or other property, under any deed of conveyance or otherwise, on the written request of such married woman, accompanied by a certificate of a justice of the supreme court that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, may convey to such married woman, by deed or otherwise, all or any portion of such property, or

the rents, issues or profits thereof, for her sole and separate use and benefit."

§ 3. "All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place."

Act of July 18, 1853, *ch.* 576.—*As to Wife's Debts contracted before Marriage.*—This act provides that an action may be maintained against the husband and wife jointly for any debt of the wife contracted before marriage, but the execution in any judgment in such action shall issue against, and such judgment shall bind, the separate estate and property of the wife only, and not that of the husband.

The act further provides that any husband who may hereafter acquire the separate property of his wife, or any portion thereof, by any ante-nuptial contract or otherwise, shall be liable for the debts of his wife contracted before marriage, to the extent only of the property so acquired, as if the act had not been passed.

"*Act of March* 20, 1860, *ch.* 90.—By act of this date, § 1, the property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift or grant, that which she acquires by her trade, business, labor or services carried on or performed on her sole or separate account; that which a woman married in this State owns at the time of her marriage, and the rents, issues and proceeds of all such property shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her, in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children, by her as his agent."

The second section of this act of 1860 refers to her personal property and earnings in business.

The third section of this act, as amended by the act of April 10, 1862, ch. 172, *post*, is as follows:

"Any married woman possessed of real estate as her separate property may bargain, sell and convey such property, and enter into any contract in reference to the same, with the like effect, in all respects as if she were unmarried. [And she may in like manner enter into such covenant or covenants for title as are usual in conveyances of real estate, which covenants shall be obligatory to bind her separate property, in case the same or any of them be broken.]"

The words in brackets were added by the law of 1862, and a provision in the law of 1860 struck out that "no such conveyance or contract shall be valid without the assent in writing of her husband, except as hereinafter provided."

The fourth, fifth and sixth sections of the act of 1860 were repealed by said act of 1862. These sections made provision as to the obtaining the consent of the husband or conveying without him, under an order of the supreme court.

The seventh section of the act of 1860, as amended by the law of 1862, provides that married women may sue with respect to their separate property, as if sole, and for damages to person and character, and may execute bonds, &c., in such actions as if sole; the bonds to be enforced against their separate estate. The provision as to bonds was not in the law of 1860.

The eighth section of the law of 1860 was amended by that of 1862 so as to read, that no bargains or contracts made by any married woman in respect to her sole and separate property, or that which she might acquire by descent, devise, bequest, *purchase*, or the gift or *grant* of any person except her husband, and no bargain or contract with reference to her trade or business, under any State law, should render her husband liable.

The words "*purchase*" and "*grant*" were added by the law of 1862.

The ninth, tenth and eleventh sections of the act of 1860 were repealed by the act of 1862. They provided that the wife should be joint guardian with her husband of their children, and that at the decease of the husband or wife without minor child or children, the survivor should have a life estate in one-third of the other's real estate; and that on the decease of either, *intestate*, leaving a minor child or children, the survivor should take all the real estate of the other, and the rents, &c., during the minority of the youngest child, and one-third thereof for life.

See fully, as to "Guardians," *post*, ch. 25.

The statute of 1862 further provided, § 5, that in actions brought or defended by a married woman in her own name, the husband was not to be liable for costs or any recovery.

In actions brought by her for injuries to her person, character or property, judgment for costs might be enforced against her separate estate.

The sixth section of the act of 1862 provides that no man shall bind his child to service, &c., or part with the control of the child, or create any testamentary guardian therefor, without the consent in writing of the mother, if living.

Vide post, ch. 25, as to Guardians.

The seventh section provides that a married woman may be sued in any court of the State, and a judgment may be enforced against her separate estate, as if she were sole.

The act was to take effect on the 1st of July then next.

Judicial Interpretation of the above Laws of 1848-9, 1860-2.—With respect to the effect of these recent acts upon rights already existing, the courts of this State hold that vested rights in the property of the wife already acquired under the law regulating the marriage contract, cannot be disturbed by legislative authority; but that it is competent for the legislature to modify the

incidents of the marriage relation in respect to the property to be acquired after the change of the law.

With respect to property acquired after the acts took effect, the principle maintained is that the marriage contract does not imply that the husband shall have the same interest in the future acquisitions of the wife that the law gives him in the property she possessed at the time of marriage; but that she shall have whatever interest, if any, the legislature, before she is invested with them, may think proper to prescribe.

These laws have been held unconstitutional, therefore, and not to have a retroactive effect as to property acquired before the acts took effect; but not as to that acquired after, although the marriage occurred before.

Holmes v. Holmes, 4 Barb. 295; Blood v. Colvin, 17 *Id.* 157; Blood v. Humphrey, 17 *Id.* 600; Watson v. Bonney, 2 Sand. 405; Ryder v. Hulse, 24 N. Y. 372; Kelly v. McCarty, 3 Bradf. 7; Snyder v. Snyder, 3 Barb. 621; White v. White, 5 *Id.* 474, 485; Sleight v. Read, 18 *Id.* 159; Lawrence v. Miller, 2 Com. 245; Savage v. O'Neil, 42 Barb. 374; Vartie v. Underwood, 18 Barb. 561.

Curtesy.—The husband's curtesy is not destroyed, unless the wife have conveyed or devised the land, even as to lands acquired after the above acts.

Vide head Curtsey, *post*, ch. vii.

Right to Administer.—Nor is his right taken away to administer upon her estate, and take her personal estate left undisposed of, absolutely.

2 R. S. 1st edit. 74, 75.

Shumway v. Cooper, 16 Barb. 556; Ransom v. Nichols, 22 N. Y. 100; Ryder v. Hulse, 24 *Ib.* 372.

By Law of 1867, ch. 782, if she leave descendants, he has no other right of distribution than such as a widow has in the personal estate of her husband. Barnes v. Underwood, 47 N. Y. 351.

Covenants by Married Women.—By the common law, a wife was not answerable in damages on her covenant of warranty entered into during coverture.

By law of March 20, 1860, a married woman, as is above seen, owning real estate, may contract for and convey the same as if *sole*, and make the usual covenants in the deed, which shall bind her separate property. (As

amended by laws of 1862, ch. 172.) Previous to the amendment, the consent of the husband or a county court was necessary.

Before this act a *feme covert's* covenants did not even work an estoppel, so as to indirectly transfer title.

Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Jackson v. Vanderheyden, 17 Johns. 167; Martin v. Dwelly, 6 Wend. 11; Dominick v. Michael, 4 Sandf. 374.

She is now also personally liable for breach of covenant, out of her separate estate. Kalls v. Deleyer, 41 Barb. 208; Sigel v. Johns, 58 Barb. 620.

As to covenants to convey under a settlement made before 1848, *vide* Van Allen v. Humphrey, 15 Barb. 555.

Acknowledgments.—It is held that, under the above laws, a married woman's "acknowledgment" is now unnecessary to pass title to lands acquired since the statute of 1848.

Blood v. Humphrey, 17 Barb. 600; Yale v. Dederer, 18 N. Y. 271; Wiles v. Peck, 26 *Id.* 42.

And she may acknowledge the deed as if she were a *feme sole*. *Ib.*

Non-Residence.—A married woman, claiming the benefit of the above statutes of 1848–9, must show a residence in this State at a time and under circumstances to entitle her to such benefit.

Savage v. O'Neil, 42 Barb. 374.

Leasing Land and Trespass.—Under the above laws, a married woman may hire premises in her own name; and maintain an action in her own name for ejectment, or trespass thereon, without joining her husband.

Fox v. Duff, 1 Daly, 196; Darby v. Collaghan, 16 N. Y. 71.

As to Lands Held Conjointly by Husband and Wife.—As before observed, the above statutes of 1848–9 and 1860 do not affect the principles of the common law above referred to, with respect to lands that may be held conjointly by the husband and wife.

Those statutes, it is held, were not intended to enable married women to take and hold property jointly with their husbands, as if they were *sole*, but to take, hold and dispose of property as if they had no husbands.

See Goelet v. Gori, 31 Barb. 314.

All of the common law principles in this title, above referred to, are supposed to be still in force, except where specially abrogated or modified by the above statutory provisions.

Mechanics' Liens.—Liens under the mechanics' lien laws attach on the separate property of married women, as well as on that of men.

Hauptman v. Catlin, 20 N. Y. 247.

Actions against her Separate Estate.—In such an action her husband has no right to enter an appearance for her; and she is not bound by the acts of an attorney who appears for her without her authority or knowledge.

Lathrop v. Heacock, 4 Lansing, 1.

The remedy against a married woman in equity to charge her separate estate for her contracts is superseded by the statutory provisions for judgment against her personally. (Law of 1862, ch. 172, § 7.)

In the case of the Corn Ex. Ins. Co. v. Babcock (42 N. Y. 613), it is held that where a married woman, having separate real estate, expressly charges her individual property as surety for her husband's debt, she is rendered liable to an ordinary judgment for the amount; and the property to be charged need not be specified.

See, also, § 274 of the code as amended, and the law of 1862, *supra*.

Improvements to Wife's Estate.—A married woman is not chargeable at law for improvements made to her separate estate under the husband's contract therefor.

Nor is she or her estate chargeable in equity for such improvements made under the husband's contract, where no fraud in her induced the contract.

Ainsley v. Mead, 3 Lans. 116; overruling, 22 Barb. 371, Colvin v. Cruise.

Provisions of the Code, as to Actions.—By the code of procedure, § 114, when a married woman is a party, her husband must be joined with her, except that when the action concerns her separate property she may sue alone; when the action is between herself and her husband, she

may sue or be sued alone; and in no case need she prosecute or defend by a guardian or next friend.

Where husband and wife have joint interests, they must be united in the action. See the cases under the head of actions for or against husband and wife. (Voorhis' and also Wait's edition of Code.)

By the code, also, § 287, an execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her, from her separate property, and not otherwise.

For cases under this section, see as above.

Powers of Attorney.—It has been questioned whether, since the above acts of 1848–9, a power of attorney to convey her land, executed by a wife to her husband, is valid.

Hunt v. Johnson, 19 N. Y. 279.

Wills by Married Women.—Vide post, ch. xv.

Acknowledgments.—As to form of acknowledgment, &c., by married women, *vide post,* ch. xxvi.

Married Women as Executrixes, Administratrixes, and Guardians.—Vide post, ch. xvii and ch. xxv.

Title IV. Aliens.

By the common law, an alien cannot take real property by descent or other mere operation of law, but can by act of a party transferring it. By said law, also, an alien could not have curtesy or dower; nor could a natural-born subject take through an alien, because an alien had no inheritable blood through which a title could be deduced.

An alien could, by the common law, take by devise or conveyance; but if he took by devise or conveyance, he could only hold until inquest of office by the *State;* and his title, during life, was only defeasible by such proceedings. His title to land thus held would be good

against every person except the State; and his deed would be good against himself only, and not against the State; but as he was incompetent to transmit by descent, on his death, or on the death of a citizen without other than alien heirs, the land would instantly escheat to and vest in the State, without legal proceedings.

Craig v. Radford, 3 Wheat. 363; Doe v. Governeur, 11 Wheat. 352; The People v. Conklin, 2 Hill, 67; Jackson v. Green, 7 Wend. 333; Jackson v. Fitzsimmons, 10 Wend. 10; Fairfax v. Hunter, 7 Cranch, 603; Wadsworth v. Wadsworth, 12 N. Y. 376; Craig v. Leslie, 3 Wheat. 563; Munro v. Merchant, 28 N. Y. 9; Heeney v. Trustees, &c. 33 Barb. 360; affirmed, 39 N. Y. 333; Goodrich v. Russel, Court of Appeals, 1870, Wright v. Saddler, 20 N. Y. 320; Banks v. Walker, 3 Barb. Ch. 438; Osterman v. Baldwin, 6 Wall. 116.

Vide also *infra*, ch. xxxiii, title *Escheat;* also *post*, "DEVISES TO ALIENS," ch. xv.

Under the principles above laid down, a son could not inherit from his grandfather, if his father was an alien, although son and grandfather were citizens. Brothers, or their descendants respectively, however, might inherit from each other, though the father was an alien, the descent between them being immediate. Collingwood v. Pace, 1 Sid. R. 193; 1 Vent R. 413; Jackson v. Green, 7 Wend. 333; Parish v. Ward, 28 Barb. 328; McGregor v. Comstock, 3 Coms. 408; Smith v. Mulligan, 11 Abb. N. S. 438.

And cousins, children of brothers who were citizens, might inherit from each other, though the grandfather was an alien. McGregor v. Comstock, 3 Com. 408; Banks v. Walker, 3 Barb. Ch. 438.

But not if the descent had to be traced through an alien. And a nephew could not inherit from his uncle, if the former's father were an alien. Levy v. Levy, 6 Peters, 102; Jackson v. Green, 7 Wend. 333; Jackson v. Fitzsimmons, 10 Wend. 1; Redpath v. Rich, 3 Sandf. 79.

If the next heir of the person last seized, who had heritable blood, was an alien, the land did not therefore escheat, but went to a next remote heir, capable of taking. Thus a younger son, being a citizen, would inherit from the father in preference of the elder son, an alien. Jackson v. Jackson, 7 Johns. 214; Ovser v. Hoag, 3 Hill, 79; Orr v. Hodgson, 4 Wheat. 453.

The estate would *not* go to the remote heir, however, if he could only deduce descent through such alien. Levy v. McCartee, 6 Peters, 102.

The capacity to take by descent had to exist at the time the descent happened; and subsequent naturalization will not enable, if alienship existed at the death of the one last seized. People v. Conkling, 2 Hill, 67; Heeney v. Brooklyn Benev. Soc. 33 Barb. 360; affirmed, 39 N. Y. 333.

Naturalization, however, before office found would enable the alien to hold an estate by purchase against the State. 2 Hill, *supra*, p. 67.

Aliens would not be held included in the general descriptive words "heirs at law." Orr v. Hodgson, 4 Wheat. 453.

Although under a patent from the State to an alien and "his heirs," alien heirs are entitled to take, and the words are extended to all persons who might inherit. Act of April 2, 1798, ch. 72; of April 18, 1808, ch. 175. Jackson v. Etz, 5 Cow. 314, 397; Goodell v. Jackson, 20 Johns. 693; Duke of Cumberland v. Graves, 9 Barb. 595; *Ib.* 7 N. Y. (3 Seld.) 305.

A trust to a citizen to sell lands and give the proceeds to an alien is held good. Anstice v. Brown, 6 Paige, 448.

Adverse Possession.—An alien may hold by adverse possession as against a third person claiming title.

Overing v. Russel, 32 Barb. 263.

Sale by an Alien.—If an alien sold to a citizen, the right of forfeiture was not lost by the alienation, by the strict rules of the common law.

Vide infra, changes by statutes of this State.

Dower.—An alien woman is not, by the common law, entitled to dower.

Mick v. Mick, 10 Wend. 379; Connolly v. Smith, 21 *Ib.* 59. *Vide post*, changes by statute.

Joint Estate of Husband and Wife.—The alienage of a husband does not prevent the vesting in him, upon the death of his wife, of the entire estate in land conveyed in fee to himself and wife, subject to escheat, on office found.

Wright v. Saddler, 20 Barb. 321; 20 N. Y. 320.

Remainders.—A remainder in fee dependent on a valid life estate, may escheat before the death of the life tenant.

The People v. Conklin, 2 Hill, 68.

And, by the common law, devisees in remainder, though aliens, can take and hold as against the heir, and all others except the State.

The People v. Conklin, 2 Hill, 68.

Private Statutes.—A special statute, enabling an alien to acquire, hold and alienate real estate, invests him with inheritable blood, and dying intestate, his estate would descend the same as that of a citizen by birth, and would not escheat, provided an heir capable of taking by descent could be found. Such a statute would not remove the barrier against alien heirs.

Parish v. Ward, 28 Barb. 328.

An authority to alienate as above would be authority to devise.

Parish v. Ward, 28 Barb. 328.

Alien Laws in the various States.—In connection with the subject of alienage in this country, it is to be observed that the statutory provisions of the various States modifying the common law disabilities of aliens are not uniform.

In some States the disabilities are removed altogether, and aliens are put upon the same footing as citizens. These various laws, in giving or withholding the privilege of citizenship, have no exterritorial effect, and the privilege is entirely local in its character. The laws of one State are not permitted to prescribe qualifications of citizenship to be exercised in another State, in opposition to the laws and local policy of that State.

It has been held, therefore, that the article in the constitution of the United States (art. iv. § 2) declaring that citizens of each State were entitled to all the privileges and immunities of citizens in the several States, applies only to natural born or duly naturalized citizens; and if they remove from one State to another they are entitled to the privileges that persons of the same description are entitled to in the State to which the removal is made, and to none other.

Vide Corfield v. Corgell, 4 Wash. C. C. 371.

Effect of Treaties.—As to the effect of national treaties on the political qualifications of aliens in a State, *vide ante*, this chapter, title I.

Changes by Statute.—The statutes of this State have, on this subject, extensively modified the common law. The following is a summary of the laws, given chronologically:

Law of Feb. 28, 1789, *ch.* 42 (2 *Green.* 279).—By this law, the title of then citizens of the State, under sales to resident aliens, since Jan. 27, 1770, is not to be prejudiced by alienism in the grantee or of any person holding as by descent or otherwise since such grant or purchase.

No title accruing between Sept. 3, 1783, and the passage of the act, to citizens of the State, in lands granted by the colony prior to Oct. 14, 1775, shall be prejudiced

on account of alienism of persons through whom the title came.

For the colonial laws respecting citizenship, *vide ante*, p. 4.

Early State Laws.—The earlier laws removing disabilities were as follows, as enacted in this State:

By law of April 2, 1798, all conveyances thereafter to any aliens not subjects to a power at war with the United States, shall vest the estate conveyed in him, his heirs and assigns, provided no rent service is reserved; such conveyances to be recorded within twelve months after date in secretary of State's office—otherwise the land to escheat. This law was to be in force only three years. An act declaratory of the construction of this act was passed March 3, 1819, ch. 25, p. 29, curing any defects in titles then existing, and making any mortgages on said land effectual.

Duke of Cumberland v. Graves, 7 N. Y. 305; Aldrich v. Manton, 13 Wend. 458; The People v. Snyder, 41 N. Y. 397; 51 Barb. 589. Under the above law of 1798, alien heirs could take by descent from an alien entitled to hold. *Vide* above cases. Also their alien devisees and assignees. *Ib.*; and Watson v. Dannell, 28 Barb. 653.

By law of March 26, 1802, ch. 49 (*vide* 2 Rev. Laws, p. 540), purchases of land made or to be made by aliens who *have* become inhabitants of the State, to an extent not over 1,000 acres, are made valid, and they may make mortgages on the sales thereof. This act also provided that the title *of any citizen* to land *theretofore conveyed* and then in his possession, should not be impeached through the alienism of any one through whom title was derived (excepting bounty lands in counties of Onondaga and Cayuga). The provisions of said act were by law of April 10, 1804, extended to the date of said last-mentioned act. (2 R. L. p. 542). By law of March 2, 1805, extended to all aliens who may have become inhabitants of the State at the close of the then legislative session. (*Vide* 2 Rev. Laws, p. 543.) Extended by act of April 4, 1807, and April 8, 1808, to all becoming inhabitants at the close of the then session, and that such aliens might also take by

devise or descent as well as by purchase. (2 R. L. p. 543.) These acts of 1802 and 1808 enabled aliens acquiring lands under those acts to transmit them by descent to their alien heirs.

5 Cow. 314; 7 N. Y. 305.

By the above law of 1807, the title of no citizen to lands theretofore conveyed was to be impeached for alienism of any through whom title was derived.

Under these acts of 1802, 1808, if an alien died intestate, his lands descended to his heirs, although they were aliens. If he died without heirs, the lands escheated; but until office found, the State had no right to enter and take possession; and a grant by it before office found, conveyed no title. Jackson v. Adams, 7 Wend. 367.

Dower.—As to dower of an alien widow under the law of 1802, *vide* Priest v. Cummings, 20 Wend. 338; reversing, 16 *Ib.* 617.

The above laws were re-enacted in the revision of 1813, and a section was passed in 1813 (2 R. L. 542, § 2), which enabled alien mortgagees, who were authorized to sell and dispose of real estate, to re-purchase on foreclosure sales thereof, and to hold the same, as they were held by the mortgagor.

Alienism of Ancestor—Possession before 1825.—By law of 1826, ch. 297, no title of a *citizen* of the State who was in the actual possession of lands on April 21, 1825, or at any time before, shall be defeated or prejudiced, &c., on account of the alienism of any person through or from whom the title may have been derived.

Re-enacted in the Revised Statutes of 1830.

Revised Statutes of 1830—*Alienism of Ancestor.*—By revised statutes of 1830, it is provided that no person capable of inheriting shall be precluded by the *alienism* of any *ancestor* of such person.

3d vol. 5th edit. p. 43.

This provision first altered the common law rule. It was taken from the English statute of 11, 12 William III, ch. vi, which, however, had no operation in this State.

Levy v. McCartee, 6 Pet. 102.

This provision has been held prospective. Redpath v. Rich, 3 Sand. 79; Jackson v. Green, 7 Wend. 333.

This provision is held to protect the inheritance, whether title was derived through *lineal* or *collateral* ancestors, or both. McCarty v. Marsh, 1 Selden, 263; overruling, 3 Barb. Ch. 438.

It does not, however, enable a person to take by inheritance by descent through a living alien relative of the deceased, who would himself inherit were he a citizen.

McLean v. Swanton, 3 Kern. 535; The People v. Irvin, 21 Wend. 128; approved, 13 N. Y. 535.
See modifications of this statute, Laws of 1868 and 1872, *infra*.

Devises to Aliens.—Devises to aliens are declared *void* by statute, and the interest devised shall descend to the testator's heirs, if competent to take, and in default thereof to residuary devisees, if any are competent to take. (3 Rev. Stat. of 1830, p. 139.)

Downing v. Marshall, 23 N. Y. 366. This held not to apply to an alien devisee born after the death of the testator. as not being within the strict words of the statute. Wadsworth v. Wadsworth, 2 Kernan, 376.

Vide infra this title as to devises to aliens under more recent laws.

Naturalization Laws and Citizenship.—As to *citizenship* and its renunciation, and the naturalization laws, and treaties bearing on citizenship, *vide ante*, this chapter, Title I.

Holding Lands on a Declaration of Intention.—By law of 1825,* p. 427 (as amended by law of 1834, ch. 272), 3 Rev. Stat. p. 5, any alien who has or may come in the United States, on filing with the secretary of State a deposition to be taken before and certified by an officer authorized to take proof of deeds, of residence in and of intention to reside in the United States, and to be a citizen thereof as soon as he can be naturalized, and that he has taken the incipient steps for naturalization, may take and hold land to himself and heirs and assigns forever; and for six years thereafter may dispose thereof and devise and mortgage the same in any manner as if a citizen (except by lease until he is naturalized).

This law of 1825 is held to apply to former alien residents as well. Kennedy v. Wood, 20 Wend. 230.

The deposition is to be filed with and recorded by the secretary of State, in a book kept by him for that purpose; and the certificate, or a certified copy, is made evidence.

By the revised statutes taken from the said law of

* The original provision applied only to aliens becoming residents of *this State*.

1825 such alien was not to be capable of taking or holding any lands or real estate, which may have descended or become devised or conveyed to him previously to his having become such resident and made the deposition aforesaid.

It is held that the provisions of the law of 1825 that the alien is not to be capable of taking land acquired by him previous to his making the deposition, is merely a limitation of the preceding sections, and prevents his title thus acquired being good as against the people, but does not impair the common law rule. The provision therefore leaves the common law in force as to lands previously acquired, and as to aliens who have not complied with the statute. Wright v. Saddler, 20 N. Y. 320.

By law of 1826, p. 348, if the alien died within the six years intestate after filing the deposition, any heirs inhabitants of the United States would take as if he had been a citizen.

This section was repealed by the general repealing act of 1828, but incorporated in the revised statutes of 1830. The above act of 1825 was also incorporated in the revised statutes of 1830, the original act being repealed in the general repealing act.

Mortgage Sales and Purchases Thereon.—The revised statutes of 1830 also provided that if an alien sell real estate, which he was authorized to dispose of, he, his heirs and assigns may take mortgages for the purchase money, and repurchase on any mortgage sale, and hold the same, in the like manner, and with the same authority as the same were originally held by the mortgagor. (2 Rev. Stat. of 1813, p. 542.)

Purchases of Lands without Filing the Certificate.—By law of April 15, 1830, ch. 171, if a resident alien has purchased land without making the deposition, he may hold it by filing the deposition, within a year after the passage of the act. The act confirms all grants, mortgages, &c., theretofore made by such alien to a citizen of the United States.

Even if he had not filed the deposition, an alien could still take by purchase, and hold against all but the State.

2 Hill, 67; 4 Edw. 395.

This act was extended until April 15, 1835, by law of April 18, 1831, ch. 172; April 17, 1832, ch. 171; April 18th, 1833, ch. 167.

A law was passed May 13, 1836, enabling resident aliens to hold and convey land by filing the deposition within a year from the passage of the act, or taking the conveyance. This act was to be in force only for five years from date.

The time was extended to April 13, 1839, within which the deposition might be filed by act of February 7, 1838.

See McCarty v. Deming, 4 Lansing, 440, as to such limitations as to time.

Naturalized Citizens before 1843.—By law of 1843 (ch. 87), any *naturalized* citizen of the United States, being grantee or devisee of real estate (legal or equitable) within the State, or to whom it would have descended if a citizen at the time of decease of the person last seized, may hold it as if a citizen at the time of purchase, devise, or descent cast; and all deeds and mortgages theretofore made by such citizen are confirmed. Reservation is made of escheats, if instituted, and of any vested interests.

The above act of 1843 is held not to apply to an alien who had not been in possession; and removes no disabilities as to alienage of ancestors, and none except growing out of the alienage of the party claiming its benefit. Redpath v. Rich, 3 Sand. 79.

This act also held purely retrospective, and not to remove the disability of an alien to take by descent. The naturalization must have occurred before descent cast. Heeney v. Trustees, &c. 33 Barb. 360; affirmed, 39 N. Y. 333.

Rights of Grantees, etc., Accruing before the Filing.—By law of April 30, 1845, p. 94, ch. 115, any resident alien of the State who had or might thereafter purchase and take a *conveyance* of land in the State, or to whom it had been or might be *devised* before filing the deposition, might, on filing, hold the land as if a citizen of the United States at the time of acquisition.

This act of 1845 does not operate to confirm a title previously conveyed by an alien heir. Brown v. Sprague, 5 Denio, 545.

Alien Resident's Heirs.—By same law of 1845, § 4, the

alien or other heirs of any alien resident of the State, who has taken or may take by *conveyance*, may hold the land as if citizens, provided the male heirs file the deposition, if of age and not citizens, otherwise they shall not hold as against the State.

By this law, alien heirs of resident aliens could take, but not if the intestate were a citizen. Larreau v. Davignon, 5 Abb. N. S. 367. The heirs may be non-resident aliens. Goodrich v. Russell, 42 N. Y. 177.

Devisees or Grantees of Resident Aliens.—By same law of 1845, if any resident alien die who has taken or may take real estate by *conveyance*, his alien or other *devisees* or *grantees* may take and hold the same, provided that if of full age, and any are aliens, they file said deposition, in order to hold as against the State.

Grants and Devises by Aliens who have filed the Deposition.—By same law of 1845, any resident alien who has purchased and taken, or may take by deed or devise, and who has filed or shall file the deposition, may grant and devise the land to any *citizen* or to any alien resident of the State; but the latter, if a male of full age, must file the certificate.

Alien Resident Women Devisees.—By same law of 1845, §§ 7, 8, every alien resident woman may take and hold real estate under the will of her husband, or any other person capable of devising real estate, and may execute any lawful power relative thereto.

She may also take *beneficial* interests under trusts theretofore or thereafter created in lawful wills or marriage settlements, subject to the laws relative to uses and trusts.

Confirmation of Former and Future Grants, Leases, etc. by Aliens.—By same law, § 9, every grant, devise, demise, lease or mortgage of any land or interest therein, within this State, *theretofore* duly executed by an *alien* to any citizen of the State or to any *resident alien* capable of taking and holding real estate, or which may *thereafter* be made by any resident alien capable of taking and

holding real estate within this State, to any citizen of this State, or to any resident alien capable of taking and holding real estate, or any beneficial interest therein; and all rents reserved or hereafter reserved, and all lawful covenants and conditions in any such lease or demise, are thereby confirmed and made effectual, as if made by or between citizens of this State.

By § 13, all provisions of part 1, ch. 9, title 12 (relative to escheats), inconsistent with this act, are repealed, and the provisions of § 19 (28), title 1, ch. 1, part 2 (relative to aliens taking land sold under foreclosure of mortgages to them), are made applicable.

The law of April 29, 1833, and April 26, 1832 (relative to escheats), are repealed.

Bona fide Rights not Affected.—By same law, § 15, it is provided that nothing contained in the act shall prejudice the rights *bona fide* acquired by purchase or descent without notice before the act should take effect.

Escheat Suspended.—The act also provides that all future proceedings to recover land held by a resident alien, by reason of his alienage, shall be suspended on his filing the deposition aforesaid, but reserves the rights of the State in proceedings commenced, and also vested interests of any persons.

Confirmation of Grants, Leases, etc.—By the law of 1857, ch. 576 (April 15), it is provided that the several provisions of the above act of 1845 are extended and applied to any such *grant, demise, devise, lease* or *mortgage,* as are enumerated in said act, and which have been *theretofore* made, and shall be as effectual to pass the title thereto as though the persons by, from, or through whom the title shall have so passed had been citizens of the United States, and as though the several provisions of said act had been, as they are, re-enacted.

"The deposition required to be made by the first section of said act shall be made and filed within two years from the time when this act shall take effect; and if any person who, according to the provisions of said act, is required to make and file such certificate, shall omit to file the same within the time herein limited, he or she so neglecting or omitting to make and file such deposition or affirmation shall not be entitled to the benefit of this act. (This act to take effect immediately.)"

An alien cannot avoid fulfilling a contract to purchase land on the ground that he is an alien. 1 Edw. 512.

A purchase-money mortgage given by an alien is valid, and only the equity of redemption escheats.

The privileges conferred by statute on aliens are local and territorial in their nature.

Leases by Aliens.—*Vide* Estates for Years, ch. 8, *post*.

Trusts for Aliens.—Aliens were under like disabilities as to *uses* and *trusts* arising out of real estate. By the revised statutes, all escheated lands are liable to the same trusts as if they had descended.

It has been held that on a conveyance of land to a citizen upon *express* trust to hold for the benefit of an alien in fee, the trust estate is acquired for the State. Hubbard v. Goodwin, 3 Leigh, 492; Leggett v. Dubois, 5 Paige, 114. Such a trust in a will is void. Beekman v. Bonser, 23 N. Y. 298.

On the other hand, a conveyance of land to a citizen as trustee on express trust to sell the same and pay over the proceeds to a creditor who is an alien, is a valid trust. Craig v. Leslie, 3 Wheaton's Rep. 503; Anstice v. Brown, 6 Paige, 448.

But not if done to avoid the alien laws. 5 Paige, 114.

An alien can act as trustee, if otherwise capable of holding lands. Duke of Cumberland v. Graves, 9 Barb. 595; 7 N. Y. 305; and see *post* Trustees, ch. x.

Letters testamentary and of administration cannot be granted to aliens if not inhabitants of the State.

3 Rev. Stat. 154–159.

Widows of Aliens.—By the revised statutes of 1830, the widow of any alien, who, at the time of his death, shall be entitled by law to hold any real estate, if she be an inhabitant of this State at the time of such death, shall be entitled to dower, of such estate, in the same manner as if such alien had been a native citizen.

Alien Widows.—The naturalization of a *feme covert*, who is an alien, would not have a retroactive operation so as to entitle her to dower in lands of which her husband was seized during coverture, and which he had aliened previous to her naturalization. Priest v. Cummings, 20 Wend. 338; reversing, 16 *Ib.* 617.

Aliens before 1802.—It is held that the widow of a natural born citizen, who was an alien when the act of 1802, was passed, *supra*, is not entitled to dower under the provisions of that act, where the lands in which dower was claimed were acquired by the husband, and the marriage took place previous to the passage of the act. *Ib.*

As to Act of 1825.—It has been held also, that, in view of the provisions

of the act of 1825, *supra*, an alien widow, whose husband being a citizen purchased lands during their coverture in 1833 and died in 1838, was not entitled to dower. Currin v. Finn, 3 Den. 329; Sutliff v. Forgey, 1 Cow. 89.

Dower of Wife of Alien Resident.—By above law of April 30, 1845, § 2, *Ib*, the wife of an *alien resident* of this State who has *heretofore* taken by conveyance, grant or devise, and become seized of any real estate, and who has died before the passage of this act, and the wife of any *alien resident* of this State, who may *hereafter* take by conveyance, grant or devise, any real estate within this State, shall be entitled to *dower* therein, whether she be an *alien* or *citizen* of the United States; but no such dower shall be claimed in land granted or conveyed by the husband before this act shall take effect.

Formerly an alien widow could not be endowed, though her husband were a citizen. Mick v. Mick, 10 Wend. 379; Connolly v. Smith, 21 Wend. 79.

Alien Wife of Citizen.—By same chapter, § 3, any *alien* woman who has heretofore married or who may hereafter marry a citizen of the United States, shall be entitled to dower in the real estate of her husband, within this State, as if she were a citizen of the United States.

Formerly the alien wife of a citizen could not have dower in lands purchased since the act of 1825, unless she had filed the deposition as above. Curren v. Diren, 3 Den. 329.

Held to apply to an alien woman residing abroad at time of marriage, although husband afterwards naturalized. Burton v. Burton, 1 Keyes, 359; overruling, 26 How. Pr. 471.

By act of Congress of 1855, any woman naturalized and married to a citizen of the United States, shall be deemed a *citizen*. See above case of Burton v. Burton, and *ante*, tit. i, as to said law of 1855.

This act is held to mean that whenever a woman who, under previous acts might be naturalized, is in a state of marriage to a citizen, she becomes by that fact a citizen also. Kelly v. Owen, 7 Wallace, 496.

This law of 1845 confers the right of dower on an alien widow of an alien purchaser, and denies it to the alien widow of the native born or naturalized citizen. Larreau v. Davignon, 5 Abb. N. S. 367.

Marriage with an Alien.—Neither the marriage of a female with an alien husband, nor her residence in a foreign country, will constitute her an alien so as to prevent her taking real estate in this country. Beck v. McGillis, 9 Barb. 35.

Law of 1868. *Alienism of Ancestor.*—The law of May 1, 1868, ch. 513, provides as follows: The title of any citizen or citizens of this State to any land or lands within the State, and *now in the actual possession* of such citizen or citizens, shall not be questioned or impeached by reason of the alienism of any person or persons from or through whom such title *may have been derived;* provided, however, that nothing in this act shall affect the rights of the State in any case in which proceedings for escheat have been instituted.

As to Alienage of Former Owners, &c.—Act of March 27, 1872, ch. 141. The title of any citizen of this State to lands therein is not to be questioned or impeached by reason of the alienage of any persons from or through whom such title *may have been derived.* The rights of the State are reserved where proceedings for escheat have been commenced.

Nothing in the act is to affect or impair the right of any heir, devisee, mortgagee, or creditor by judgment *or otherwise.*

Descendants of Female Citizens married to Aliens.—Law of 1872,* ch. 120. By law of March 20, 1872, ch. 120, it is provided that real estate in this State, now belonging to or hereafter coming or descending to any woman born in the United States, or who has been otherwise a citizen thereof, shall, upon her death, notwithstanding her marriage with an alien and residence in a foreign country, descend to her lawful children of such marriage, if any, and their descendants, in like manner and with like effect as if such children or their descendants were native born or naturalized citizens of the United States. Nor shall the title to any real estate now owned by, or which shall

* Reference may be made to a learned treatise on the alien laws of the various States of Europe and this country, bearing upon this question of the alienship of children of a female citizen married to an alien; by the Hon. W. B. Lawrence, of Rhode Island. (New York, 1872, Baker, Voorhis & Co.)

descend, be devised or otherwise conveyed to such woman, or her lawful children, or to their descendants, be impaired or affected by reason of her marriage with an alien, or the alienage of such children or their descendants.

Act of April 24, 1872, *as to Title through Aliens.*—By law of this date (ch. 358), the title of citizens of the State to lands therein "*heretofore*" purchased by such citizens from aliens, and for which a conveyance *has been* taken from such aliens, is not to be impeached on account of the alienage of such persons, or by any devise of any such lands to any such persons, in any will being inoperative or void on account of the alienage of such persons. All devises heretofore made to aliens, from whom a conveyance of such lands shall have been heretofore taken by citizens of this State, are declared effectual, so far that the title of such citizens shall not be affected by any invalidity of such devise.

The rights of the State are reserved where proceedings for escheat have been instituted prior to January 1, 1872.

Military Bounty Lands held by Aliens.—Early statutes were passed on this subject in 1790, 1794, 1798, 1807, and 1813. *Vide* 1 Rev. Laws, p. 209.

Title V. Corporations, Lunatics, Idiots.

The right of the above classes to hold and convey land is reviewed at length in subsequent chapters.

Title VI. Those Sentenced to Imprisonment.

A sentence of imprisonment in a State prison for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all *private trusts* during the term of such imprisonment.

A person sentenced to a State prison for *life* shall thereafter be *civilly dead*.

3 Rev. Stat. of 1830, part 2, ch. 1, title 7.

Provision is made by statute for the appointment of trustees of the estate of persons imprisoned for a term less than life. Their powers and duties are given in Rev. Stat. Vol. III, p. 90.

As to service of process on such persons, *vide* 7 Paige, 150.

It is held that service of process upon a convict in the State prison is valid, and gives the court jurisdiction. Davis v. Duffie, 4 Abb. N. S. 478.

CHAPTER IV.

OF ESTATES IN LAND.

TITLE I. BY WHAT LAW GOVERNED.

THE title to real property, and all modes of its alienation or transfer, and the effect and construction of deeds conveying it, must be exclusively governed by the law of the country where it is situated. Likewise, a title to land can only be lost under and by virtue of such law. In this country, rights affecting real estate are governed by the existing laws of the States where the lands are situated respectively—the States being sovereign in that particular, and in all matters appertaining to their domestic concerns—unless it is otherwise provided by the federal constitution.

Clark v. Graham, 6 Wheat. 577; Story, Conflict of Laws, ch. x, § 424; Kerr v. Moon, 9 Wheat. 565; Levy v. Levy, 33 N. Y. 97; McCormick v. Sullivan, 10 *Id.* 192; White v. Howard, 52 Barb. 594; Oakey v. Bennet, 11 How. U. S. 33; McGoon v. Scales, 9 Wall. 23; Lynch v. Clarke, 1 Sand. Ch. 583; Hosford v. Nichols, 1 Paige, 220.

Consequently, the sale of land in one State, under authority of the court of another State, would pass no title, unless the parties in interest submitted to the jurisdiction of the court. If the court obtained jurisdiction, so as to act *in personam*, they might compel a performance of contracts.

Williams v. Fitzhugh, 37 N. Y. 450, and cases cited.

The decisions of the tribunals acting under the common law, both in England and America, is, in a practical sense uniform on the above subject. All the authorities in both countries recognize the principle that real estate, or immovable property, is exclusively subject to the law of the government within whose territory it is situate.

As to the Capacity of Persons capable of Taking, &c., Realty.—In accordance with the above general principle, the party taking land must have a capacity to take, according to the law of its *situs;* otherwise he will be excluded from ownership. Thus, if the laws of a country or State exclude aliens from holding lands, either by succession, or by purchase, or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of the place of their domicil. This principle extends to all persons incapacitated or restricted in any way by the laws of the place where the land lies, such as minors, married women, lunatics, &c. On the other hand, if, by the local law, aliens or others may take and hold lands, it is wholly immaterial what may be the law of their own domicil, either of origin or of choice.

This is the rule also generally prevailing among civil jurists, although there is a diversity of opinion among them; some claiming that the law of the capacity of an individual must be uniformly the same everywhere, and that the law of the domicil ought to regulate it. Doe v. Vardill, 5 Barn. & Cress. 438; Buchanan v. Deshon, 1 Har. & Gill, 280; Sewall v. Lee, 9 Mass. 363; Story, Conflict Laws, § 430; Boyce v. City of St. Louis, 29 Barb. 650.

Vide ante, ch. iii, title i, Citizens; also *Ib.* title iv, Aliens.

In respect to real estate situated in this State, claimed by a foreign corporation, it is for the courts of this State to construe the charter of such corporation, and determine whether the corporation is authorized thereby to take or hold such real estate. A foreign corporation, not authorized by its charter, or by statute, to take and hold real estate, cannot take by devise lands lying within this State.

Boyce v. City of St. Louis, 29 Barb. 650.
See, also, Chamberlain v. Chamberlain, *Ib.* 43 N. Y. 424.

Medium of Transfer.—As regards the medium and

forms of passing real estate, the rule is also that the local law governs. Hence, executory contracts for the sale, and devises and conveyances for the transfer of land, or any interest therein or lien thereon, must be made, executed, and delivered in accordance with the formalities of that law.

In relation to a will, also, or instrument made elsewhere, transferring or affecting real estate in this State, it is the province of the courts of this State to *construe* such instruments, and pass upon their validity or invalidity according to the laws of this State.

U. S. v. Crosby, 7 Cranch, 115; Cutler v. Davenport, 1 Pick. R. 81; Hosford v. Nichols, 1 Paige R. 220; Willis v. Cowper, 2 Hamm. R. 124; Wilcox's R. 278; Kerr v. Moon, 9 Wheat. 566; McCormick v. Sullivant, 10 Wheat. 192; Darby v. Mayer, 11 Wheat. R. 465; White v. Howard, 52 Barb. 294; Hosford v. Nichols, 1 Paige, 220; Goddar v. Sawyer, 9 Allen (Mass.), 78; Chapman v. Robertson, 6 Paige, 627; McCraney v. Alden, 46 Barb. 272.

An assignment of a mortgage, however, has been held to be governed by the law of the State where made, and not of the State where the property is. Dundas v. Bowler, 3 McLean, 397; 2 Story Conf. Laws, § 435.

Transfers by Operation of Law.—The principles above expressed apply equally (independent of any contract express or implied) to transfers of immoveables by operation of law. Thus no estate in dowry, or by the curtesy, or inheritable estate or interest in immoveable property can be acquired, except by such persons, and under such circumstances as the local law prescribes; and the law of the *situs* absolutely governs in regard to all rights, interests, and titles in and to immoveable property transferred as well by operation of law as by acts of parties. Therefore the law of this State would control, as to real estate within it, the succession or right of succession to such real estate.

Brodie v. Barry, 2 Ves. & Beames, 127; Gambier v. Gambier, 7 Simm. R. 263; Story Conflict Laws, § 463; White v. Howard, 52 Barb. 294.

The Subject-matter of Transfer.—The law as to the *lex loci*, prevailing as above stated, will apply not merely to what is actually immoveable, but to what may be deemed to partake of an immoveable or real nature by the law of

the locality. In other words, resort must be had to the *lex loci rei* for determining what is technically immoveable heritable or real property.

Thus servitudes, easements, rents, and other incorporeal hereditaments and interests in, and appurtenances to land in this State, and structures thereon, would come within the legal definition of *land* as subject to the laws of the State.

Vide Chapman v. Robertson, 6 Paige, 630; Levy v. Levy, 33 N. Y. 97; Story Con. Laws, § 464; Chapman v. Robinson, 6 Paige, 627.

As regards personal property the rule is different. It is supposed to have no locality *per se*, and follows the domicil of its owner, and the law of his domicil would regulate its condition and transfer. *Vide* White v. Howard, 52 Barb. 294.

TITLE II. DEFINITION OF "ESTATE" AND LAND.

The word "*estate*" means whatever and all interest a person has in land.

The word "*land*" comprehends, in legal signification, any ground or soil whatever, and all structures and things that are attached to or growing thereon. The word also includes "water," which, if the subject of conveyance, must be described as land covered by water.

Vide ch. 43, *post*, as to land under water.

Incorporeal hereditaments also partake of the "realty," and are made the subjects of conveyance and inheritance. The most important of them are: easements, ways, aquatic rights, rents, rights of common, offices, and franchises.

Land has also, legally, an indefinite extent upwards as well as downwards.

The legal maxim is, "*Cujus est solum, ejus est usque ad cœlum.*"

2 Bl. 13; 3 Kent, 401; Norris v. Baker, 1 Rol. R. 393; Lodie v. Arnold, 2 Salk. 458; 3 Step. Com. 500; Masters v. Pollie, 2 Rol. R. 141; Crabbe on Real Prop. § 96; 2 Bour. Inst. 158, 1570, 1576.

The Revised Statutes of 1830 provide that the terms "real estate" and "lands," as used in chap. 1, Part 2, relative to estates in land, shall be

construed as coextensive in meaning with "lands, tenements, and hereditaments." Vol. III, p. 39. By "land" in a will or deed, expectant estates will pass. Pond v. Bergh, 10 Paige, 141.

Timber.—The word "land," also, would apply to *growing timber;* and contracts or deeds for the same are within the recording statutes.

Vorebeck v. Roe, 50 Barb. 302; Goodyear v. Vosburgh, 57 Barb. 243; Hutchins v. King, 1 Wallace, 53. Warren v. Leland, 2 Barb. 613.

Trees must be removed by a tenant of a nursery, or they become part of the reversion. So with structures.

Brooks v. Galster, 51 Barb. 196; Loughran v. Ross, 45 N. Y. 792.

As regards trees, also, it is held that a person upon whose lands a tree wholly stands is the owner of the whole thereof, and is entitled to all its fruit, notwithstanding some of its branches overhang the lands of another.

Hoffman v. Armstrong, 48 N. Y. 201.
As to trees, fruits, grass and emblements, *vide post* chs. vi, viii, xiv.

Partnership Property.—As to whether land held by business partners is to be treated as realty or personalty, *vide post,* ch. xi.

Equitable Conversion, vide post, chs. xiv and xv; and as to when proceeds of real estate are treated as land.

Stock of Land Company.—By law of 1853, ch. 117, the stock of building and land companies authorized by the act is to be considered as personal estate.

Rent charge.—A rent charge with condition of reentry is also held to be real estate.

Van Rensselaer v. Hays, 19 N. Y. 68; Cruger v. McLaurey, 41 N. Y. 219; and see *post,* ch. v, title III.

Interests in Land.—The words "real estate," when applied to an interest in lands or other real property, includes all estates or interests which are held for life, or some greater estate, but does not embrace terms for years and other chattel interests in land.

Westervelt v. The People, 20 Wend. 416.

Real Estate under the Statute of Descents.—As to this, *vide post*, ch. xiv; and as to proceeds of infants' lands.

Pew.—The interest of the lessee of a pew in perpetuity is an interest in real estate, and is subject to all the incidents thereof. It is, however, a mere right of occupancy, and gives no right to the soil or to the body of the church. The interest of the pewholder is a qualified interest. It is limited to the use thereof during divine worship. It is limited, also, as respects time. If the house is burnt, or destroyed by time, the right is in general gone. The building and soil are vested in the religious corporation usually through trustees. In case of a destruction of a pew for convenience only, or in a wanton abuse of power by the trustees, a pewholder will have a right of action for damages.

Voorhees v. The Presbyterian Church, 8 Barb. 135; affirmed, 17 Barb. 103; St. Paul's Church v. Ford, 34 Barb. 16.

As to the rights of pewholders, *vide* Cooper v. First Presbyterian Church, 32 Barb. 222; and also as to above point, see also *post*, ch. xxiv, Corporations.

Erections on Real Estate of Another.—When a building is erected by one person on the land of another, it becomes part of the realty, and passes with a conveyance of the land. There are certain exceptions, based on the doctrine of estoppel, in equity. An exception, also, exists with respect to unattached constructions erected for purposes of trade or farming, by a tenant, during the time the relation of landlord and tenant exists, when the right of removal must be exercised during the term, or immediately on its cessation.

Brooks v. Galsten, 51 Barb. 196; Loughran v. Ross, 45 N. Y. 792; Ritchmayer v. Mooss, 3 Keyes, 349; Voorhies v. McGinnis, 48 N. Y. 278; reversing, 46 Barb. 242; Noyes v. Terry, 1 Lans. 219.

If a tenant having the right to remove fixtures on demised premises, accepts a new lease of the land, without reservation of or making claim to the buildings, his right of removal is lost, even if his possession has been continuous.

Loughran v. Ross, 45 N. Y. 792.

Title III. The Feudal System.

The English estates at common law had their origin in the feudal system. The basis of this system was the allotment by the sovereign or military chief of tracts of land to his officers, and these again subdivided them among others. These beneficial allotments were called *feuds*, *fiefs*, or *fees*, and in the course of time were allowed to become hereditary, under definite maxims of inheritance.

The paramount ownership of the land was still vested in the head of the community, who exacted, as a recognition of title and condition of tenure, *allegiance* and certain services, military or otherwise, and fines and penalties annexed to the estate. When allegiance was withdrawn, or in case of the death of the feudatory (or subsequently of his heirs), the land fell back or *escheated* to the *suzerain*. The like tenure or relation existed between the *mesne* lord and the sub-feudatory or "vassal," except as modified by statute. The fundamental doctrine of the feudal principle was that all land was held either mediately or immediately of the crown. On the Norman conquest, the system became established in England; from which country the *common law*, which was based on feudal principles, became established in the colonial government of this State, and was adopted by the State Constitutions of 1777, 1822, and 1846, except as modified by the statutory law, or the several constitutions of the State.

Common Law.—As to its existence here, *vide ante*, ch. i, p. 25.

Feuds how Created.—The mode of *investiture* of a feud was by the words "*dedi and concessi*," and by open notorious delivery of possession, generally on the premises, and by a symbolical delivery of some article taken therefrom. This delivery of possession was called "*livery of seizen.*" The grant might be for years or for life or hereditary, the eldest *male* heirs taking in turn,

as best calculated to defend the feud. A *class* of heirs also might be designated, creating a *fee-tail.*

Livery of seizen was necessary to give effect to a deed as a feoffment.

Vide Schott v. Burton, 13 Barb. 173.

By the Rev. Stat. of 1830, feoffment with livery of seizen was abolished.

3 R. S. p. 29, § 156.

Feuds at First Inalienable.—Feuds were at first inalienable, without the consent of the lord; being looked upon as a personal trust to the feudatory and *those of his blood.*

In time, as military yielded to civil rule, the stringency of the system was relaxed, and feuds became alienable; and various other modifications and changes were authorized by law, or established by usage, until the English system of tenures grew into complex and extensive proportions, the feudal base of the system still being the prominent and controlling element, as well as the key for its interpretation. At the restoration in 1660, and by subsequent statutes in the reign of Charles II, the feudal system of tenure was virtually abolished; and the tenure of land turned into that of free and common socage, that is to say, not military nor dependent on the will of the lord.

Title IV. The Feudal Principle in this State.

The feudal principle of tenures is supposed to have, theoretically at least, existed in this State during its colonial existence, except as positively modified by English statutes and grants from the crown. By an act of parliament of 25th April, 1660, all military tenures were abolished from 24th February, 1645. The provisions of the act of this State of 1787, *infra*, abolishing feudal tenures, were taken from that English act. While the colony was under the Dutch government these tenures,

and all feudal tenures, were unknown. The nearest semblance to them was the order of "*patroon.*" Under a provision of the Dutch West India Company, any person who should plant a colony of fifty souls should be deemed a "*patroon,*" should be entitled to select land, except on Manhattan Island, to a limited extent, and have an absolute property therein, "to be holden of the company as an eternal inheritance, without its ever devolving again to the company," upon certain conditions of trading. The patroons had also the liberty of disposing of their estates by testament. By the articles of capitulation of 1664, with the English Colonel Nicolls, it was stipulated that the people should still continue free denizens, and should "enjoy their lands, houses and goods, wheresoever they are within this country, and dispose of them *as they please,*" and the Dutch "were to enjoy their *own customs concerning their inheritances.*" The grant from Charles II to the Duke of York, of 12th March, 1664 (confirmed in 1674), was of all the lands, &c., in the province, to have and to hold "in free and *common socage, and not in capite by knight service,* yielding annually forty beaver skins." The tenure of land in the State seems therefore always to have existed as of *common socage—i. e.,* a service not military or dependent on the will of the lord, it being remembered that military tenures were abolished by the act of 1660; 12 Charles II, ch. 24, *supra.*

The principles enunciated by the courts as to the feudal principle in this State are that no ultimate estate can remain in the grantor of lands in fee simple; and he has no possible reversion, by escheat or otherwise; and there are no conditions implied by law in his favor incident to the estate, such as existed under the ancient common law rules, arising out of the feudal relation.

But in the decisions of the courts on this subject, an important distinction is drawn between conditions implied by the law of feudal tenures and those which the parties to a grant expressly mention and create in the

conveyance, for the purpose of avoiding or defeating the estate. Any condition of the latter kind is held valid, if consistent with the general rules of law, and if the condition expressed in a grant be valid, a right of entry for its breach, reserved to the grantor and his heirs or assigns by the express terms of the grant, is also held valid, wholly independent of tenure.

It has been held, therefore, that since the act of 1787, *infra*, concerning tenures, whatever was the law before its passage, it has not been possible to create a feudal tenure in this State; although the owner of an estate might be liable to conditions of rents and services inserted in the deed (as are consistent with the general rules of law), which might run with the land and bind heirs and assigns. Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Dennison, 35 N. Y., p. 393; Cruger v. McLaury, 41 N. Y. 219. See also cases in title iv, ch v, *post*.

Dutch Grants.—As to these, *vide ante*, p. 22.

Grants from the Crown after 1775.—*Vide ante*, ch. i, p. 13.

Restraints on Alienation.—By the constitution of 1846, art. 1, § 15, all fines, quarter sales, or other like restraints upon alienation, reserved in any grant of land thereafter to be made are void.

See also more fully as to this, *post*, ch. v, title iv.

Socage Tenure.—By the statute of 1787, *infra*, rent, certain or other services consistent with socage tenure were still retained. By socage tenure is meant a fixed rent or service, not military nor liable to change by the will of the lord.

See *infra*, ch. v, title iv, more fully as to this subject.

General Knowledge of the Feudal Law.—Some knowledge of the feudal system of tenures, in view of the principles of the common law growing out of them, is still not an unnecessary branch of legal knowledge in this State. The interpretation to be placed upon constitutional and statutory law, an intelligent appreciation of the purposes of the changes effected by them, and the elucidation of legal principles in their daily application to the various phases of present civil life, are often

due to researches amid the dim ruins of this venerable social and legal system.

In the consideration of the principles of the common law, applicable to conditions determining "Grants and leases in fee," in connection with the various constitutional and statutory changes in this State, has the light to be derived from an investigation of the ancient law of tenures been most frequently invoked; and the variety and frequent change in the expression of the judicial mind, in the range of cases in this State on this subject, is a matter of remark. See a review of such cases, *post*, ch. v, title iv.

As the most important of the cases relating to such conditional estates have been decided within the last fifteen years, it is evident that some knowledge of the ancient law bearing upon the subject is still necessary.

Title V. Substitution of Allodial Estates for Feudal Tenure in this State.

The statutes of 1779 and of 1787 of this State, which in terms abolished feudal tenures, are here given at some length, as frequent reference is made to their provisions. Their application is considered in chap. v, title iv, *post*.

Act of 1779, *Transferring the Seignory of Lands from the King to the People.*—By statute of Oct. 22, 1779, § 14, the absolute property of all messuages, lands, tenements and hereditaments, and of all rents, royalties, franchises, prerogatives, privileges, escheats, forfeitures, debts, dues, duties and services, by whatsoever names respectively the same are called and known in the law, and all right and title to the same, which next and immediately before the 9th day of July, 1776, did vest in or belong, or was or were due to the crown of Great Britain, were declared to be, and since the 9th day of July, 1776, to have been, and forever thereafter were to be, vested in the

people of this State, in whom the sovereignty and seignory thereof are and were united and vested, on and from said 9th day of July, 1776 (1 Jones and Varick, 44).

The Act concerning Tenures of Feb. 20, 1787 (1 *R. L. p.* 70).—§ 1. The first section enacts, "That it shall forever hereafter be lawful for every freeholder to give, sell or alien the lands or tenements whereof he or she is, or at any time hereafter shall be, seized in fee simple, or any part thereof, at his or her pleasure, so always that the purchaser shall hold the lands or tenements so given, sold or aliened, of the chief lord, if there be any, of the same fee, by the same services and customs, by which the person or persons making such gift, sale or alienation before held the same lands or tenements; and if such freeholder give, sell or alien only a part of such lands or tenements to any, the feoffee or alienee shall immediately hold such part of the chief lord, and shall be forthwith charged with the services for so much as pertaineth, or ought to pertain, to the said chief lord for the same parcel, according to the quantity of the land or tenement so given, sold or aliened; and so in this case, the same part of the service shall remain to the lord, to be taken by the hands of the feoffee or alienee, for which he or she ought to be attendant and answerable to the same chief lord, according to the quantity of the land or tenement given, sold or aliened, for the parcel of the service so due."

By the 2d section, all wardships, liveries, primer seizins, &c., by reason of tenure by knight-service, and all mean rates, gifts, charges, &c., incident or arising for wardships, liveries, &c., are to be deemed taken away from the 30th Aug. 1664. Also, all fines for alienations, seizures and pardons for alienations, tenure by homage, and all charges arising from wardship, livery, tenure by knight-service, relief, aids, &c., are taken away from the same date. All tenures by knights' service, and by knights' service *in capitè;* and by socage *in capitè*, and the fruits and consequents thereof happened or to happen, are abolished, any law, custom, &c., to the contrary notwithstanding.

§ 3. All tenures of honors, manors, lands, tenements or hereditaments of any estate of inheritance at the common law, held either of the king or of any other person or persons, bodies politic or corporate, before July 4, 1776, are turned into free and common socage, and are so to be construed from the time of the creation thereof and forever thereafter; and said honors,

manors, &c., shall be forever discharged of all tenure by homage, escuage and charges incident to tenure by knight-service.

By the 4th section, all conveyances and devises of manors, lands, tenements or hereditaments, &c., shall be expounded as if said manors, &c., were held in free and common socage only.

By the 5th section, the act is not to be construed as taking away rents certain or other services incidental or belonging to tenure in common socage, due to the State or any mesne lord, or other private person, or the fealty or distresses incident thereto.

By the 6th section, the tenure upon former gifts, grants, conveyances, &c., made, or hereafter to be made, of manors, lands, &c., of any estate of inheritance, by letters patent of the State, or in any other manner, by the people, or commissioners of forfeiture, shall be allodial, and not feudal; and shall be discharged from all wardships, aids, renders, fealty, &c., and all other services whatsoever.

This act of 1787 was repealed (3 R. S. of 1830, 1st edit. p. 129), and the provisions of the revised statutes, p. 718 *Ib.;* §§ 2, 3 and 4 substituted, as below given. See further, as to this act, ch. v. title 4, and as to the English statute, "*Quia emptores,*" of which it was the substitute.

Provisions of the Revised Statutes Abolishing Tenures, &c.—§ 1. The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands, the title to which shall fail from a defect of heirs, shall revert or escheat to the people.

§ 2. All escheated lands, when held by the State or its grantees, shall be subject to the same trusts, incumbrances, charges, rents and services to which they would have been subject had they descended; and the supreme court shall have power to direct the attorney-general to convey such lands to the parties equitably entitled thereto, according to their respective rights, or to such new trustee as may be appointed by the court.

§ 3. All lands within this State are declared to be *allodial;* so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates, and all feudal tenures of every description, with all their incidents, are abolished.

§ 4. The abolition of tenures shall not take away or discharge any rents or services certain, which at any time *heretofore have been, or hereafter may be, created or reserved;* nor shall it be construed to affect or change the powers or jurisdiction of any court of justice in this State.

Provisions of the Constitution of 1846.—*Art.* I, § 11. The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail from a defect of heirs, shall revert or escheat to the people.

§ 12. All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain, which, at any time *heretofore*, have been lawfully created or reserved.

§ 13. All lands within this State are declared to be *allodial;* so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners according to the nature of their respective estates.

§ 14. No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid.

§ 15. All fines, quarter sales or other like restraints upon alienation, reserved in any grant of land hereafter to be made, shall be void.

Prior to the constitution of 1846, there was no rule of law in this State prohibiting the reservation of a perpetual yearly rent in a grant of land *in fee*, as a condition of the estate, the breach of which might determine the estate.

Van Rennselaer v. Dennison, 35 N. Y. 393.

It will be observed that in the revised statutes (vol. 3, p. 2, § 4) rents and services certain which might *there-*

after be created or reserved, were excepted in the clause abolishing the incidents of tenure. In the constitution of 1846, those that *thereafter* might be created were omitted, and the saving clause only applied to those already reserved.

The constitution further provides that—

"All grants of land within this State, made by the king of Great Britain, or persons acting under his authority, after the 14th day of October, 1775, shall be null and void; but nothing contained in this constitution shall affect any grants of land within this State, made by the authority of the said king or his predecessors, or shall annul any charters to bodies politic or corporate by him or them made before that day; or shall affect any such grants or charters since made by this State, or by persons acting under its authority, &c."

(Similar provisions are in the constitutions of 1777 and 1822.)

Restraints on Alienation.—See *post*, as to Restraints on Alienation, ch. v, title iv.

Feudal Tenures in this State.—See further on this subject, *post*, ch. v, title iv.

TITLE VI.—DIVISION OF ESTATES, &C.

By revised statutes of 1830, part 2, ch. 1, title 3, § 1, estates in land are divided into estates of *inheritance*, estates for *life*, estates for *years*, and estates at *will* and by *sufferance*.

"§ 2. Every estate of *inheritance*, notwithstanding the abolition of tenures, shall continue to be termed a *fee simple* or *fee;* and every such estate, when not defeasible or conditional, shall be termed a *fee simple absolute*, or an *absolute fee*.

§ 5. Estates of *inheritance* and for *life* shall continue to be denominated estates of *freehold;* estates for *years*

shall be chattels *real;* and estates at *will* or by *sufferance* shall be *chattel interests*, but shall not be liable as such to sale on executions.

§ 6. An estate during the *life* of a *third* person, whether limited to heirs or otherwise, shall be deemed a *freehold* only during the life of the *grantee* or *devisee*, but after his death it shall be deemed a *chattel real.*

§ 7. Estates, as respects the time of their enjoyment, are divided into estates *in possession* and estates in *expectancy.*

§ 8. An estate in *possession* is where the owner has an immediate right to the possession of the land. An estate in *expectancy* is where the right to the possession is postponed to a future period."

Real Estate, Lands, &c.—The provisions of the rev. statutes with relation to "*real estate*" and "*lands*," construe those terms as co-extensive in meaning with "*lands, tenements* and *hereditaments.*"

Vested Rights.—None of the provisions of the chapter of the revised statutes relative to estates in land, except those converting formal estates into legal estates, shall be construed as altering or impairing any vested estate, interest or right; or as altering or affecting the construction of any deed, will or other instrument, which shall have taken effect at any time before the chapter should be in force as a law. 1 R. S. 1st edit. p. 750.

Vide Brewster v. Brewster, 32 Barb. 429; De Peyster v. Clendening, 8 Paige, 304; 26 Wend. 23.

CHAPTER V.

FREEHOLD ESTATES OF INHERITANCE.

A freehold estate was, by feudal law, an estate held by a freeman independently of the will of the lord, as opposed to those of a lower order liable to be determined at his pleasure.

The English common law writers divide estates into estates *of inheritance* or *not of inheritance.* The former were divided into—

1. *Absolute,* or fee simple.
2. *Limited,* such as estates in fee tail.

Our revised statutes provide that every estate of inheritance, notwithstanding the abolition of feudal tenures, should be termed a *fee simple,* or fee, and when without condition or defeasance annexed, a fee simple *absolute.*

Vol. 3, p. 10, § 2.

TITLE I.—FEES SIMPLE ABSOLUTE.

Fees Simple.—A tenant in fee simple absolute holds to him and his heirs forever. It is the highest estate in law, and was the most extensive interest that one by the common law could have in a feud; being an absolute inheritance, clear of any condition or limitation of duration or restrictions to particular heirs, but descendible to heirs generally. The estate confers an unlimited power of alienation. The word "*heirs,*" by the common law

is necessary, in some part of the grant, in order to confer a *fee.* If that word was omitted, only a life estate passed. This was a relic of the feudal rule, the donation being made in consideration of the personal abilities of the feudatory, and for his benefit alone, unless otherwise provided. The rule continued in force in this State until abolished by the revised statutes of 1830.

The strictness of the rule was modified by other rules, and when the transfer of the estate was by "fine" or "common recovery," releases by way of extinguishment or discharge, partition, or to a "corporation;" and transfers between joint tenants and tenants in common, also, where the *intent* of a testator in a will is evident to convey a fee, then a fee might pass.

Words of Inheritance not necessary since 1830, *to pass a fee.*—In this State the revised statutes of 1830 provide that the word "*heirs,*" or other word of *inheritance, shall not be requisite to create a fee;* and every grant or devise of real estate, or any interest therein, thereafter to be executed, shall pass *all* the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest should appear by *express terms* or be necessarily *implied* in the terms of such grant.

Vol. 3, p. 38, § 1.

The revised statutes also provide that in the construction of instruments the courts shall carry out the manifest *intent* of parties. *It will therefore be necessary, pursuant to the above common law rule, in examining title to real estate where the property passed before* 1830, *to observe, whether in the deed or will transferring an estate, the proper words of inheritance are used.*

As to exceptions to the former rule in cases of devises, *vide post,* ch. xv.

Title II.—Fees Tail.

Among *conditional* fees at the common law was a fee restrained to some particular heirs—as to the *heirs of a*

man's body, or to the heirs *male of his body*, in which cases only his lineal descendants, or his lineal male descendants, were admitted, to the exclusion of collateral heirs and lineal females.

On failure of these, the land reverted to the lord of the feud or his heirs.

These gifts being *on condition*, if the grantee had the heirs indicated, the condition was considered as *performed*, and the estate to which the condition was annexed became absolute, and the grantee could alien the estate absolutely after the designated class of heirs were in *esse*, and thus cut off the reversion. He could even alien on condition, prior to the birth of such issue.

To prevent this action of tenants, the statute "*de donis conditionalibus*," 13 Edw. I, ch. 1, was passed, which restored in a measure the feudal restraints and prevented the alienation on heirs being born, and thus preserved the reversion.

Under this statute it was determined that the *donee* took a *fee tail* (or fee *taillé*, or cut-off), and the reversionary fee simple of the land remained in the donor expectant on the failure of issue of the donee. It was also determined that the grantee should have no power to alien the land, and so cut off the prescribed heirs.

The several *species* or varieties of *estates tail* need not here be enumerated, as the estate by our law has been abolished, although some of the principles and the history of these estates are given, as they have been in existence in this State up to a not very remote period, being now turned by the revised statutes into fees simple; even at the present day, however, they are occasionally subjects of investigation before our courts.

As the word *heirs* was necessary to create a *fee*, so the word *body*, or some other word of *procreation*, was necessary to create a fee tail as a designation of the class to whom the estate was limited. Both words of inheritance and words of procreation were therefore required.

In wills, however, wherein greater indulgence is allowed, an *estate tail* might be created by less regular and technical mode of expression, provided the intent were manifest.

Estates tail thus established remained for a certain time in full force and effect, under the influence of great landed proprieters, being conducive to their power and influence, by preserving their estates.

A subsequent policy, however, allowed the heirs to be cut off, and turned the estate into a fee simple through a "*common recovery*," which was a fictitious proceeding, introduced to evade the effect of the *statute de donis*, and operating in law as an assurance and conveyance of the land. A *fine* had, as against issue, the same effect. These proceedings gave an absolute power of disposal of the estate, as if the tenant in tail were tenant in fee simple.

Fines and recoveries were established by the statutes of this State. For the proceedings under them see "An Act concerning Fines and Recoveries, &c.," law of Feb. 26, 1787 (1 Green. 377), April 8, 1808 (5 Web. 405), April 5, 1813, April 14, 1827. 1 Rev. Laws of 1813, p. 358. The revised statutes, however, expressly abolish them. 3 R. S., p. 629, § 24.

Estates Tail Abolished.—Estates tail were introduced into and formed part of the law of this State, subject to being barred by a fine or common recovery, until by statutes of July 12, 1782, and of Feb. 23, 1786, (1 Greenleaf, p. 205; repealing the act of 1782; 1 Rev. Laws of 1813, p. 52), they were abolished, and persons seized in fee tail were to be deemed seized of the same in *fee simple absolute.*

Grant v. Townsend, 2 Denio, 336; Lott v. Wykoff, 2 Com. 355; Jackson v. Brown, 13 Wend. 347. The act of July, 1782, acted prospectively. Jackson v. Van Zandt, 12 Johns. 169.

It has been held that this statute of 1786 included an estate tail in remainder, as well as in possession. Vanderheyden v. Crandell, 1 Com. 491; Van Rensselaer v. Poucher, 5 Den. 35; Van Rensselaer v. Kearney, 11 How. U. S. 298.

Estates tail are not prohibited by this statute, but when created are turned into fees simple. Lott v. Wykoff, 2 Com. 355.

By Rev. Stat. of 1830, all estates tail are abolished,

and it is provided that every estate which would be adjudged a fee tail, according to the law of this State as it existed previous to the 12th of July, 1782, shall thereafter be adjudged a *fee simple*, and if no valid remainder be limited thereon, shall be a fee simple *absolute*. Where a remainder in fee shall be limited upon an estate tail, such remainder shall be valid as a *contingent limitation* upon a fee, and shall vest in possession on the death of the first taker without issue living at the time of such death.

Vol. 3, p. 10, §§ 3, 4.

Right to Alien Lands.—By the act of Feb. 20, 1787 (Sess. 10, ch. 36), all freeholders were authorized to alien at pleasure any lands whereof they were seized in fee simple, subject to any services or charges thereon, and by the revised laws of 1813 any person seized of an estate in lands may alien the same. Also by 3 Rev. Stat., Vol. III, p. 3, § 10, any person capable of holding lands may alien the same, or any interest therein subject to the restrictions and regulations of law.

Vide post, as to the law of 1787 more fully, title iv.

III.—Conditional and Qualified Fees.

A *base* or *qualified* fee is one that has a qualification subjoined, and which must be determined whenever the qualification annexed to it is at an end; *e. g.*, as a fee to one and his heirs, tenants of such a manor, or until the marriage of A. This estate, though a fee, and one which might endure forever, yet, as its duration might be determined by collateral circumstances, was considered not an absolute, but a *qualified* or base fee, the condition being subsequent. Other qualified fees have conditions annexed, the performance of which is necessary to the vesting of the estate. The determinable quality of these fees follow any transfer thereof.

The following *conditions*, or limitations, on fees have been held valid in this State:

A grant on condition that the grantee, his heirs and assigns shall not at any time manufacture or sell intoxicating liquor, &c., on the premises. Plumb v. Tubbs, 41 N. Y. 442.

On condition not to build on the land under penalty of forfeiture. Gibert v. Peteler, 38 N. Y. 165.

On condition that the grantee should support the grantors. Spalding v. Hallenbeck, 39 Barb. 80.

A devise to a person "until Gloversville shall be incorporated as a village." Leonard v. Burr, 18 N. Y. 96.

A grant to the corporation of New York of land to be appropriated and *used* for a public square, &c. Stuyvesant v. Mayor of New York, 11 Paige, 415; Mayor v. Stuyvesant, 17 N. Y. 34.

A grant on a condition to build and maintain a certain dam. 20 Barb. 455. To erect salt works. 2 Seld. 74.

In Massachusetts, a devise of land to a town for a school-house, provided it be built within a certain distance of the church, has been held valid, as a condition subsequent; and the vested estate would be forfeited and go over to the residuary devisee, as a contingent interest, on non-compliance, within a reasonable time, of the condition. Hayden v. Stoughton, 5 Pick. 528.

A base fee held in trust on conditions determining it, is capable of transfer. Grant v. Tounsend, 2 Den. 336; Mayor v. Stuyvesant, 17 N. Y. p. 34; 4 Kent, 10.

And see fully on the point of leases in fee, rights of re-entry, determinable fees, and restraints on alienation, *infra*, title IV.

The conditions, on which qualified or conditional fees are held, are either *precedent* or *subsequent*. A precedent condition is one which must take place before the estate can vest; and in general the performance is necessary, and courts cannot relieve from the consequences of a non-performance. Whether a condition is precedent or subsequent depends upon the intention of the parties as expressed in the deed.

Subsequent conditions act upon estates already created or vested, and render them liable to be defeated—such as on failure to pay rent, or the performance of other stipulations. The effect of a deed with condition subsequent is to vest the estate in fee, subject to be defeated by omission to perform, and entry by the grantor or his heirs, even though there be no clause of re-entry in the deed.

Where the condition has been once performed, and the estate *vested* thereunder, a subsequent failure to continue the performance of the condition does not of

itself divest the estate. As the breach of a condition subsequent does not forfeit or divest the estate vested, but confers merely a right of entry on the grantor or his heirs, the performance of the condition may be specifically or impliedly waived by them. The grantor or his heirs can alone enter for the breach of a condition subsequent.

Vide, with reference to the above principles, Ives v. Van Auken, 34 Barb. 566; Spalding v. Hallenback, 39 Barb. 79; Ludlow v. N. Y. & H. R. R. 12 Barb. 440; Nicoll v. N. Y. & E. R. Co. 2 Kern. 121; Mead v. Ballard, 7 Wall. U. S. 290; Fonda v. Sparrow, 46 Barb. 109; Underhill v. Saratoga & R. R. 20 Barb. 456.

It is also a principle that if land is granted as one piece, subject to a condition, the condition is entire, and a breach of it gives a right to re-enter for all the land.

Tinkham v. E. R. R. 53 Barb. 393. *Vide* also title IV, *infra*.

If the condition be destroyed, performed, released or barred by estoppel or limitation, the estate is no longer defeasible, but becomes absolute; and if the forfeiture is once waived, the courts will not enforce it thereafter.

So, also, if the reversion is granted by the maker of a condition contained in a previous grant, the condition is gone.

Supra, 53 Barb. 393; Co. Litt. 215, a. b.

Determination of the Nature of the Condition.—Whether the words in an instrument amount to a *condition* precedent or subsequent, or a *limitation*, or a *covenant* (sounding merely in damages), is matter of construction, and the distinctions on the subject are nice and artificial, but in the main depend on the sense and meaning of the entire instrument.

Stanley v. Colt, 5 Wall. 119; McCullough v. Cox, 6 Barb. 387; Underhill v. The Saratoga, &c. R. R. 20 Barb. 455; Parmlee v. Oswego, &c. R. R. 2 Seld. 74; Fonda v. Sage, 46 Barb. 109; and see *post*, p. 126.

In determining whether a condition in a deed is precedent or subsequent, the main test is whether the *vesting* or enlarging of the estate granted by the instru-

ment containing it, is postponed until the happening of the contingent event forming the condition, or is to be divested by it. If the act or condition does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent. The precedence of conditions, therefore, depends upon the order of time in which the intent of the transaction requires their performance.

Illegal and Impossible Conditions, &c.—If the condition be impossible at the time of making it, or against law, the estate, being once vested, becomes absolute. So if the condition be *personal*, as that the lessee shall not sell without leave, the executors of the lessee, not being named, may sell without incurring a breach.

So also illegal conditions would be nugatory, such as a general restraint against marriage (except as against the testator's widow), or conditions against public morals or policy.

So also if the condition which is to divest an estate becomes impossible by the act of God, the condition is discharged.

McLachlan v. McLachlan, 9 Paige, 534.

Non-performance of a Condition Precedent.—Advantage of the non-performance of a condition precedent cannot be taken by one who has himself prevented its performance.

Jones v. Walker, 12 B. Mon. 163; Lamb v. Clark, 2 Wms. 29 Vt. 273.

And under a condition precedent, the right to the estate does not accrue, although the performance of the condition becomes impossible by the act of God.

Mizell v. Burnett, 4 Jones' Law, N. C. 249; Wells v. Smith, 2 Edw. ch. 78.

Condition Lost by License.—If a lease contained a condition that the lessees or their assigns should not alien without license, a license given to one of three lessees dispenses with the condition as to all, on the ground that, the condition being entire, it cannot be apportioned or divided. This, however, would not be the case with a covenant not coupled with a condition.

Smith's Leading Cases; Dumpor's Case, 4 Co. 119, b.; 4 Taunt. 735; 14 Vesey, 173; Dakin v. Williams, 17 Wend. 447.

Tender of Performance.—A tender of performance at the day will save a condition, and if the tender be refused the land may be discharged, as in the case of a mortgage while the debt remains.

4 Kent, p. 146.

Covenants as Conditions.—Where mutual covenants in an instrument go to the whole consideration on both sides they are held mutual conditions, the one precedent of the other; but when the covenants go only to a part of the consideration, the remedy is by damages, and the covenant is held not a condition precedent.

Boone v. Eyre, 1 H. Bl. 254; McCullough v. Cox, 6 Barb. 387.

In the case of Grant v. Johnson, however, (1 Seld. 247,) the dependence or independence of *covenants* is held determined by the order of time of their performance.

The courts will incline to consider a clause a covenant rather than a condition.

Conditions implied by Law.—The doctrine of estates upon condition *in law*, that is, such estates as had a condition impliedly annexed to them, without any condition expressed in the deed or will, resulted from the obligations arising out of the feudal relation. Estates for life or years were held on implied conditions that the tenant should not alien nor commit waste, or do any other act prejudicing the reversion. Rents and services of the feudatory also were considered as conditions annexed to the fief, and on default the donor or his heirs

might resume possession, and no other persons could, by the common law, take advantage of conditions that required a re-entry to re-vest the estate.

When the grantor entered he was seized as of his former estate. His entry, or that of his heirs, defeated the livery made on the creation of the original estate, and, consequently, all subsequent estates or remainders dependent thereon.

Conditions in Terms for Years.—Where land is given for a term of *years*, and a condition is annexed determining it, the estate *ipso facto* ceases, as soon as the condition is broken without an entry. An exception to the rule is where the lease provides expressly that the landlord shall enter in case of a breach of the condition.

6 Bar. & Cress. 519; Parmelee v. Oswego, &c. R. R. 6 N. Y. 2 Seld. 74; Brown v. Evans, 34 Barb. 494; Beach v. Nixon, 5 Seld. 35; Stuyvesant v. Davis, 9 Paige, 431.

Actions by Third Parties.—It is held that persons not parties to a conveyance may have an action in equity for breach of covenants made for their benefit.

Gibert v. Peteler, 38 N. Y. 165.

As, for example, restrictions against nuisances. Barrow v. Richard, 8 Paige, 351; Bleecker v. Bingham, 3 Paige, 246.

And it is a general rule that any one who has an interest in the condition, or in the lands to which it relates, may perform it.

Wilson v. Wilson, 38 Maine, 18.

Conditions Subsequent as Restraints on Alienation, &c.—Courts will relieve parties, if possible, against the results of non-performance of conditions subsequent, especially where the result of accident or omission; although they will not relieve against acts of commission directly in the face of the instrument.

Conditions *subsequent* are not favored by law, and are construed strictly, and if they are or become impossible, either by the act of God or of the law, or of the grantor, the estate is relieved from them. Conditions are not sustained when they are *repugnant* to the estate granted,

such as a condition annexed to a conveyance or devise in fee, that the grantee or devisee should not alien, or commit waste, nor his wife have dower.

Newkirk v. Newkirk, 2 Caines, 345; De Peyster v. Michael, 2 Selden, 468; Jackson v. Delancey, 13 Johns. 537; Same v. Robins, 16 Johns. 537.

As to condition reserved in leases in fee, rights of entry, &c. *vide post*, this chap. title iv.

Limitations.—If the estate be limited in *duration*, the defeasance is the result of a "*limitation*" which determines the estate without entry by the grantor or his heirs, or he who has the expectant interest—whereas on "*condition*" broken the estate is not defeated until *entry*, or by ejectment, its substitute.

Conditional Limitations.—These were of a mixed nature, and generally found in wills and conveyances to uses. They tended to divest, by condition subsequent, the estate before the time limited, and the estate would vest in a stranger having the expectant estate without entry, contrary to the rule of law that a stranger could not take advantage of a condition broken.

The revised statutes provide that "where a remainder shall be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate, every such remainder shall be construed a *conditional limitation*, and shall have the same effect as a limitation would have by law.

Vol. 3, p. 12.

Parmelee v. Oswego R. R. 2 Sel. 74.

As to the difference between a condition and a conditional limitation, *vide* Beach v. Nixon, 5 Seld. 35.

There were other refinements of law on this abstruse subject which cannot here be further pursued.

See, also, Mayor v. Stuyvesant, 17 N. Y. 34.

On the determining of a conditional limitation, the land becomes divested, and passes to the parties to whom the estate is limited over, if any. Brown v. Evans, 34 Barb. 594; Stanley v. Cox, 5 Wall. 119.

Infants and Married Women.—These are under equal obligation as others in the performance of conditions annexed to real estate.

Garrett v. Scouten, 3 Denio, 334; Co. Litt. 246*b*; Havens v. Patterson, 43 N. Y. 218; Ludlow v. N. Y. & H. R. 12 Barb. 440.

TITLE IV.—GRANTS AND LEASES IN FEE CONTAINING CONDITIONS OF FORFEITURE.

Questions on the legality and effect of restrictions or conditions determining estates transferred under leases or grants in fee, have been a fruitful source of litigation in this State, and have called forth much legal research and learning in their investigation.

The points raised are of interest, and a brief summary of the legislation and judicial determination bearing on the subject is given, particularly as such grants and leases are still frequently presented to the courts for construction, although generally of quite remote origin, many dating back to the colonial period.

According to the English feudal system, tenants, whether holding mediately or immediately of the king, had no right to alien or devise the feud, without consent of the immediate lord of whom they held. This practice was detrimental to the great lords holding fiefs of the crown, as they were deprived of escheats, wardships, fines, and other fruits of the tenure.

By *charter* of Henry III (1225), and the statute of Westminster, commonly called "*Quia emptores*," &c., (18th ed. I, ch. i), enacted in 1290, important changes were made. This statute recited that purchasers of fees had entered into them to the prejudice of chief lords, who had thereby lost their escheats, and enacted that thenceforward every freeman should be authorized at pleasure to alien his estates; to be holden, however, by the same services and customs, and of the same chief lord as he of whom it was held before. Tenants *in capite*, holding of the king, had still to procure a license to alien. The effect of this act was that thenceforth no new tenure of lands which had already been granted by the sovereign could be created. Every subsequent alienation placed the feoffee in the same feudal relation which his feoffer before occupied; that is, he held of the same superior lord, by the same services, and not of his feoffer. The principle of tenures was left untouched by

the act, but the progress of subinfeudations was arrested.

This statute, also, by declaring that every freeman might sell his lands at his pleasure, removed the former feudal restraints, which prevented the tenant from selling his land, without the license of his grantor, who was, before the statute, his feudal lord.

The statute, by changing the tenure from the immediate to the superior lord, took away the reversion from the immediate lord, *i. e.*, the grantor, and thus deprived him of the power of imposing, by expressed condition, the same restraints as theretofore existed by force of and under the feudal law. This right to restrain alienation ceased when the statute abolished the feudal relation between him and his grantee.

Such restraints on alienation were therefore held to be lawful before the statute "*quia emptores*," but unlawful thereafter, except so far as the king was concerned, whom the statute did not reach.

As between the grantor and grantee, also, the statute made all the covenants of the latter personal, and not binding the land in the hands of the assignee; thus practically preventing subinfeudations.

The main object of that statute "*quia emptores*," and of the first section of our act concerning tenures (1787, *infra*), was to reverse the old rule restraining alienation by tenants, so that the right of alienation was made incident to the grant, and followed of course.

By Stat. Edw. III, ch. 12, tenants holding *in capite* of the *crown* directly could purchase a license; and if they sold without one they suffered a specified fine for the alienation.

The Statute of Charles II.—By the Stat. of 12 Charles II, ch. 24, *fines* on alienation were abolished, with exception of certain tenants *in capite* and by copyhold.

The same statute abolished tenancy by knight service, or military tenure; and converted tenures into that of *free and common* socage; that is, into a fixed and determinate service not military.

The Statute Quia Emptores in this State.—It has been questioned in the range of cases that have passed before our courts, bearing on this subject, whether the statute "*quia emptores*" ever actually was in force in this State. It has been considered to have been substituted here by the act of Feb. 20, 1787, concerning tenures, (*ante* ch. iv, and *infra*), and by some jurists held not to have been in force at all under the colonial or State governments.

See the case of De Peyster v. Michael, 2 Seld. *infra.*

Under the views expressed in other cases, however, the principles of the statute "*quia emptores*" were supposed to have been transmitted and established here, as part of our colonial legal system.

In the latter cases, lands were deemed to be holden in this State under grants from the crown, and as the king was not within the statute "*quia emptores,*" a certain tenure, which, after the act of 12 Charles II (ch. 24), *supra*, abolishing military tenures, must have been merely that of free and common socage, was created between the king and his grantees.

The latter view is entertained, among others, in the case of Van Rensselaer v. Hays (19 N. Y.), Judge Denio also expressly holding that the law forbidding the creating new tenants by means of subinfeudation was always the law of the colony, and that it was the law of the State, both before and after the act of 1787, concerning tenures, below mentioned. Consequently no tenures, it was held, arose in the colony upon grants made by others than the crown, although the king could license his immediate tenants to create seignories, and to grant land to be holden of the patentees. The court, in the latter case, comments upon the opinions expressed in the above cited case of De Peyster v. Michael, as to the existence of the statute *quia emptores* in this colony and State, and holds that there was a misconception of the law as expressed in that case, founded on an erroneous view of the history of tenures in this colony.

Under the colonial rule, it is to be observed, a number of *manor grants* were made, by which manors were created within the province, and the patentees were authorized to grant lands within those manors to be holden of them and their heirs as *immediate* lords, to whom, by the feudal tenures thus created; fealty was due, and who were entitled to the reversions or escheats in the same manner as the mesne lords in England before the statute "*quia emptores.*"

In the above case of De Peyster v. Michael, it is urged as one argument against the existence of that statute in this colony, that if it had existed, such patents as above would not have been made; and it is claimed there, that the statute of 1787 recognizes them, in excepting from the operation of that statute the fealty and feudal services due to mesne lords on conveyances made before July 4, 1776.

The questions that have arisen and been determined with respect to these manor grants, will be given in a subsequent part of this title.

This case of De Peyster v. Michael also holds that, inasmuch as the statute "*quia emptores*" was never in force here, it follows that restraints on alienation in grants in fee made in the colony, before the acts of 1779 and 1787, were valid.

That these statutes by their terms, however, acted retrospectively, the one from the 9th and the other from the 4th of July, 1776.

The statute of 1779, it was held, transferred the seigniory and escheat of lands to the people of the State, who then became the chief lords of the fee; and, by the operation of the statute of tenures (1787), the right to escheat lands in fee granted by proprietors of patents before the revolution became vested in the people, on any transfer being made, if not immediately on the passage of the act. Thus tenures between the landholder and the people were substituted for those between landholders and individuals; and the above statutes converted

rents upon leases in fee from *rent service*, into *rent charges*, or *rent seck;* and by taking away the grantor's right of reversion or escheat, they removed the entire foundation on which the power of a grantor to restrain alienation by his grantee formerly rested.

In Van Rensselaer v. Hays, however, (19 N. Y. 96), the court expresses the opinion that the statute of 1787 had no retrospective effect upon tenures. Any change in the common law of tenures in the State affecting grants made before that statute took effect would consequently, under such view, have resulted from the effect of the statute "*quia emptores*," which, the court holds, was brought by our ancestors to the colony, and became part of its law and the law of the State.

The decision of Van Rensselaer v. Hayes, above quoted, must be considered as overruling other decisions in the State, and particularly certain dicta in that of Van Rensselaer v. Smith, 27 Barb. 104, where it is held that the statute "*quia emptores*" was never in existence in this State; and, therefore, did not affect fee farm grants or leases here; but that the rules of the common law applied to them, until modified by the subsequent statutes.

These subsequent statutes of 1779 and 1787, *infra*, while in terms destroying feudal tenure and substituting allodial estates, preserved some feudal incidents, such as rents certain or other services incident to tenure in common *socage;* and the feudal incidents of fealty and distress were reserved to grantors of lands in fee or for life or years; but the right of escheat was divested.

The following is a digest of the statutes of 1779 and and 1787, above referred to:

The Statute of 1779.—By the 14th section of the act of Oct. 22, 1779, the absolute property of all messuages, lands, tenements, &c., and of all rents, royalties, debts, dues, services, &c., and all right to the same which, before the 9th of July, 1776, belonged to or were due to the crown of Great Britain, were declared to be since said day vested in the people of the State; in whom the sov-

ereignty and seignory thereof are and were declared to be united and vested since said day.

The Statute of 1787 (1 R. L. 70), following the principle of the statute "*quia emptores*," made the right of alienation necessarily incident to a grant, unless the parties qualified the right by express *condition* or stipulation, which, according to the general rules of law, had to be of such a nature, however, as not to be entirely repugnant to the grant, nor unlawful, nor impossible of performance.

That statute provided as follows, in its first section, which is substantially a transcript of the statute "*quia emptores*:" "It shall forever hereafter be lawful for every freeholder to give, sell or alien the lands or tenements whereof he or she is, or at any time hereafter, shall be seized, in fee simple, or any part thereof, at his or her pleasure; so always that the purchaser shall hold the lands or tenements so given, sold or aliened of the chief lord, if there be any, of the same fee, by the same services and customs, by which the person or persons making such gift, sale, or alienation before held the same lands and tenements." The rest of the section provided that any alienee, as above, should hold of the chief lord, and should be charged with the proportionate part of the service for the part aliened, to the chief lord.

The rest of the section is given in full, *ante* ch. iv; also a digest of the other sections of said act.

This statute was based upon an act of Apr., 1691. (Brad. 1, 4, repealed in 1697 by the crown), which abolished all feudal military services and incidents, also all fines for alienation, seizures and pardons for alienations, tenure by homage, and all charges incident or arising by reason of wardship, livery, &c., from date of Aug. 30, 1664, when the province was surrendered by the Dutch to the English. This act of 1787 also abolished all tenure *in socage, in capite;* and converted all manorial and other tenures into free and common *socage;* and required all conveyances and devises of lands, &c., to be expounded as if so held in free and *common socage.* The 5th section reserves rents and services due to tenure in free and common socage to those entitled to them;—*i. e.*, to the people, or any mesne lord, or other person, or the fealty or distress *incident thereto. Vide* the act *ante* ch. iv, more fully given.

The sections of this act, except the first, are a substantial re-enactment of the act 12 Charles II. (ch. 24), abolishing military and other incidents of tenure.

The statute of 1787 was repealed by the general re-

pealing act of 1828, and the provisions of the revised statutes of 1830 (§§ 3 and 4, 1 Rev. Stat. 714,) were substituted, (*vide ante* ch. iv). The revisers, in their notes, expressed the opinion that the act of 1787 was unnecessary, and that no feudal tenures had existed here before its enactment.

The question as to whether the statute "*quia emptores*" ever had existence here had especial reference to the construction of the effect of restraints on alienation and conditions of forfeiture in grants or leases in fee.

Such leases in fee created an estate of inheritance in the grantee, his heirs and assigns, subject to the payment of rent reserved and performance of certain conditions. They created what was anciently called a fee farm estate, and the fee farm rent was a perpetual *rent charge* issuing out of the estate in fee, or a "rent service," if a reversion was deemed to be still remaining in the grantor.

Being estates in fee simple, vested in the grantees thereof, it was urged that no reversionary interest whatever remained in the grantors or lessors, and that they were therefore subject to the operation of the general legal principles which forbid restraints on alienation, in all cases where no feudal relation existed between the grantor and grantee. The important question was to determine whether that technical feudal relation ever existed at all in the colony, and if it did, how far it had been modified by statute.

Definition of Rent Charge and Rent Service, &c.—1. *Rent service* was so called because it had some corporeal service incident to it, at least fealty, or the feudal oath of fidelity. Where fealty was due, therefore, with a pecuniary rent, and the landlord had the reversionary interest in the demised premises, then the landlord had, by common law, a right to distrain without any power in the lease.

2. *Rent charge* is a rent reserved where the landlord has no reversionary interest. He would have, for such rent, no right to distrain, unless the power were contained in the lease, or specially conferred by statute.

3. *Rent seck* is the same as rent charge, except there is no right to distrain reserved.

As a remnant of the policy of feudal proprietorship, it had become the habit of the great landholders in the colony, since its earliest history, for the purpose of re-

taining property more or less under the control of the grantors, and of restricting its occupation to tenants of their own selection, to grant leases for lives, or perpetual leases in fee, to the grantees or lessees and their heirs, *on one or more of the conditions*, that, in case of sale by the lessee, his executors, &c., or assigns, the lessor or his heirs, &c., should have a *preemptive right*, or refusal of buying, or that there should be *no sale without written permission of the lessors, their heirs, &c.;* or that, *in case of sale, there should be a proportion of the purchase money paid to the lessor, &c., within a specified time.*

In case these conditions were not performed, there was provision that the granted or demised estate should cease, and a right of entry thereupon result.

Question arose as to whether or not these conditions were opposed to the provisions of the law of "*quia emptores*," if it ever existed here, and to that of 1787, as imposing restraints on alienation, and were or not repugnant to the estate conveyed, and therefore void under the general principles of law; or whether under the operation of the common law they were not valid as not being within the operation of any statutes.

It was held, at first, by the courts of this State, that the power to make such leases existed, and particularly that the clause in the lease restricting assignment, unless by permit, was not repugnant to the grant, and as such void.

The estate conveyed was held a valid "*fee simple conditional*" according to the common law, and not a mere tenure by lease.

It was held also that these covenants bound all assignees or holders of the lease, and that the estate became forfeited on non-compliance with the conditions.

The following early cases sustained these positions:

Jackson v. Silvernail, 15 Johns. 278; Jackson v. Schutz, 18 Johns. 174; Jackson v. Groat, 8 Cow. 285.

It was held, moreover, and these are principles of law, that have not been disturbed, that to work a forfeiture un-

der the clause against transfer without consent, the lessee must have parted with his *entire legal* interest; and that all such restrictions as above are to be strictly construed.

See, also, Livingston v. Stickles, 7 Hill; affirming, 8 Paige, 398.

It was also determined that the forfeiture, by reason of alienation without consent, would not apply to forced judicial sales *in invitum*.

Jackson v. Corlis, 7 Johns. 531; Jackson v. Silvernail, 15 Johns. 277; Jackson v. Kipp, 3 Wend. 230.

The question of the validity of the condition reserving a proportion of the proceeds of sale to be paid within a fixed time to the landlord, and of that requiring assent before a transfer, were subsequently considered in more recent cases with great care, and it has been determined, overruling in those particulars the cases of Jackson v. Silvernail, Jackson v. Schutz and Jackson v. Groat, above quoted, that such reservations contained in leases in fee made since 1776 at least were void, although they would be valid in a lease for years or for lives; and that even in the latter class of leases nothing short of a violation of the covenant, on the most literal and rigid interpretation, would subject to a forfeiture.

The courts overruled the previous cases establishing the validity of such conditions in leases in fee, on the principle that the whole *estate* had been granted, and that no technical reversion, or possibility of reversion, was left to the grantor in the estate by the terms of its limitation. Both the conditions restricting transfer without assent and that reserving a portion of the purchase money, were held to be in *restraint of alienation*, and, as such, repugnant to the grant and void, and the void conditions being conditions *subsequent*, the estate would stand divested of them. The reservation to the grantor of a portion of the purchase proceeds on a sale, wasalso considered in the nature of a fine on alienation, and, on that account, void, and also on the ground that such reservations were against public policy and the general spirit of our laws and institutions.

Huntington v. Forkson, 6 Hill, 149; Payn v. Beal, 4 Den. 405, overruling, People v. Haskins, 7 Wend. 463; Overbagh v. Patrie, 8 Barb. 28; affi'd, 2 Seld. 6 N. Y. 510; De Peyster v. Michael, 2 Seld. (6 N. Y.) 467.

The court, in the above quoted case of De Peyster v. Michael, holds that such restraints upon alienation could, by the common law, be only imposed by persons having, at least, a reversion, or possibility of reversion, therein, and that a mere right of *reentry*, for non-payment of rent, or non-performance of any other condition in a lease in fee, as well as in an absolute conveyance, was neither a *reversion*, or possibility of *reversion;* that it was not an *estate* in the land, but a mere right of action, and that if enforced the person entering would be in by a forfeiture of *condition*, and not by *reverter*.

The court also intimated the opinion, as before stated, that, under the colonial government, the English statute "*quia emptores*" was not regarded as in force, and citizens could therefore convey their lands *in fee*, to be holden directly of them and their heirs, &c., and *such* grantors being entitled to the reversion or escheat on failure of the issue of the grantee, could lawfully, during the colonial term, annex conditions to the power of alienation. This view, as seen above, p. 131, as to the existence of the law of "*quia emptores*" in this colony was not sustained in the case of Van Rensselaer v. Hays; although the general determination in the two cases was similar.

The court further held, in De Peyster v. Michael, that the acts of Oct. 22, 1779, *infra* (1 Jones & Varick, 44), transferring the seignory of all lands, escheats, &c., from the king to the people of the State, and the above act of Feb. 20, 1787, concerning tenures, put an end to all feudal tenures between one citizen and another, and substituted in their place a tenure between each landholder and the people, in their sovereign capacity, and thus removed the entire foundation on which the right of the grantor to restrain alienation had formerly rested.

In the subsequent case of Van Rensselaer v. Dennison, 35 N. Y. 393, it was held, that a conveyance in fee

executed in 1789, *i. e., after the statute of* 1787, with a stipulation for *rent*, operated in law as a deed of assignment, and not as a deed of lease, and left in the assignor or grantor neither any *reversion* or possibility of reverter. The case was decided on the principle that since the statute of 1787, whatever was the law before its passage, it has been impossible to create a feudal tenure in this State; and consequently none of the peculiar incidents of that tenure attach to an estate granted by one citizen to another, since that act took effect. Such feudal rules, therefore, it was held, as that an ultimate estate remained in the grantor of a fee simple, or that he had a possible reversion by escheat or otherwise, or that the estate granted was subject to certain inseparable conditions implied by law in his favor, as that the grantee should not alien, or should render service or rent, under a penalty of forfeiture, and other rules of feudal extraction, were abrogated. The case holds, however, that the assignment of the estate may be under expressed conditions of rents and services consistent with the general rules of law, and independent of the tenure of the land; and that a right of entry for breach of such conditions, reserved to the grantor, his heirs or assigns, in the grant, was valid.

Before the constitution of 1846, cited *infra*, a perpetual yearly rent in a grant of land in fee, it was also held, might be lawfully reserved as a *condition* of the estate, and such a rent thus reserved, although not a *rent service*, for want of a reversion in the grantor, is considered a *rent charge in fee.* Such a rent charge or condition thus expressly mentioned, it was decided, runs with the land, and binds the heirs and assigns of the covenantor; and an assignee of the rent and right of entry might maintain ejectment. To the same effect was Van Rensselaer v. Slingerland, 26 N. Y. 580, and Van Rensselaer v. Read, 26 N. Y. 558, which hold that conveyances in fee under a rent charge operate as assignments, and not as leases, and leave no reversion in

the grantor. Such rent is held to be a hereditament, and descends, and is devisable and assignable.

Under the above view of the nature of such conveyances the strict relation of landlord and tenant, as under the feudal rule, is not created between the parties to them.

See, also, Lyon v. Chase, 51 Barb. 13.

In the case of Van Rensselaer v. Hays, 19 N. Y. 68, it is also held as to these conveyances in fee reserving rent, that as there is no reversion in the grantor there was no right to distrain, which is necessarily incident to the reversion, unless there is a clause of distress; that the rent reserved was a *rent charge*, which was not an estate in the land but a hereditament, and that it is subject to alienation and descent to heirs as a heritable estate.

To the same effect, Tyler v. Heidorn, 46 Barb. 439.

Restraints on Alienation since 1846.—The revised statutes of 1830 (Vol. III, p. 2, § 5), provide that tenures shall be abolished except *rents* or *services certain*, which at any time theretofore might have been, or "hereafter might be created or reserved." By the constitution of 1846, the words "hereafter created or reserved" are omitted, and it is also provided that leases or grants of *agricultural* land, wherein rent or service is reserved for a longer term than *twelve years*, shall be invalid.

It is also provided in said constitution, art. 1, § 15, that all fines, quarter sales, or other like restraints on alienation reserved in any grant of land thereafter to be made, should be void.

Although, therefore, since the act of 1787, feudal tenures could not be created, by which the estate could be subjected to conditions determining the estate, still conditions of rent and service might be stipulated in the instrument creating the estate, the non-performance of which might terminate its existence. The constitution of 1846, however, has altered the rule, and forbidden

such reservation of a perpetual rent or service as the determinable condition of a fee.

Van Rensselaer v. Dennison, 35 N. Y. 393.

Manorial Grants.—Manorial grants were issued in many instances by the royal governors of the province, with a reservation of yearly rent. Sub-leases were made by the patentees with reservations of rent in produce or otherwise. The rents due the crown, or, as its successor, the State, were in general subsequently commuted and released for a gross sum. These manorial patents also constituted the land granted a "lordship and manor," and gave the patentees, their heirs and assigns, power to hold courts "leete" and "baron," and to enjoy other manorial privileges.

In the State legislature, April 6, 1848, a resolution was passed whereby the attorney-general was directed to ascertain whether the titles of landlords who had made leases under such grants were valid, and to institute suits for the purpose of ascertaining whether the lands held had not escheated to the State.

Actions were brought, pursuant to said law, to determine the rights to parties claiming under such manorial grants or patents.

The grounds taken in said actions were, among others, that the parties claiming possession had no authority or claim of right thereto, and that the lands claimed belonged to the people as sovereigns of the country and original proprietors thereof, and that neither the colony nor the State had by any acts recognized the possession or claim of the patentees, or those under them, but that the people of the State, since the revolution, became the rightful owners of such lands, and were entitled to the possession.

It was also urged that the provisions of such patents, whereby manorial privileges and franchises were conferred upon the lord of the manor, were in express violation of the established law, not only of England but of the colony, when they were made, and were, therefore,

void; and that the act of 1691, passed upon the accession of William and Mary, for the purpose of confirming certain grants, had no application to these patents; also, that the mere voluntary payment of quit-rents, or the reception of a commutation by the State, did not amount to a release of the right of the people, or a confirmation of the patentees' rights.

The important legal questions arising under such patents were fully reviewed in the case of The People v. Van Rensselaer, (9 N. Y. 5 Seld. 291). The decision of the court was to the effect, that such grants were in the power of the crown to issue, and the king had a right to grant to his immediate tenant the right to make grants to be held of himself, the tenant, since thus there would be the assent of all the lords, mediate and immediate; and that both before and since the statute "*Quia emptores*," the king could license his immediate tenant, or tenant *in capite*, to alien to hold of himself the tenant; and that, inasmuch as the statute was made for the advantage of the chief lords, the king might dispense with and license his tenant to reserve any new service. On the making of such grants, therefore, the patentees became the *mesne* lords, holding of the king, and the grantees of the patentees were the tenants *paravail*, holding (by license from the king as lord paramount) of their immediate lords, the patentees.

The court further held, that whether the statute "*Quia emptores*" was ever in force here or not was immaterial—and that, if it was, it had no application to the ungranted crown lands in the colonies—but that, in respect to those, the king was competent to authorize his immediate grantees to create tenants of a freehold manor, by granting lands to be held of themselves.

The court also was of opinion that even if the provisions in the patents relating to a lordship, and manor courts, and other feudal privileges were inoperative and void, under the statute against subinfeudations or any other statute, it would not follow that the grants of the lands were void; and there would be no legal difficulty in

declaring that the patentee was entitled to retain the land, but holding that his alienee must hold of the crown and its successors, instead of holding of the patentee and his heirs.

The court also held, that the action of the people in the matter was barred by the statute of limitations (Laws of 1788, 2 Greenl. 93; Laws of 1801, ch. 183, 189; 1 R. L. of 1813, 484); and that, although there had not been actual adverse occupation, the consent, recognition, payment, and reception of the quit-rents, as between the parties, caused the possession to be recognized as in the grantees, and certainly that it was out of the grantors, and the people were estopped from impeaching the validity of the patents.

It was also determined that such patents, under any circumstances, would be protected under the confirmatory colonial act of May, 1691, if not otherwise (Brad. Laws, 7, 77; 8 Barb. 291), which ratified and confirmed patents of the nature of that under review.

The opinion of the court, with reference to the limitation of the time for the action, and of the estoppel of plaintiffs by the reception of rent, was approved in the case of The People v. Trinity Church, 22 N. Y. 44.

Rights of Assignees under Conveyances and Leases in Fee.—It has been seen, as above, that conveyances in fee, under a rent charge, operate as assignments, and leave no reversion in the grantor.

Such rent is held a hereditament, and descends, and is devisable and assignable.

Hunter v. Hunter, 17 Barb. 25, and cases cited, *supra*, p. 138.

It is held in the above quoted cases of Van Rensselaer v. Slingerland, 26 N. Y. 580, and Van Rensselaer v. Dennison, 35 N. Y. 393, that rent charges, under such leases or conveyances in fee, run with the land, and bind the heirs and assigns of the covenantors; and that an assignee of the rent and right of entry may maintain

ejectment. Also that covenant will lie by the assignee of the lessor against the assignee of the lessee.

Vide also Van Rensselaer v. Reed, 26 N. Y. 558; De Peyster v. Michael, 2 Seld. 506.

The following cases also held that the covenant to pay rent runs with the land, and binds devisees, heirs and assignees, independent of tenure and reversion, and is not a mere personal covenant.

Main v. Feathers, 21 Barb. 646; Van Rensselaer v. Hays, 19 N. Y. 68; Tyler v. Heidorn, 46 Barb. 439; Van Rensselaer v. Ball, 19 N. Y. 100.

Before the "Code" it was held that in suits against lessees, a grantee could not maintain actions against lessees in his own name, but only in that of his grantor. Harbeck v. Sylvester, 13 Wend. 608.

The above decisions, to the effect that rent runs with the land, were made in opposition to the view taken that the statute of Feb. 20, 1787, destroyed all tenure under a lease in fee, and did away with the relation of landlord and tenant as between the lessor and lessee in such lease, and discharged the land from the payment of rent to anybody. See also cases below cited.

Act of Feb. 6, 1788.—An act was passed of this date (2 Greenl. 13), providing that all persons or corporations, their heirs or assigns, holding, or who may hold lands, manors, tenements, rents, or other hereditaments, or reversions thereof, by gift or grant of the people, or coming from others through the people, or from any others, should have the same advantages against lessees, their executors, &c., or assigns, by entry, for non-payment of rent, for waste or other forfeiture, and on non-performance of conditions, covenants, &c., as if the reversions had remained in the original lessors.

By the same act, lessees or grantees of lands, manors, &c., their executors, &c., or assigns under leases for years or life, have the same rights against heirs, successors or assigns, holding from the people or from others, as the lessees had, with exception of recoveries of value by reason of warranty in deed or in law, or by voucher or otherwise.

Act of 1805.—By act of Apr. 9, 1805, ch. 98, after reciting the above act of 1788, it is provided that the provisions of said act, and the remedies thereby given, should be con-

strued to extend as well to grants or leases in fee, reserving rents as to leases for life or years.

The above two acts were re-enacted in the revision of 1813. 1 R. L. 363.

This act was somewhat modified and re-enacted in the Rev. Stat. of 1830, *infra*.

For a history of this act, *vide* Van Rensselaer v. Smith, 27 Barb. 104, in which it is held that the provisions of this act are retroactive.

This case was affirmed. 19 N. Y. 100.

Act of 1846. *Abolishing Distress for Rent.*—By act of May 13, 1846, ch. 274, the 12th to the 17th sections of the IV title, 1st chapter, 2nd part, of the revised statutes were repealed relative to distress, and distress for rent was abolished.

The 3d section provides as follows: "Whenever the right of re-entry is reserved and given to a grantor or lessor in any grant or lease, in default of a sufficiency of goods and chattels whereon to destrain for the satisfaction of any rent due, such re-entry may be made at any time after default in the payment of such rent, provided fifteen days previous notice of such intention to re-enter, in writing, be given by such grantor or lessor, or his heirs or assigns, to the grantee or lessee, his heirs, executors, administrators or assigns, notwithstanding there may be a sufficiency of goods and chattels on the lands granted or demised for the satisfaction thereof. The said notice may be served personally on such grantee or lessee, or by leaving it at his dwelling house on the premises.

Provisions of the Revised Statutes of 1830.—§ 17. (Sec. 23.) The grantees of any demised land, tenements, rents or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee shall have the same remedies by entry, action or otherwise for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor had, or might have

had, if such reversion had remained in such lessor or grantor. (As modified by chap. 274 of laws of 1846.)

§ 18. (Sec. 24.) The lessees of any lands, their assigns or personal representatives shall have the same remedy by action or otherwise against the lessor, his grantees, assignees, or his or their representatives, for the breach of any covenant or agreement in such lease contained, as such lessee might have had against his immediate lessor, except covenants against incumbrances, or relating to the title or possession of the premises demised.

§ 19. (Sec. 25.) The provisions of the two last sections shall extend as well to grants or leases in fee, reserving rents, as to leases for life and for years.

Act of April 14th, 1860.—By act of this date (ch. 396), the above law of 1805, and § 3 of the revised laws of 1813, ch. 31, and also § 25 of ch. 1, title 4, part 2, of the revised statutes, as above given, are not to apply to deeds of conveyance in fee made before the 9th April, 1805, nor to such deeds "*hereafter to be made.*"

Construction of the above Acts of 1805, 1830, 1846, *and* 1860.—Various decisions have been made as to the effect of the above statutes on leases in fee. Of the most recent and important of them a summary is here given.

It is held that, notwithstanding the provisions of the above acts, excepting from their application, conveyances in fee made before 1805, an action of ejectment would lie for non-payment of rent by the assignee of the devisee of the grantor, upon a lease made prior to 1805, where the plaintiff had acquired the rights and remedies of the original lessor previous to the act of 1860. That that act could not disturb vested rights; and it was held to apply only to rights acquired under conveyances made prior to 1805 and since 1860, through transfers or assignments executed since the act of 1860.

It has been held also, that although in general a right of entry is not assignable, so as to allow an as-

signee to sue in his own name, that an assignee of the lessor, while the acts of 1805, 1813 and 1830 were in force, could, before the act of 1860 was passed, under § 111 of the code, requiring actions to be brought in the name of the party in interest, bring ejectment.

Van R. v. Snyder, 3 Ker. 299; Main v. Green, 32 Barb. 448; 33 *Ib.* 136; Main v. Davis, 32 Barb. 461.

The case of Van R. v. Hayes, 19 N. Y. 68, also holds that the assignee of the grantor of such leases in fee, whatever might have been his rights before the statute of 1805, since that statute has the same remedies which his grantor had; and could have an action of covenant for non-payment of rent.

It also holds said statute constitutional as to leases theretofore made, *i. e.*, as not impairing the validity of contracts in relation to the rights of parties existing in leases in fee at the time the statute was passed.

Also Van Rensselaer v. Ball, 19 N. Y. 100.

These two cases were decided, it is to be observed, before the statute of 1860.

The case of Van Rennsalaer v. Slingerland, 26 N. Y. 580, holds that the statute of 1846 (ch. 274, § 3), (abolishing distress for rent,) recognises the assignable quality of a condition for re-entry for non-payment of rent, reserved in a grant in fee, and gives to an assignee of the rent the same right to maintain ejectment as was conferred by ch. 98 of 1805, repealed by ch. 396 of 1860, as to grants made prior to its passage.

The case of Van Rennselaer v. Read (26 N. Y. 558) decides that the legal right of action, on a covenant for the payment of rent reserved on a conveyance in fee, passes to the assignee of the rent, at common law, independently of the act of 1805, or of the code. The principle of the decision is that a privity of estate subsists between the grantee of the rent and the grantee of the land, although there is no *reversion* in the former or his grantor.

This case also holds that the partial repeal of the statute of 1805 by that of 1860 is constitutional as to leases existing.

This case further holds that the personal representatives of the original grantor can maintain no action for rent payable after the decease of the grantor; and that a devisee or assignee of the rent can maintain no action against the personal representatives of the original covenantor for default, accruing after the death of the covenantor.

Apportionments of rents reserved in a lease in fee. Rents reserved in a lease in fee are considered apportionable

among the several tenants occupying the demised premises, and ejectment will lie against a tenant occupying a portion of the land.

Main v. Green, 32 Barb. 448.

It is held, also, that the owner by inheritance of one undivided portion of a rent charge, under a lease in fee, may bring ejectment for his proportionate part of the lands leased; and that such a rent charge though it cannot be apportioned by act of the parties, may be by force of law.

Cruger v. McLaury, 41 N. Y. 214.

Where land, therefore, is divided by act of parties, the condition still remains entire; and a breach of it as to one piece gives the grantor, &c., the right to reenter for the whole land.

Tinkham v. Erie R. R. 53 Barb. 393, or for a separate parcel; Van Renssalaer v. Jewett, 5 Den. 1.

Tenants in common, under a rent charge, however, may, on partition, apportion the rent, *if the lessor concur;* and the release of the lessor to one tenant would only extinguish rent as to the portion released.

Van Renssalaer v. Chadwick, 22 N. Y. 32.

See also as to apportionment of rent under leases in fee. Van Rensselaer v. Gallup, 5 Den. 454.

Certain taxes under leases in perpetuity.—Under a covenant to pay taxes imposed for or in respect of the premises, it has been held that lessees are not obliged to pay taxes imposed on the landlord under law of May 13, 1846.

Van Renssalaer v. Dennison, 8 Barb. 23.

Forfeiture, Reentry, and Ejectment.—It has been seen that conditions annexed to conveyances in fee stipulating for the payment of rent, with a right of reentry to the grantor or his heirs, on default, are lawful conditions.

Van Renssalaer v. Ball, 19 N. Y. 100; so also Tyler v. Heidorn, 46 Barb. 439; and cases cited *ante*, p. 138.

No one but the grantor or his heirs, however, could reenter for the breach of such a condition "subsequent," at common law. And this principle the courts hold, notwithstanding certain excepting statutes, and the provisions of the code is still a general principle of law in the State.

It is held, however, that although it is a rule of law that conditions in a deed can only be reserved for the grantor and his heirs, and therefore do not pass a right of reentry for condition broken by conveyance before or after such breach, that this principle does not extend to leases in fee reserving rents, nor to leases for life or years in the State of New York.

The modification of the common law rule is based upon the provisions of the above statutes of 1805, and its reenactment in 1830, above quoted. *Ante*, p. 145, as modified by the law of 1860. *Ib.*

Vide, Nicoll v. The N. Y. & Erie R. R., 12 Barb. 460; affirmed, 12 N. Y. (2 Kern.), 121.

As to the remedies for rent, the common law rule of demand, and the statutory remedy by ejectment, *vide*, *post*, ch. 8.

It is held that the words "yielding and rendering" in a lease import a covenant but not a *condition*, unless the landlord would otherwise be without remedy in case the rent should not be paid.

De Lancey v. Ganun, 12 Barb. 120; affirmed, 5 Seld. (9 N. Y.) 9.

The case of Main v. Feathers, 21 Barb. 646, had intimated *contra*, that the words "yielding and rendering," &c., in leases in fee implied a condition for breach of which a forfeiture and reentry could be had at common law.

The subsequent case of Van Rennsalaer v. Smith, *Ib.* v. Ball, *Ib.* v. Hays, 27 Barb. 104, holds that parties to such leases stand in the privity or relation of landlord and tenant under a rent service as an incident of socage tenure, and that the words of rendering imply a covenant to perform the condition, which runs with the land, binding assignees.

Affirmed, 19 N. Y. 100.

The statutes giving the remedy of ejectment in place of demand and reentry are held not limited to rents service, but are applicable to all cases where there was a

right to reenter at common law, including an annual payment or rent reserved upon a conveyance or lease in fee, as well as to leases for life or years.

Van Renssalaer v. Ball, 19 N. Y. 100; Hosford v. Ballard, 39 N. Y. 147; *vide* ch. Ejectment.

The case of Van Rensselaer v. Baninger, 39 N. Y. holds that the assignee of the grantor can bring ejectment for condition broken, and confirms other cases, *ante*.

The cases of Van Rensselaer v. Gallup, 5 Denio, 454, and Hosford v. Ballard, 39 N. Y. 147, holds that no prior demand is necessary prior to ejectment for non-payment of rent, on a grant in fee, that ejectment stands in place of such demand.

CHAPTER VI.

FREEHOLD ESTATES NOT OF INHERITANCE.

TITLE I. ESTATES FOR LIFE.

An estate for life is a freehold estate, but not of inheritance.

Estates for Life are held for the term of the grantee's life, or during that of a third person; they were created by *livery of seizin*, and formerly held by the feudal tenure of fealty and service.

When the estate is held during the life of another person, it is termed an estate *pur autre vie*, and esteemed a lower species of freehold than an estate for the grantee's life.

By the revised statutes of 1830, an estate, during the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee, but after his death it shall be deemed a *chattel real.*

Vol. III, p. 10, § 6.

It is then excluded from the statutes of descents (R. S. Vol. III, p. 44, § 28), and is an asset for administration.

Ib. p. 169.

It has been shown above, that, by the common law, the granting an estate without words of inheritance or other limitation, created an estate for the *life* of the grantee only, but that the rule is altered by the revised

statutes of 1830; and, since those statutes, the conveyance or devise of land to a man *generally* passes to him all the estate held by the grantor.

Vide supra, p. 119, and *infra*, ch. xv.

There may also be *conditional* estates for life, determining upon a future contingency, but otherwise enduring until the life for which they were created expires.

As to provisos restraining alienation annexed to a life estate, *vide ante*, p. 117. The case of Rockford v. Hackman, 10 Eng. L. & Eq. 64, holds however, with the other English cases of Brandon v. Robinson, 18 Ves. 429, and Graves v. Dolphin, 1 Simm. 67, that provisos restraining alienation on a life estate are void, as much as if annexed to an estate in fee.

Presumption of Decease of Life Tenant.—By the revised statutes of 1830 a person upon whose life an estate may depend shall be presumed dead, if he remain beyond sea, or shall absent himself in this State or elsewhere for seven years together, unless proof to the contrary be given. What is a reasonable search and inquiry is a mixed question of law and fact, to be determined upon the circumstances of each case. Clark v. Cummings, 5 Barb. 339. *Vide* also Gerry v. Post, 13 How. P. 120; Eagle's Case, 3 Abb. 224; McCartee v. Camel, 1 B. Ch. 462.

Forfeiture of Life Estate.—By Rev. Stat. Vol. III, p. 30, § 165, a conveyance made by a tenant for life or years of a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee all the title, estate or interest which such tenant could lawfully convey. This avoided the effect of the old common law rule of forfeiture by a wrongful alienation, which was abrogated, in fact, before the revised statutes.

Grant v. Townsend, 2 Hill, 554; affirmed, 2 Den. 336.

The deed, by the revised statutes, operates as an estoppel, however, against the grantor or his heirs.

As to successive estates for life, and the limitations thereof, and of the power of alienation, *vide* titles "Remainder" and "Executory Devise," ch. ix, *post*.

Title II. Incidents of the Estate.

Estovers.—Tenants for life are entitled to take reasonable *estovers*, *i. e.*, wood for fuel, fences and agricultural erections and purposes, but not so as to commit *waste;* nor for purposes of sale nor exchange. Timber also may

be cut for necessary repairs, and to clear portions of the land for cultivation.

Co. Litt. 73, a. b. 4 Kent, 73; Miles v. Miles, 32 N. Hamp. 147; White v. Cutter, 7 Pick. 248; Poddleford v. Same, 7 Pick. 152; Dalton v. Dalton, 7 Ired. Eq. 197; Sarles v. Sarles, 3 Sand. Ch. 601; Harder v. Harder, 26 Barb. 409; and see *infra*, "Waste."

Emblements.—The representatives of tenants for life are also entitled to the profits of crops, in case the estate determines by the tenant's decease before the produce can be gathered. This applies to crops sown, and not to the natural products of the soil, such as grass or fruit, not resulting from special cultivation. Under tenants are also entitled to their emblements, when the life tenant dies as above.

Evans v. Roberts, 5 Barn. & Cress. 829; Evans v. Inglehart, 6 Gill. & Johns. 171; Kent IV, p. 73; Bevans v. Briscoe, 4 Harr. & Johns. 139; The Bank of Lansingburgh v. Crary, 1 Barb. 542.

Rent due on termination of life estate.

Vide post, Leases, ch. 8.

It is held, that as between tenant for life and remainder men, rent accruing upon leases executed by the testator of the parties, and becoming due after the termination of the life estate, cannot be apportioned, and the devisees in remainder of the land out of which the rent issued may maintain a joint action against the executor of the life tenant for rent collected by him, which became due after the termination of the life estate.

Marshall v. Moseley, 21 N. Y. 280.

Charges.—Tenants in life are bound to keep down charges, and preserve the estate from loss and forfeiture by paying interest on incumbrances, taxes, &c.

And this the life tenant is obliged to do, even though it should exhaust rents and profits of the estate, unless the intention of the testator or other party creating the estate be otherwise manifested.

4 Kent, 75; Stillwell v. Doughty, 2 Brad. 311; Moseley v. Marshall, 22 N. Y. 200.

It is a well-established principle, also, that where there is an estate for life and a remainder in fee, and there exists an incumbrance binding the whole estate in the land, and no special equities between the remainderman and the tenant for life can be shown, the latter is bound to pay the interest accruing during the continuance of his estate, and the owner of the future estate is to pay off the principal of the lien.

House v. House, 10 Paige, 158; 4 Kent's 74; Moseley v. Marshall, 22 N. Y. 200.

See also as to when the personalty and when the realty is bound under a will, &c., ch. xv.

Waste.—Tenants for life are bound not to commit waste or destruction of the estate, voluntary or permissive; and are bound to take proper care, so as to prevent deterioration from neglect or decay. Otherwise they may have to respond in damages, even for waste committed by a stranger, and may be stopped by injunction.

By the English rule they could not destroy timber growing on the lands. In this country, it is held that a reasonable amount of timber land may be cleared for cultivation, and may be cut for use, if the estate be not injured and enough is left for permanent use. Timber may be cut, also, for use in mining; and for staves and shingles if the lands were used for those purposes.

Jackson v. Brownson, 7 Johns. 227; Parkins v. Coxe, 2 Hayw. 339; Hickman v. Irvine, 3 Dana, 123; Owen v. Hyde, 6 Yerger, 334; Veel v. Neel, 19 Penn. St. 323; Ballentyne v. Poyner, 2 Hawy. 110; Loomis v. Wolbur, 5 Mason, 13; Harder v. Harder, 26 Barb. 409.

If timber is improperly cut, it becomes the personal property of the owner of the inheritance, who may maintain trover for it against any one in possession. See N. Y. Rev. Stat. about Waste, Vol. I, 780, § 8; Mooers v. Wait, 3 Wend. 104; Rodgers v. Rogers, 11 Barb. 595.

An injunction may be granted against any one who colludes with the tenant to commit to waste. Rodgers v. Rodgers, 11 Barb. 595.

Damages for Waste.—Damages are to be based not merely on the value of what may be removed, but the solid and permanent injury to the inheritance caused by the removal. Harder v. Harder, 26 Barb. 409; and see *infra*.

Provisions of the Statutes.—The revised statutes (1st ed. p. 324) make life tenants and tenants for years, and by curtesy and dower, and also guardians, liable for waste, and the assignees of such tenants; such tenants

are liable, if they are in possession, whether they have let and granted the estate or not. Suits, also, for waste may be brought by joint tenants or tenants in common against each other; and heirs may bring the action for waste done in the time of the ancestor as well as in their own time.

By the revised statutes, also, a person seized of an estate in remainder or reversion, may maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years. (Taken from R. L. of 1813, p. 527). In case of judgment in favor of any other than a joint tenant or tenant in common, judgment shall be for recovery of the place wasted, and treble damages as found. If in favor of the said classes, they may have judgment either for treble damages or to have partition.

As to proceedings for waste, *vide* the Rev. Stat. 1st ed. p. 334; see also as to waste and proceedings for damages. McGregor v. Brown, 10 N. Y. 114; Van Brunt v. Schenck, 11 J. R. 429; Kidd v. Denniso, 6 Barb. 9; Vanduzen v. Young, 29 Barb. 15; reversed, 29 N. Y. 9; Carris v. Ingalls, 12 Wend. 70; Robinson v. Wheeler, 25 N. Y. 252; Livingston v. Mott, 2 *Ib.* 605.

By the Code, §§ 450, 451, 452, it is provided as follows: "The action of waste is abolished; but any proceedings heretofore commenced, or judgment rendered, or right acquired, shall not be affected thereby. Wrongs heretofore remediable by action of waste, are subjects of action as other wrongs, in which action there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises."

"The provisions of the revised statutes relating to the action of waste shall apply to an action of waste, brought under this act, without regard to the form of the action, so far as the same can be so applied."

Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate, or unexpired term, or to have been done in malice."

As to proceedings in actions since the Code. *Vide* 26 Barb. 409; 25 N. Y. 252, *supra*; and Harder v. Harder, 26 Barb. 409.

Application for Production of Life Tenants.—By the revised statutes (title 8, pt. III, ch. v.) application may be made, by petition to the Court of Chancery (Supreme Court), by any person entitled to claim any lands or tenements after the death of any other person having any prior estate therein, once a year, for an order that the person upon whose life such prior estate depends, be produced and shown as therein provided, by the guardian, husband, trustee, or party who may have the custody of such other person, or of his estate, or who may be entitled to such custody. Full details of the proceedings are given.

If any person presumed to be dead, shall be in any other action proved to have been living at the time of

the commencement of such action, his estate shall be restored to him, and he or his executors shall recover the full profits of the estate during the time he was deprived thereof, and while he was living, against those who occupied the same, or their executors or administrators.

Ib. 1 R. L. 104; *vide* Code, § 471, continuing proceedings under the revised statutes in force.

Liability of Guardians, &c., holding over after their Estates have ceased.—By the revised statutes of 1830, guardians or trustees for infants, and husbands seized in right of their wives only, and any other persons having estates determinable upon life, who, after the determination of of the particular estate, without the express consent of the party immediately entitled after such determination, shall hold over and continue in possession of lands, &c., shall be adjudged trespassers, and shall, and their heirs, executors, and administrators, be liable for the full value of the profits received during such wrongful possession.

1 R. L. 167, § 71; see Livingston v. Tanner, 14 N. Y. 64; Torrey v. Torrey, *Ib.* 430.

Dower and Curtesy.—These two species of estates for life are reviewed in the ensuing chapter.

CHAPTER VII.

DOWER AND CURTESY.

I. THE ESTATE OF DOWER.

Dower is a life estate created by operation of law, in favor of the wife on the decease of her husband, by which she is endowed for life with a third of the lands of which he was seized, of an estate of inheritance, at any time during coverture. The title to dower is inchoate on marriage and seizin, and then attaches to the land, but is not consummate until decease of the husband.

Denton v. Nanny, 8 Barb. 618; Sutliff v. Forgey, 1 Cow. 89, 5 *Ib.* 713.

By our revised statutes, this common law right is confirmed as follows:

"A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage."

Rev. Stat. Vol. III, p. 31 (substantially the same provision as in 1 R. L. of 1813, p. 56, § 1).

The *freehold* and the inheritance must be in the husband during the marriage, *simul et semel.* Beardslee v. Beardslee, 5 Barb. 324; 4 Kent, 39.

If the marriage is void by reason of a former wife living, and marriage of the husband when the divorce was obtained against him *a vinculo*, the widow is not entitled to dower. Cropsey v. Ogden, 11 N. Y. 228.

In general, however, it attaches in favor of the wife *de facto* where the marriage is voidable merely.

Joint Seizin.—No title to dower attaches on a *joint* seizin by the husband and others, the possibility of the estate being defeated by survivorship defeats dower.

Partnership Lands.—As to dower in such lands, *vide post*, ch. xi, as to joint interests in land.

Nature of the Seizin requisite.—A seizin *in law* of the husband is sufficient without *actual* seizin; but the seizin must be in fact or in law. If the husband died before entry, the wife is entitled to dower; unless in case of non-entry for forfeiture, or where a tenant retains his seizin after the determination of a particular freehold estate.

Therefore there can be no dower in a reversion in fee, or a vested remainder expectant, on an estate for life, or the like estate. Durando v. Durando, 23 N. Y. 231; Green v. Putnam, 1 Barb. 500. Dower is defeated by entry under a prior title and disseizin of the husband. Beardslee v. Beardslee, 5 Barb. 324. Nor can there be dower in a life estate *pur autre vie*. Nor in an estate held adversely, after release to the legal owner. Poor v. Horton, 15 Barb. 485.

A transitory seizin of the husband for an instant, as a *conduit*, is insufficient to give dower, though if it vest *beneficially* in him for a moment, the right of dower attaches.

Cunningham v. Knight, 1 Barb. 399.

Wife of Mortgagee.—Nor is the wife of a mortgagee dowable of a mortgaged estate, unless he acquired an absolute estate during coverture.

3 R. S. p. 31, § 7; Cooper v. Whitney, 3 Hill, 95; Gomez v. Tradesmen's Bank, 4 Sand. 102; Jackson v. Williams, 4 Johns. 41.

If there has been an entry by the mortgagee after forfeiture, under a mortgage made before coverture, or the equity of redemption has been released to the mortgagee or those claiming under him by the husband, the widow of the mortgagor is not entitled to recover dower at law, but might have relief in equity on paying a due proportion of the debt. Van Dyne v. Thayer, 19 Wend. 162; Swaine v. Perine, 5 Johns. Ch. 482.

If the mortgagee, under a mortgage made before coverture, enters, under a foreclosure, or after forfeiture of the estate, and by virtue of his rights as mortgagee, the right of dower of the mortgagor's wife must yield to the mortgagee's superior title; for, as against the title under the mortgage, the widow has no right of dower, and the equity of redemption is entirely subordinate to that title. Smith v. Gardner, 42 Barb. 356.

The mortgage in the above case was given for purchase-money, and the wife not made a party to the foreclosure. It was held that the remedy, if any, was by action to redeem, and not ejectment for dower. See, also, Jackson v. Bruyn, 6 Cow. 316.

If the wife redeem, she is bound to contribute ratably with the heir towards the redemption. If the heir redeem, she contributes by paying

during life to the heir one-third of the interest on the amount of the mortgage-debt, paid by him, or else a gross sum, amounting to the value of such annuity. Swaine v. Perrine, 5 Johns. Ch. 482; Bell v. Mayor, 10 Paige, 49; House v. House, *Id.* 159.

Equity of Redemption.—As in this State the mortgagor, until re-entry or foreclosure, is regarded to be legally, as well as equitably, seized of mortgaged lands, the wife is dowable of an equity of redemption therein, existing at the decease of her husband. Where she has duly executed a mortgage jointly with him, she is only dowable of such equity.

She is endowed of such equity as well when a mortgage was executed before marriage by her husband *sole*, as after, when executed jointly, as against every person except the mortgagee and those claiming under him. The equity of redemption may be defeated by foreclosure suit, to which she must be a party. This applies in this State as well to mortgages given as part consideration-money, in which she does not join, as to others.

Vide infra, title Foreclosure, ch. 28, and Russel v. Austin, 1 Paige, 192; Van Duyne v. Thayer, 14 Wend. 233; Bell v. The Mayor, 10 Paige, 49; Mills v. Voorhis, 20 N. Y. 412; *Ib.* 23 Barb. 125; 3 R. S. 1830, p. 31, §§ 2, 5, 6; Denton v. Nanny, 8 Barb. 618; Wheeler v. Morris, 2 Bos. 524; compare Cunningham v. Knight, 1 Barb. 399; Runyan v. Stewart, 12 Barb. 537.

The wife's right, both inchoate and vested, in the husband's land follows the surplus moneys; and will be protected against creditors, and her one-third will be directed to be invested for her.

Ib; and Vartie v. Underwood, 18 Barb. 564; Hawley v. Bradford, 9 Paige, 200; 1 R. S. 1st ed. p. 741.

Where the wife unites with her husband in conveying an estate in which she is entitled to dower, the conveyance is held to be an extinguishment of her right, not only with respect to the grantee and his successors in interest, but also as to third parties.

Accordingly, where the husband gave a purchase-money mortgage, and he and his wife conveyed, subsequently, the land to another person, and afterwards the mortgage was foreclosed, it was determined that as between herself and strangers to the conveyance, the wife was not, after her husband's decease, entitled to dower in the surplus moneys. Elmendorf v. Lockwood, 4 Lans. 393.

A mortgage given by husband and wife to secure the purchase-money of mortgaged premises, cannot, after having been satisfied and discharged of record, be set up by the assignee of the husband as a bar to his widow's right of dower. Runyan v. Steward, 12 Barb. 537.

To what Dower Attaches.—A woman is dowable in all hereditaments appertaining to the realty, as well as to lands of which her husband was seized; this would include rents, commons, mines, if opened, and other incorporeals, partaking of the realty

Stoughton v. Leigh, 1 Taunt. 402; Coates v. Cheever, 1 Cow. 460; 4 Kent. 41.

Dower would not apply to such a right as the using of water for hydraulic purposes.

Kingman v. Sparrow, 12 Barb. 201.

Nor to shares in a land company, of which the husband had disposed in his life-time.

McDougal v. Hepburn, 5 Fla. 568.

Beneficial Estates.—Strictly, the wife of a *cestui qui trust* was not dowable in an estate in which her husband had only the equitable and not the legal estate during coverture, as of a use or trust; and this is still the English rule, except where modified by statute.

By various provisions of statutes, in this State, the wife has her dower in certain inheritable interests of the husband, in lands whereof he died seized, of the equitable, but not of the legal, estate, as will be seen under appropriate heads.

A wife is not endowable of lands held by a party in trust to sell and dispose of the same, and then to pay debts and legacies, the residue to belong to the trustee.

This is on the principle that the husband is seized of no *estate* in the land; but has a mere power in trust, inasmuch as he is not entitled to the rents and profits as well as to the possession. Germond v. Jones, 2 Hill, 569.

Dower in Lands Purchased under Execution.—By the revised statutes (Vol. III, p. 655, § 80), the wife also is to have dower in lands purchased by the husband at sale on execution, when the husband dies before the expiration of the time for redemption, and the lands are subsequently conveyed to the executors or administrators of the deceased husband, in trust for the heirs.

And see *post*, Sales under execution.

Dower in Lands Contracted to be Sold.—By the revised

statutes, a wife also has dower in lands held by the husband at the time of his death, by contract of purchase. This was also the general rule in equity.

3 R. S. p. 199; also, p. 200, § 84.

The chancellor, in Hawley v. James, 5 Paige, 318, 453, and 16 Wend. holds that a widow is dowable only of lands held by the husband by contract at the time of his death; and if aliened in his life-time, he holds her not entitled to dower. In Hicks v. Stebbins, the right is held to apply to lands which the deceased held by contract as purchaser, without regard to the time of the death of the husband, or whether he had or had not parted with the contract before his decease. The court, however, reluctantly refuses to disturb the chancellor's decision.

3 Lans. 39.

Trust Estates.—There is no dower in them. Cooper v. Whitney, 3 Hill, 95.

Equitable Conversion.—In equity, lands agreed to be turned into money, or money into lands, are considered as that species of property into which they were agreed to be converted; and the right of dower is regulated in equity by the nature of the property in the equity view of it.

Green v. Green, 1 Ham. Ohio, 249; Coster v. Clarke, 3 Edw. Ch. 437; Kent, p. 50; Church v. Church, 3 Sand. Ch. 434.

Grass and Fruits.—A widow has no dower in grass and fruits, and other spontaneous productions of the soil growing on her husband's lands at the time of his decease.

Kain v. Fisher, 2 Seld. 597, *vide*, *infra*, "Crops," p. 172.

Lands Exchanged.—Our statutes prescribe that if a husband, seized of an estate of inheritance in lands, exchange them for other lands, his widow shall not have dower of both, but shall make her election; and if such election be not evinced by the commencement of proceedings to recover her dower of the lands given in exchange within one year after the death of her husband, she shall be deemed to have elected to take her dower of the lands received in exchange.

§ 3, p. 31, Vol. III, Rev. Stat.

This means a mutual grant of equal interests. If the husband take back merely an equitable interest, and gives a fee, the wife's dower is not removed. Wilcox v. Randall, 7 Barb. 633.

Statutes of Descent.—By R. S., Vol. III. p. 43, § 21, it is provided that the estate of a widow as tenant in dower shall not be affected by any of the provisions of ch. ii, title 5, part 2d, of R. S., relative to the descent of real property.

Lands taken by the Public.—A widow has no dower where the land is taken for public purposes during the coverture, as by a municipal corporation, according to law.

Moore v. The Mayor, 8 N. Y. 110, affirming, 4 Sand. 456; Melizst's Appeal, 17 Penn St. 449; Weaver v. Gregg, 6 Ohio St. 547.

Title II.—Dower, how Defeated or Barred.

As a general rule, no act, deed or conveyance of the husband or judgment or decree confessed by or recovered against him or his heirs, can prejudice the wife's right to her dower—nor can deeds fraudulently made by him to defeat dower, have that effect. Neither can courts, unless under express statutory provision, compel a widow to accept a gross sum in lieu of dower.

Crain v. Cavana, 36 Barb. 410, overruling, Jackson v. Edwards, 22 Wend. 498.

Jointure.—The wife may be barred, with her assent, by a pecuniary provision or by having a *jointure* settled upon her in lieu and satisfaction of dower. If the jointure be made *before marriage*, with her assent, it bars the dower, (even if she be an infant.) (McCartee v. Keller, 2 Paige, 511, affirmed, 8 Wend. 267, but if made after marriage or before marriage, without her consent, the wife, on the death of her husband, has her *election* to accept of the jointure, &c., or her dower. Her assent as aforesaid is evidenced by her being a party to the conveyance, if of

full age, and if an infant, by her joining with her father or guardian therein.

3 R. S. p. 32.

The legal or equitable provisions to bar the dower estate must be a fair equivalent therefor, and be a reasonable and competent livelihood, to make them absolutely binding in the first instance. 8 Wend 267; 2 Paige, 511, *supra*. Unless they are carried out, dower will not be barred. Ellicott v. Mosier, 11 Barb. 31; 7 N.Y. 201; Sheldon v. Bliss, 4 Seld. 31; nor unless they are to take effect immediately on decease of the husband. Crain v. Cavana, 36 Barb. 410. The above provisions are taken from the R. L., 1813.

Provision by Will, § 13, *Ib.*—If provision be made to a woman by will, in lieu of dower, she shall also make her election. She shall be considered to have chosen the jointure or provision, unless within *one* year from her husband's death she commences proceedings for dower or enters on the lands to be assigned to her for dower.

3 R. S. p. 32, § 14; Palmer v. Voorhis, 35 Barb. 479.

Where a legacy is not expressed in lieu of dower, it will not be so intended, unless the intention is manifest from the will. 2 Johns. Ch. 448; 7 Cow. 287; 4 Barb. 20; 9 N. Y. 502; 13 Barb. 106; Savage v. Jackson, 10 Paige, 266; Savage v. Burnham, 17 N. Y. 562; Dodge v. Dodge, 31 Barb. 413; Palmer v. Vorhis, 35 Barb. 479; Bull v. Church, 5 Hill, 206; affirmed, 2 Den. 430.

A provision by will in lieu of dower, if accepted, bars the wife's dower in lands which the testator had conveyed before the date of the will. 35 Barb. 479, *supra;* Steele v. Fisher, 1 Edw. 435. She is barred after the year, whether she knew of the provisions of the will or not. 35 Barb. 479, *supra*.

When Dower Defeated.—As a general principle, the wife's dower is liable to be defeated by every subsisting claim or incumbrance in law or in equity existing before the inception of the title, and which would have defeated the husband's seizin.

An agreement by the husband to convey, before dower attaches, will, if enforced in equity, extinquish the claim to dower; also a judgment recovered against the husband before marriage, and a sale under it, overreaches the wife's right of dower. 3 Paige, 117.

Defeasance.—Dower is also defeated by the disseizin of the husband, by paramount title or re-entry, on condition broken, and by the operation of collateral limitations determining the estate.

Acts of the Husband.—By 3 R. S., p. 33, § 16, no act, deed or conveyance executed or performed by the husband, without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estates of married woman, and no judgment or decree confessed by or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto.

Denton v. Nanny, 8 Barb. 618. The statute of Apr. 6, 1792 (2 Greenl. 452), made provision that a wife's dower would be barred if she were a non-resident of the State, and if she joined in a conveyance by her husband. Her deed concludes her as an estoppel, not as a grant. Maloney v. Horan, 53 Barb. 29. The legal effect of a wife's uniting with her husband in a conveyance of his lands is to release her dower. Before admeasurement, she has no interest or estate in the lands, and her deed operates not as a grant but as an estoppel.

Dower is not removed if the wife is an infant at the time of the acknowledgment. Cunningham v. Knight, 1 Barb. 399; Sanford v. McLean, 3 Paige, 117. Nor is her dower barred by a deed of separation. Carson v. Murray, 3 Paige, 433. It is barred if she join in the deed, although it be subsequently set aside as a fraud on creditors. Manhattan Co. v. Evertson, 6 Paige, 467; Maloney v. Horan, 53 Barb. 29. *Vide infra*, "Release." See also *ante*, pp. 76 and 77.

Adultery of Wife.—By the laws of 1787, Sess. 10, c. 4, § 7, the wife was barred of dower who eloped with an adulterer, unless subsequently reconciled to her husband.

By the revised statutes of 1830, in case of divorce *a vinculo* for the misconduct of the wife, she shall not be endowed. These provisions superseded the above.

Vol. III, p. 237, § 61; p. 32, § 8.

As to a case arising under adultery committed before 1830, *vide* Reynolds v. Reynolds, 24 Wend. 193.

Jointure, &c., when Forfeited.—Every jointure, devise, and every pecuniary provision in lieu of dower shall be forfeited by the woman for whose benefit it shall be made, in the same cases in which she would forfeit her dower; and upon such forfeiture, any estate so con-

veyed for jointure, and every pecuniary provision so made, shall immediately vest in the person or his legal representatives, in whom they would have vested on the determination of her interest therein, by the death of such woman.

Vol. III, p. 32, § 15.

Divorce by the Wife.—It has been questioned whether a woman who has obtained a decree for a divorce *a vinculo matrimonii*, for the adultery of *her husband* was entitled after his death to dower in his estate. In Wait v. Wait, 4 Barb. 192, it was held that she was not. This case, however, was reversed, and the contrary rule established by the Court of Appeals.

Wait v. Wait, 4 Com. 95. See also, Forest v. Forest, 3 Abb. 144.

Provisions under Law of 1860.—Under law of March 20, 1860, ch. 90, p. 159, on the decease of husband or wife, leaving no minor child, the survivor took a life estate of one-third of the estate of which the other died seized. If he or she died intestate, leaving minor child or children, the survivor took the income of the whole real estate during the minority of the youngest child, and of one-third for life. *These provisions were repealed* by law 1862, ch. 172, but affected rights vested under them.

Release.—The wife may release dower by joining in a conveyance to a third person. Carson v. Murray, 3 Paige, 483. An agreement during coverture or between husband or his trustee and the wife to relinquish her dower, is invalid.

2 Sandf. 711. Or a release by her to him. Crain v. Cavana, 36 Barb. 410; 3 Paige, 483, *supra*. See also cases, *ante*, p. 74.

Neither do the laws of 1848 and 1849, for the protection of married women, enable a wife to release her dower directly to her husband. Graham v. Van Wyck, 14 Barb. 531. Nor agree with him to do so. Crain v. Cavana, 36 Barb. 410. If she release to a purchaser for value she shall be deemed to release in every character which enabled her to give effect to her deed. Hitchcock v. Dundas, 12 How. 256.

The release of dower to lessees of the husband is not an abandonment of dower as between the widow and the husband's heirs. Williams v. Cox, 3 Edw. 605.

The court cannot compel a husband who has married a woman having a dower right, nor the female either, to join in a deed releasing it. *In re* Lane, 1 Ed. ch. 349. It has been held, as a principle regulating the estate, that a release of dower is held to operate *only* as a *release*, and that it does not operate as the *transfer* of an independent estate; that therefore if the principal instrument (a deed or mortgage, as the case may be) accompanying it is cancelled, or never takes effect, or ceases to operate, the release of dower falls with it, and the right of dower revives. Halstead v. Eldridge, 2 Halst. 392; Douglas v. McCoy, 5 Ohio R. 527; Powell v. Morrison, &c. 3 Mason, 347; Hall v. Savage, 4 *Id.* 273; Barker v. Parker, 17 Mass. 56; Summers v. Babb, 13 Ill. 483; Stinson v. Summers, 9 Mass. 143; Kitzmiller v. Rensselaer, 10 Ohio St. 63; Taylor v. Fowler, 18 Ohio, 567; Robinson v. Bates, 3 Metc. 40; Woodworth v. Paige, 5 Ohio St. 70; Miller v. Wilson, 15 Ohio St. 108. The case of Maloney v. Horan, 53 Barb. 29, does not appear to be in accord with these cases, although that case was decided mostly on the ground of estoppel. As to a release during coverture of part of an estate held in trust, *vide* Martin v. Smith, 46 N. Y. 571.

Estoppel.—A woman may be estopped by her own acts from setting up dower. As, when an innocent grantee has taken a deed under a statement from a widow that her dower had been extinguished.

Maloney v. Horan, 53 Barb. 29; Lawrence v. Brown, 5 N. Y. 394; Wood v. Seely, 32 N. Y. 105; Jewett v. Miller, 10 N. Y. 402.

Assignment in Bar.—Where a widow has accepted an assignment of dower in satisfaction thereof, it may be pleaded in bar of any further claim of dower, by the heir of the husband, or any grantee of the heir or the husband only.

3 R. S. p. 33, § 23.

Partition.—Where there has been actual voluntary partition among tenants in common, the dower rights of each wife attach to the share in severalty of her husband.

Wilkinson v. Parish, 3 Edw. 653; Jackson v. Edward, 7 Paige, 386; 22 Wend. 498.

As to provisions relative to dower, in partition suits, *vide* "*Partition*," ch. xxx, *post.*

And a sale in partition will extinguish the wife's right of dower, if she is made a party. 7 Paige, 386; 22 Wend. 498, *supra.*

Limitation.—It is also provided, that "a widow shall demand her dower within twenty years after the death of her husband; but if at the time of such death she be under the age of twenty-one years, or insane, or imprisoned on a criminal charge, or conviction, the time during which such disability continues shall not form any part of the said term of twenty years.

3 R. S., p. 33. This section would apply to cases where the husband died before the Rev. Stat. of 1830. Brewster v. Brewster, 32 Barb. 428; *contra*, Stewart v. Smith, 14 Abb. 75; Ward v. Kilts, 12 Wend. 137; Williamson v. Field, 2 Sand. Ch. 569.

III. Assignment and Admeasurement of Dower.

The revised statutes prescribe that after assignment by the satisfaction of the widow's claim of dower to all the lands of her husband, and her acceptance, it may be pleaded in bar of any further claim of dower, even by the grantee of the husband.

3 R. S. p. 33.

Proceedings to Admeasure Dower.—The statutes of this State have abolished the old writ of dower, and substituted the action of ejectment, and the statutory proceedings.

3 Rev. Stat. 592, 629.

The assignment also may be made *in pais*, by parol, by the party who has the freehold.

Proceedings for the admeasurement of dower are provided in 3 Rev. Stat. p. 790.* The Supreme Court have a general jurisdiction of these proceedings, and also the "County Courts;" also the Superior Court and Court of Common Pleas of New York city, for land situated within their counties (code, §§ 30 and 33); also the surrogate of the county.

* These proceedings for the admeasurement of dower were substantially enacted by law of Feb. 20, 1806 (1 Rev. Laws, p. 60), giving the Supreme Court, and the Surrogate's and Common Pleas Courts of the county, jurisdiction. The details of them are not appropriate to this treatise. They were amended by laws of 1869, ch. 433.

The dower, it is provided, shall be admeasured, if not assigned within forty days after decease of the husband, on application of the widow, and notice to the heirs and other owners of the land; or said persons may make the application, on notice to the widow. The dower is to be admeasured by three commissioners appointed by the court, who shall admeasure and lay off one-third of the lands mentioned in the order of their appointment, and shall describe the same by monuments and bounds, if practicable, and for the interest of all parties. If not, then one-third of the rental value is to be set off, and shall be a charge upon the lands.

As amended by law of 1869, ch. 433. The adverse parties must have reasonable notice, in writing, of the proceedings, or they will be set aside. 15 Johns. 532. Tenants for years are not entitled to notice. Ward v. Kilts, 12 Wend. 137. See also *In re* Sipperly, 44 Barb. 371.

Effect of Admeasurement.—The admeasurement of dower, being made and confirmed, shall, at the expiration of thirty days from the date of such confirmation, unless appealed from, be binding and conclusive, as to the location and extent of the said widow's right of dower, on the parties who applied for the same, and on all parties to whom notice shall have been given as directed. But no person shall be precluded thereby from controverting the right and title of such widow to the dower so admeasured.

If no appeal is taken within thirty days from the confirmation, the widow may thereupon bring ejectment (in which her right to such dower may be controverted,) after thirty days, and not before. Appeals are taken to the Supreme Court.

Vide 2 R. S. 1 ed. pp. 513, 634. 10 Wend. 414.

By law of 1869, ch. 433, the appeal does not stop her recovery of possession, if she give security as ordered by the court.

The right to dower cannot be aliened, and an application for admeasurement by an assignee thereof will make any order on the application void. 20 Johns. 412; 13 Wend. 524.

The proceedings under the revised statutes are expressly continued in force by the code, § 471.

Dower may be also admeasured under the statute of "Arbitrations." *Vide* 3 Rev. Stat. p. 855.

It is to be remarked that the admeasurement is binding and conclusive

only as to the *location* and *extent* of the dower right, and does not preclude the controverting the *title* to dower at law. After admeasurement, to get possession, the widow must bring ejectment, when the validity of her claim to any dower, the title of her husband, his seizin, and her marriage, may be controverted and tried. *Vide* 3 R. S. p. 592; 4 Wend. 630; 4 Bradf. 15; Wood v. Seely, 32 N. Y. 105.

It is not until the dower has been fully assigned that the widow acquires a vested estate for life, which will enable her to sustain her ejectment, or to subject it to sale under execution, or to assign it, although it may be released. Moore v. Mayor, 4 Seld. 110; Greene v. Putnam, 1 Barb. S. C. R. 500; 3 *Id.* 319; 2 Selden, 597; 10 Wend. 421.

But she can have ejectment before assignment against tenants having interests less than a freehold. Ellicott v. Mosier, 11 Barb. 574; affirmed, 7 N. Y. 201.

Until assignment the wife's interest is a chose in action or claim, which is extinguished by a sale under a surrogate's order. But where it has been actually assigned by the degree of a competent court, it cannot be sold under said proceedings. Lawrence v. Miller, 2 Coms. R. 245; Stewart v. McMartin, 5 Barb. S. C. R. 438.

After assignment, a widow's seizin relates back to the time of her marriage, or when the husband became seized, and any order for the sale of the lands by the surrogate, for debts due, is void as to her life estate. 1 Seld. 394; iv Kent. 69. And no livery or writing was necessary to an assignment *in pais*. 3 Sand. 385.

Taxes and Assessments should be paid by the heirs or devisees before the dowered lands are admeasured.

Harrison v. Peet, 56 Barb. 251.

An assessment must be borne by the heirs, the widow being required to bear a third of the interest of the capital of the assessment on the lots assigned to her, at seven per cent, to commence from the confirmation; or, if not confirmed until after the husband's death, then from such death. Williams v. Cox, 3 Edw. 605; and see *post*, p. 173.

Estimation of Lands and Improvements.—In case of alienation by the husband, the widow is to have her dower assigned according to the value of the lands at the time of alienation.

Dorchester v. Coventry, 11 Johns. 510; Shaw v. Johnson, 13 Johns. 179; Walker v. Schuyler, 10 Wend. 480; Marble v. Lewis, 53 Barb. 432.

By the revised statutes, no damages are to be estimated for any permanent improvements made after decease of the husband, as against the heirs or other owners.

3 R. S. p. 33.

But the improvements may be assigned as a part of the dower.

Brown v. Brown, 4 Robt. 688; Parks v. Hardey, 4 Bradf. 15.

In making admeasurement under the revised statutes permanent improvements, made by any heir, guardian of minors, or other owners, since the death of the husband, or since the alienation by him are to be considered; and if practicable, the court shall award such improvements within that part of the lands not allotted to such widow; and if not practicable so to award the same, they shall make a deduction from the lands allotted to such widow, proportionate to the benefit she will derive from such part of such improvements as will be included in the portion assigned to her.

Judge Kent, from a review of the American cases, claims the rule to be that the improved value of the land from which the widow is to be excluded in the assignment of her dower, as against a purchaser from her husband, is that which has arisen from the actual labor and money of the owner, and not from that which has arisen from extrinsic and general causes.

By laws of 1869, ch. 433, the court may order the value of one-third of the land to be paid the widow.

Assignment in certain Cases.—If the property be not divisible, or arises from rent, common, rights of return of yield, mines, &c., then the assignment may be made in a special manner, as of a third of the profits or the use for every third month.

So, also, rooms, and the use of halls and passages may be assigned.

Parks v. Hardey, 4 Bradf. 15.

If the widow is evicted by paramount title of her land, she may recover a third part in value of the two remaining third parts of the lands whereof she was dowable. Her remedy on eviction is by a new assignment of dower. If the assignment was by the alienee of the husband, she has no recourse as against him. IV Kent, 69; Perkins, § 419; St. Clair v. Williams, 7 Ohio, 110.

Ejectment; and Admeasurement thereon.—Provision is made by the revised statutes for the admeasurement of the lands after judgment for the wife in ejectment, and the obtaining possession of the lands by a writ of possession.

Vide 2 R. S. 1 ed. p. 321; and Ellicott v. Mosier, 7 N. Y. 205, as to the parties against whom the action is to be brought.

By law of 1869, ch. 433, regulating appeals from judgments awarding the land admeasured to the widow, no appeal shall stay the issuing of a writ of possession on her giving the security as provided.

In an action of ejectment for dower, it was held that a purchaser or heir, holding under or through the husband, was estopped from showing that the husband was not seized of such an estate as would entitle the wife to dower. This was so held in Bowne v. Potter, 17 Wend. 164, and various cases therein cited. These cases have been overruled, however, so far as

the grantee's right exists to controvert the right to dower. Sparrow v. Kingman, 1 Com. 242; Finn v. Sleight, 8 Barb. 401.

Damages for Withholding Dower.—Our statutes make provision for the recovery of damages for withholding dower. They cannot be recovered for a period over six years. The details of these proceedings are not appropriate to this treatise.

The damages are to be one-third of the annual value of the mesne profits from the husband's death, in a suit against heirs; and from the time of demand in a suit against the alienee of the heir or other person, up to the time of recovering judgment; the amounts recovered from either the heir or other person respectively are to be deducted from what the widow could otherwise be entitled to recover of the other.

Where the whole premises were aliened during the life-time of the husband, the damages, it is held, can be recovered only from the time the dower was demanded, not from the death of the husband. Marble v. Lewis, 53 Barb. 432.

The damages are not to be estimated for the use of any permanent improvements made after the decease of the husband by his heirs or by any other person claiming title. Damages can be recovered only for lands of which the husband died seized. Palmer v. Voorhis, 35 Barb. 480.

Title IV.—Miscellaneous Provisions as to Dower.

Consent to Accept a Sum in Discharge of Dower.—By law of May 6, 1870, ch. 717, a widow may file a consent in an action to admeasure or recover dower, to receive a gross sum in satisfaction. The court may decree a sale of any of the lands, pay the sum to the widow, all liens, and the surplus to those entitled thereto. The court, if no consent is filed, may also allot portions of land in fee simple to the widow. Full details of the proceedings are given in the act.

Remedy of Infant Heir.—If dower is wrongfully recovered where there is no right thereto, by default or collusion with the guardian of an infant heir, the heir, when

of age, may recover the lands wrongfully awarded for dower.

1 R. L. of 1813, 57; 3 Rev. Stat. p. 34.

Crops.—A widow may bequeath the crop in the ground of the land holden by her in dower.

1 R. L. p. 368; 3 R. S. p. 34.

Quarantine.—A widow is entitled to tarry in the chief house of her husband forty days after his death, without being liable for rent, and to have reasonable sustenance out of his estate.

3 Rev. Stat. 33.

Legislative Acts affecting Dower Rights.—It has been held, in the court of another State, that it is competent for the legislature to modify the laws relative to dower, so as to affect cases where the marriage and seizin have taken place before the passage of the law, when the title to dower has not been consummated by the death of the husband.

Magee v. Young, 40 Miss. 164. And see various cases cited above in this chapter, *ante*, p. 167.

Waste Committed by a Dowress.—A tenant in dower is liable for waste. For proceedings therefor, *vide ante*, ch. vi, p. 154.

Alien Women and Widows of Aliens, Dower of.—As to these, *vide ante*, pp. 97, 98.

Sales by Order of Surrogates.—As to the reservation of proceeds for dower claims under such sales, *vide post*, ch. 18.

These proceedings do not authorize the sale of the widow's estate in dower, where it has been assigned to her. Lawrence v. Miller, 2 Com. 245.

Sales of Infants' Estates.—As to reservation of certain proceeds for claims in dower, *vide post*, ch. 25.

Partition Sales.—As to payment of claims for dower out of proceeds of such sales, *vide post*, ch. 30, and laws of 1840, ch. 177; 1847, ch. 430.

Taxes.—All taxes and charges accruing on the lands admeasured to the widow are to be held by her, subject to the payment of all taxes and charges accruing thereon subsequent to her taking possession.

9 Wend. 310; and see, *ante*, p. 169.

Power of Attorney.—Releases through, *vide post*, ch. 13.

V.—Estates by the Curtesy.

Tenancy by the curtesy is an estate for life, created by operation of law. It arises to the husband on the decease of a wife who has been seized at any time during the coverture, of an *estate of inheritance*, either in severalty or in common, and has had a child issue by him, *born alive*, and *which child might by possibility inherit the same estate as heir to the wife*, and the wife dies in the lifetime of the husband. He then holds the land during his life, by the curtesy of England, so called. It is deemed a legal estate and not a mere charge.

It is immaterial whether the issue be living at the time of the seizin, or at the death of the wife, or whether it was born before or after the seizin. 4 Kent, p. 26; Jackson v. Johnson, 5 Cowen, 74.

If the issue take *as purchaser*, the husband is not entitled to take by curtesy, as where there was a devise to the wife and her heirs; but if she died leaving issue, then to such issue and their heirs. Barker v. Barker, 2 Simm. 249.

Four things are requisite to an estate by the curtesy, viz.: marriage, seizin of the wife during coverture, issue born alive during the life of the mother (Marselis v. Thalimer, 2 Paige, 35), and death of the wife. The law vests the estate in the husband immediately on the death of the wife without entry. His estate is *initiate* on issue had, and *consummate* on the death of the wife, although technically the estate or right is supposed to vest during coverture.

Furguson v. Tweedy, 56 Barb. 168; 43 N. Y. 543; Elsworth v. Cook, 8 Paige, 643; *in re* Winne, 2 Lansing, 21; Knapp v. Smith, 27 N. Y. 277.

Seizin of the Wife.—The seizin of the wife by the English Law had to be in *fact* and in *deed*, and where her

title is *incomplete before entry*, a seizin in fact would seem essential even in this country.

Pond v. Bergh, 10 Paige, 140–154; Jackson v. Johnson, 5 Cow. 74.

It would not be necessary, however, if the outstanding life estate is a mere equitable interest (Adair v. Lott, 3 Hill, 182); nor where her title is acquired by virtue of a conveyance, which, under the statute of uses, passes the legal title and seizin, without the necessity of an entry or other act to perfect the estate in the grantee. *Ib.*

The general rule is much relaxed, in this State, and a constructive seizin of the wife is sufficient, where it is not rebutted by an actual disseizin.

Jackson v. Sellick, 8 Johns. R. 262; Davis v. Mason, 1 Peter's U. S. R. 503; Ellsworth v. Cooke, 8 Paige R. 643; Adair v. Lott, 3 Hill, 182; Vrooman v. Shepherd, 14 Barb. 441; Furguson v. Tweedy, 56 Barb. 168; 43 N. Y. 543. So held, particularly in the case of wild lands not held adversely. Jackson v. Sellick, 8 Johns. 262. So a judgment in partition or ejectment would give a constructive seizin. Ellsworth v. Cook, 8 Paige, 643.

Where there is an outstanding life estate, however, it must be ended before the death of the wife, otherwise there is no seizin in fact. *Re* Cregier, 1 Barb. Ch. 598; Taylor v. Gould, 10 Barb. 388; and there must be either possession or a title to possession in the wife. Burke v. Valentine, 52 Barb. 412; Furguson v. Tweedy, 43 N. Y. 543, *supra*.

To entitle the husband to curtesy also, by the common law, the husband had to be a citizen, not an alien. This necessity is in a manner obviated by the alien laws of the State. *Vide* title Aliens, Ch. III, title IV.

Curtesy exists if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during the coverture. The receipt of the rents and profits is considered a sufficient seizin of the wife. Payne v. Payne, 11 B. Mon. 138; Powell v. Gossom, 18 *Ib.* 179; Pitt v. Jackson, 2 Bro. C. C. 51; Morgan v. Morgan, 5 Madd. 408.

The husband of a mortgagee in fee is not entitled to curtesy, though the estate become absolute at law, unless there has been a foreclosure, or unless the mortgage has subsisted so long a time, as to create a bar to the redemption. *Vide ante*, p. 158, the same principle as to dower.

The wife is seized through the possession of a covenant in common. 11 Barb. 44.

Curtesy would also exist in what was intended to be land, as where money had been agreed to be laid out in the purchase of land, the money being treated as land by a court of equity.

Watts v. Ball, 1 P. Wms. 108; Chaplin v. Chaplin, 3 *Ib.* 229; Casborne v. Scarfe, 1 Atk. 603; Cunningham v. Moody, 1 Vesey, 174; Dodson v. Hay, 3 Bro. 405; Coster v. Clarke, 3 Ed. ch. 428; IV Kent, p. 50; Vrooman v. Shepherd, 14 Barb. 441.

Curtesy in Beneficial Interests.—At common law, the husband could not be tenant by the curtesy of a use;

but he may be of an equity of redemption and of land of which the wife has only a beneficial interest, through a trustee; unless, perhaps, by the deed of trust, curtesy is expressly excluded.

Watts v. Ball, 1 P. Wms. 108; 1 Sumner, 128; Alexander v. Warrance, 17mo. 228; Pierce v. Hakes, 23 Penn. 231; 4 Kent, 31.

In *Conditional Estates.*—Curtesy applies to conditional and qualified, as well as to absolute estates in fee; but, as a general rule, curtesy can only be commensurate with the original estate, and if that is determined, curtesy falls with it; as also where the seizin was wrongful and there is eviction under a title paramount.

Hatfield v. Sneden, 42 Barb. 615; Stanhouse v. Gaskell, 17 Eng. L. & Eq. 140.

Statute of Descents.—Curtesy is not affected by any of the provisions of the statutes of descents. 3 R. S. p. 43.

Curtesy since the Acts of 1848–9.—The act of 1848, "for the more effectual protection of the property of married women," so far as it affects the husband's existing rights under a marriage contracted before the act has been declared *unconstitutional*, as taking away the husband's property, in violation of Art. I, §§ 1, 6, of the constitution. This would apply to lands acquired before the act. Under that act, and the act of 1849, *ante*, p. 79, the husband continues to take as tenant by the curtesy even of lands acquired subsequent to them, where the wife dies seized of the estate, without having transferred it. The object of those statutes was simply to protect the wife during coverture, and to empower her to convey by *deed* or *devise*.

Vide Decisions, *ante*, p. 83, and White v. White, 5 Barb. 474.

The right of curtesy is upheld as to lands acquired since those acts in all cases, subject to its being defeated by a disposition of the lands by deed or will.

Hurd v. Cass, 9 Barb. 366; Clarke v. Clarke, 24 *Id.* 581; Jaycox v. Collins, 26 How. P. 496; Rider v. Hulse, 33 Barb. 264; 24 N. Y. 372; Burke v. Valentine, 52 Barb. 412, overruling Billings v. Baker, 28 Barb. 243; Scott v. Guernsey, 60 Barb. 163; the case of Winne, 2 Lansing, 21, overruling, 1 Lans. 508.

Act of March 20, 1860.—It is questionable whether, by the Statute of

March 20, 1860, ch. 90, p. 159, in this State, curtesy was not abolished or modified in certain cases, for a short time. That act provides that at the decease of a husband or wife *leaving no minor child or children*, the survivor shall have a life estate of one third of all the real estate whereof the husband or wife *died seized*, and at the decease of the husband or wife *intestate*, leaving minor child or children, the survivor shall have the income of all the real estate whereof the intestate died seized, during the minority of the youngest child, and one third during his or her life.

These provisions were repealed by law of 1862, ch. 172; but they are given here, as they may affect interests vesting when they were in force.

Partition Suits.—As to the disposition of rights of curtesy in partition suits, *vide post*, ch. 30.

Effect of Divorce upon.—In case of a judgment of divorce *a vinculo*, at the instigation of the wife, the husband loses all right in the income of the wife's separate real estate.

2 R. L. of 1813, 197; 5 Rev. Stat. of 1830, p. 237.

Curtesy Liable to Creditors.—When the estate by curtesy is once vested in the husband it becomes liable for his debts, and may be sold on execution.

Watson v. Watson, 13 Conn. 83; Van Duzer v. Van Duzer, 6 Paige, 366; Wickes v. Clarke, 8 *Ib.* 161.

Waste.—Tenants by the curtesy committing waste without license in writing, are subject to an action of waste.

2 R. S. 1 ed. 334. As to proceedings for waste, *vide ante*, p. 154.

CHAPTER VIII.

ESTATES LESS THAN FREEHOLD.

TITLE I. ESTATES FOR YEARS.

1. An estate for years is one giving the possession of lands, for some determinate period; generally at a certain rent. The period being certain or *fixed*, caused the appellation *terminus*, or term, to be applied to the estate.

An estate for any number of fixed years, though they should exceed the ordinary limit of human life, is only a chattel, and reckoned part of the *personal* estate. It is termed a *chattel real.*

3 Rev. Stat. 10.

The English law on the subject of long terms, upheld in equity through trusts and attendant upon inheritances, is involved in great intricacy, and is superseded in this country by statutory enactments abolishing trusts, except for certain purposes, and providing for the record of conveyances as notice for the protection of *bona fide* purchasers and mortgagees, which prevent outstanding terms from operating when coming in collision with a registered conveyance.

By the common law, leases for years might be made to commence *in futuro;* for, being chattel interests, they were never required to be created by *feoffment* and *livery* of seizin. The tenant was never technically seized; he was the mere representative of the reversioner, and could not even defend a real action.

At common law actual entry was requisite to give the lessee the rights of a tenant in possession, and make him capable of receiving a release of the reversion by way of enlargement of the estate. Before entry, the lessee had only an executory interest or *interesse termini*, and not an estate capable of surrender, though it might be released or assigned. When the words and consideration of a lease however, were deemed sufficient to raise a use, the Statute of Uses opcrated upon the lease, and annexed the possession to the use without actual entry. Bacon's Abrid. title Leases, IV Kent, 98; Hannen v. Ewalt, 18 Penn. St. 9; Doe v. Brown, 20 Eng. L. & Eq. 88.

There are many complicated principles of law applicable to estates for years, growing out of the relation of landlord and tenant, that do not properly come within the province of this general review of the subject. They will be found in special treatises bearing directly on that relation; and the subjects of estates for years and leases, can be only treated here with reference to their more general features, such as the nature of the estate created, and the general relations and obligations of parties interested in them.

Title II. Leases.

Terms for years are generally created under conveyances technically termed "leases."

Whether an instrument is a lease or not often depends upon the intent of parties to be ascertained and gathered from the whole instrument.

It is sometimes doubtful whether the instrument amounts to a lease or is merely a contract to lease. Where the agreement appears not to vest an interest but to rest in contract, it is construed the latter. Jackson v. Delacroix, 2 Wend. 433; Pearce v. Colden, 8 Barb. 522; Averill v. Taylor, 8 N. Y. (4 Seld.) 44.

Letting lands upon shares for a crop is not a lease. 1 Hill, 234; Austin v. Sawyer, 9 Cow. 39; Bradish v. Schenck, 8 Johns. 116; Harrower v. Heath, 19 Barb. 331; Dinehart v. Wilson, 15 Barb. 595.

Leases in Fee or for Life.—Leases in fee or for life, like grants of freehold estates, must be sealed and witnessed or acknowledged. 3 R. S. p. 29. See fully as to such leases, *ante*, Ch. V, Title IV.

Leases to be in Writing.—By the Revised Laws of 1813,

and the Revised Statutes of 1830, no estate or interest in lands, &c., other than leases for a term not exceeding *one* year, shall be created, granted, assigned, surrendered or declared, unless by operation of law or a deed or conveyance in writing subscribed by the party (or his agent authorized in writing) creating, granting, &c.; and every contract for the leasing for a longer period than one year, or for the sale of lands, or any interest therein, is declared void, unless the contract or some note or memorandum be in writing expressing the consideration and subscribed by the party by whom the lease or sale is made, or by his agent lawfully authorized.

R. S. vol. 3, p. 220, §§ 6, 8, 9; 1 R. L. 75.

A parol lease for one year, to commence *in futuro*, was held void under this statute, and also as being a contract not to be performed within one year from the making thereof. Croswell v. Crane, 7 Barb. S. C. Rep. 191. The Court of Appeals, however, overruled this decision and declared such a parol lease valid. Young v. Duke, 1 Seld. 463.

Parol leases for a year or under make a legal title. McGune v. Palmer, 5 Robt. 607; Supp v. Kensing, *Ib.* 309; Hurlburt v. Ryerson, 1 Bos. 28.

The agent's authority to contract may be by parol to make his act a contract, but not a deed under seal. Worral v. Prall, 1 Sel. 229; see *post*, ch. xix. Contracts; and *post* ch. 20, as to decisions on the above sections.

A lease for years, to end on the 1st May, expires at noon on that day, but a lease from another day to the 1st May, expires at midnight on April 30. The People v. Robertson, 39 Barb. 9.

Assignments of interests in leases must be in writing, even between succeeding firms. Agate v. Gignoux, 1 Robt, 278.

Powers to Lease.—Although a lease cannot be granted for a period beyond that at which the lessor's estate determined, it may be upheld if made under a *power* to make leases, and if made for a reasonable time; and sometimes the power is implied, and equity may uphold or annul the lease; and a trustee may lawfully make a lease which may extend beyond the term of his trust.

Vide Greason v. Kettletas, 17 N. Y. 491.

By revised statutes a power may be given to tenant for life to make leases for not over twenty-one years, to commence during his life. The power is annexed to the estate, and passes by any conveyance thereof; and if specially excepted therein, becomes extinguished. It may also be extinguished by release to the remainder man or reversioner. The power is bound by any mortgage made by the life tenant, and the mortgagee may enforce the power. See *post*, ch. 12, "Powers." See 15 N. Y. 307; also, Root v. Stuyvesant, 18 Wend. 257.

The power is not separately assignable.

Leases by Estoppel.—A lease may be created or made effective by way of estoppel, as when made by a person who has no vested interest at the time but afterwards acquires it. It then takes effect, by way of estoppel, from the time the grantor acquires the interest. But not so if the grantor had any interest at the time.

Helps v. Hereford, 2 B. & Ald. 242; Brown v. McCormack, 6 Watts, 60; Bank of Utica v. Mersereau, 3 Barb. ch. 528; Bush v. Cooper, 18 How. U. S. 82; Jackson v. Bradford, 4 Wend. 619.

If the conveyance be with general warranty, a subsequent purchaser from the grantor of his after-acquired title would be equally estopped, and the estoppel runs with the land. See the notes to Trivivian v. Laurence; Smith's Leading Cases, vol. II; White v. Patten, 24 Pick. 124; McWilliams v. Nisley, 2 Serg. & Rawle, 507; Laury v. Williams, 13 Maine, 281; Cheeney v. Arnold, 18 Barb. 434; Van Rensselaer v. Kearney, 11 How. U. S. 297; 4 Kent, 99.

Covenant to Repair.—If there be no agreement or statute to the contrary, a landlord is not bound to repair, or to allow the tenant for repairs made without his authority; and the tenant is bound to repair at his own expense, to avoid the charge of permissive waste. The tenant who is bound or not to repair, is liable for damage to third persons from the ruinous state of the premises; and, if they were in good condition when leased, the landlord is not liable.

Bears v. Ambler, 9 Barr. 193; City of Lowell v. Spalding, 4 Cush. 277; City of N. Y. v. Corlies, 2 Sandf. 301; Eakin v. Brown, 1 E. D. Sm. 36.

Nor is there any implied warranty that the buildings are safe, well built or fit for any particular use (Cleves v. Willoughby, 7 Hill, 83; Dutton v. Gerrish, 9 Cush. 89); nor that the landlord shall keep them in tenantable condition (Post v. Vetter, 2 E. D. Sm. 248); nor that the land shall remain in the same condition (1 Sneed, Tenn. 613). Where the landlord is to make repairs before possession by the tenant, it is a condition precedent; and the tenant's entry before the stipulated day is no waiver. Strohecher v. Barnes, 21 Geo. 430; see also, Mumford v. Brown, 6 Cow. 475; Howard v. Doolittle, 3 Duer, 464; Bloomer v. Warren, 29 How. P. 259. A parol promise to repair is void. 2 Swee. 184.

If the premises are made untenantable by act of the landlord, before the tenancy begins, covenant for rent will not be sustained. Cleves v. Willoughby, 7 Hill, 83; *aliter*, if they become so after the term begins. 2 Swee. 184.

Destruction by Fire or Otherwise.—Formerly under a covenant to repair, a lessee was bound to rebuild in case of fire, and to pay rent for the premises even if the buildings were entirely destroyed (Howard v. Doo-

little, 3 Duer, 464; Warren v. Hitchins, 5 Barb. 66); but, by Statute of April 13, 1860, ch. 345, the lessees or occupants of any buildings which shall, without fault or or neglect on their part, be destroyed, or be so injured by the elements or any other cause, as to be untenantable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessees or occupants may thereupon quit and surrender possession of the leasehold and of the land so leased or occupied.

See also Graves v. Berdan, 26 N. Y., 498; 29 How. P. 262.

Where the building has been injured by fire, the landlord cannot be compelled to rebuild or repair it for the benefit of his tenant, unless he has expressly covenanted to do so. Not even for the tenant of a lower floor who is injured by the fire, so as to have no roof.

Doupe v. Genin, 45 N. Y. 119.

A covenant to deliver up the premises in the same condition, natural wear and tear excepted, does not bind the tenant to rebuild after a fire. Warner v. Hitchins, 5 Barb. 666.

Where the lease is in writing, parol evidence cannot be given to show that the landlord, at the time of executing it, promised to repair.

Cleves v. Willoughby, 7 Hill, 83.

Covenants for Renewal, &c.—Covenants for continual or perpetual renewals are not upheld, as tending to create perpetuities, nor a covenant generally to renew on such terms as might be agreed on, it being too uncertain. (1 Hoff. ch. 110; affirmed, 26 Wend. 57.) These covenants run with the land, and bind the grantee of the reversion.

Covenant for Quiet Enjoyment.—A covenant for quiet enjoyment in a lease means only that the tenant shall not be evicted by paramount title. It relates only to the title, and not to the actual occupation.

Howard v. Doolittle, 3 Duer, 466.

A covenant for quiet enjoyment is ordinarily implied in a lease, in spite of the provisions of the revised statutes against implied covenants in deeds (ch. xx). But if one is expressed, none will be implied.

Burr v. Stenton, 43 N. Y. 462.

Implied Covenants.—As to implied covenants in a lease, *vide post*, "Conveyances," ch. xx; and also as to covenants generally.

Conditional Limitation.—Where a breach of condition will determine a lease, and when not without entry, *vide ante*, title "Conditional Estates," pp. 39, 40, 41.

The principle is that the lessee's estate will *ipso facto* cease on breach of a condition determining it, in case there is no qualification or right of entry given to the lessor which implies an election to be exercised on his part.

Denying Title of Lessor.—In general a lessee is estopped from denying the lessor's title existing at the time of demise.

Under the common law, a denial of the landlord's title worked a forfeiture; but a parol denial did not forfeit a written lease. Delancey v. Ganong, 5 Seld. 9.

A tenant or purchaser cannot controvert the title of one under whom he holds or whose title he has recognized (7 Wend. 401; 9 N. Y. 9; 1 E. D. Smith, 141), unless the landlord's title has expired or been extinguished. 2 N. Y. 245; 6 Wend. 666. But he can controvert any assignment of the lease. 15 N. Y. 374. Or he may set up a subsequent title acquired by himself. 22 Wend. 121.

A tenant can show that the title has passed from the landlord to another person subsequent to the time of his entry as tenant. Ryers v. Farwell, 9 Barb. 615.

Recording Leases.—See chap. "Deeds," recording of deeds. By Rev. Stat. 3d vol. p. 60, Part II, ch. 3, the provisions relative to the proof and recording of deeds shall not extend to leases for life or lives or years, in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware and Schenectady. Laws of 1823, p. 413, § 5. Otherwise the laws relative to the records and proof of deeds apply to leases, except to those not exceeding three years.

3 Rev. Stat. p. 59. *Vide post*, ch. 26, as to acknowledgment and record of instruments.

Leases of Agricultural Lands.—By the constitution of 1846, it is provided that leases of agricultural land, wherein rent or service is reserved for a longer term than twelve years shall be invalid.

This has been held to apply only where rent is payable at stated periods, and not to a grant or lease for a long term for a specified consideration. Parcell v. Stryker, 41 N. Y. 480. Covenants for renewal beyond the twelve years, in the leases of agricultural lands, would be void, but the lease would be good for the twelve years. Hart v. Hart, 22 Barb. 606.

The above provision is held to apply merely to rents and services that, are certain and periodical, and issue out of the land in return for its use. It would not apply to covenants binding the person only, and not the land, for the performance of duties not certain or periodical, *e. g.*, as to support a person. Stephens v. Reynolds, 6 N. Y. 2 Seld. 454.

Leases by Guardians in Socage.—Such guardians may lease the lands of infant heirs until they become of age; but the lease is subject to be avoided either by such coming of age or the appointment of a general guardian.

Emerson v. Spicer, 55 Barb. 408; 3 R. S. p. 12. *Vide post*, ch. 25, Guardians in Socage.

Leases in Fee.—For leases in fee, reserving rents or services.

See chap. V, title IV, *ante*.

Rights of Heirs, Mortgagees, &c., in Leases for Five Years and over.—If a lessee for five years or over is removed for non-payment of rent, he, his representatives, mortgagees, assignees or judgment creditors may, within a year, redeem the term.

Laws of 1842, ch. 240.

Judgments a Lien.—By the revised statutes, judgments are a lien on *chattels real*, and they may be sold under execution.

3d vol. p. 637, *vide* "Judgments," and "Sales on Execution," *post*, ch. 37.

Assets.—Leases for years are excluded from the statute of descents, and are assets for administration.

Vol. 3 R. S. p. 44, § 28; *Ib.* p. 169.

Attornment.—An attornment to one having no color of title, or a stranger, is void, unless on consent of the landlord or under a judgment or decree, or to a mortgagee after forfeiture of the mortgage.

Rev. Stat. Vol. 3, p. 35; 5 Wend. 246; 13 Johns. 537; or after surrender, 10 *Id.* 435; Laurence v. Brown, 5 N. Y. 394.

A conveyance by the landlord is valid without attornment, but the tenant is not bound unto the grantee until he has had notice. 3 Rev. Stat. p. 30. See, also, The People v. The Mayor, 19 How. 289.

Leases by Aliens.—By Rev. Stat. 3d vol. p. 60, § 25, 16, no alien shall have power to lease or demise lands which he may take or hold by virtue of the deposition made that he intends to become a citizen (§ 24) until he becomes naturalized.

Law of 1845, *Leases by Aliens.*—The laws of 1845, ch. 115, § 9, provide that all *leases* duly executed heretofore by *aliens* to *citizens*, or to *resident aliens capable of holding real estate*, or which may hereafter be executed by *such aliens* to *any such alien* or to *a citizen*, are confirmed and made valid.

See also ch. 1, title "*Aliens*," *ante*, p. 86, and Law of 1857, p. 96, *et seq.*

Title III. Assignment and Subletting.

A lessee for years may assign or grant over his whole interest, unless restrained by covenant not to assign without leave of the lessor. Unless so restrained, also, he may underlet for any less number of years than he himself holds.

If the deed passes *all* the estate or term of the termor, it is an assignment. But if it be for a less portion of time than for the whole term, it is an *underlease*, and leaves a reversion in the termor.

Lynde v. Newcombe, 27 Barb. 415; Jackson v. Silvernail, 15 Johns. 278; Jackson v. Harrison, 17 *Id.* 60; Bedford v. Terhune, 30 N. Y. 353.

An under-lease made for the whole unexpired term, but reserving the right to reenter, is not an assignment, but is a sublease. The People v. Robertson, 39 Barb. 9; 2 N. Y. 394; Post v. Kearney, 43 *Id.* 514.

A covenant not to underlet is not broken by underletting a portion of the premises. Jackson v. Silvernail, 15 Johns. 278; Post v. Kearney, 2 Com. 394; Jackson v. Harrison, 17 Johns. 66; People v. Elston, 39 Barb. 9; Roosevelt v. Hopkins, 33 N. Y. 81.

Nor will a covenant not to let or underlet prevent the lessee from making an assignment. Lynde v. Hough, 27 Barb. 415.

A landlord's consent would discharge the covenant against assignment wholly, and the assignee would take the lease free therefrom. Siefke v. Koch, 31 How. P. 383.

A covenant that the assignor has a right to transfer, &c., does not warrant the landlord's title. Knickerbacker v. Killmore, 9 Johns. 106.

A subletting with knowledge of the landlord, who subsequently received the rent, is a waiver of any forfeiture under a covenant against subletting. Ireland v. Nicholls, 46 N. Y. 413.

A mere change in the business firm of the lessee's, incident to the admission of a new partner, or the withdrawal of an old one, does not violate a provision against subletting. Roosevelt v. Hopkins, 33 N. Y. 81.

As to assignments between partners, *vide* 1 Robtn. 271.

Subtenant may pay Rent to the original Lessor.—A subtenant may protect himself against ouster by paying rent to the original lessor, although he is not liable to the former, and there is no privity between them. Peck v. Ingersoll, 7 N. Y. (3 Seld.) 528; MacFarlan v. Watsou, 3 Comst. 286; Bedford v. Terhune, 30 N. Y. 453.

Assignments may be Proved by Acts in pais.—9 Cow. 88; 30 N. Y. 453.

Continuing liability of the Lessee and of the Assignee.—The lessee, after assignment, still remains liable upon all his covenants to the lessor, by reason of his privity of contract. And the assignee of the lessee will be liable to the lessor upon such covenants only while he remains tenant. For though there is no privity of contract between them, there is privity of estate. He may relieve himself of responsibility by assigning over to another.

Post v. Jackson, 17 Johns. 239; Carter v. Hammet, 18 Barb. 608; Van Schaick v. Third Avenue R. R. Co., 30 *Id.* 189; 49 *Ib.* 409; affi'd, 38 N. Y. 34; and *vide infra*, pp. 186, 187, and 9 Cow. 88.

He is not liable for breaches of covenant before he got the estate. Astor v. Hoyt, 5 Wend. 603.

Rights of Assignees as to Lessors' Covenants.—As seen above, p. 144, lessees and assignees of leases and their representatives have the same rights against the lessor, his grantees, assignees, or his or their representatives, as the lessee might have had against the lessor, except on

covenants against incumbrances, or relating to the title or possession.

Act of Feb. 6, 1788; 1 R. L. 363; 1 R. S. 1st ed. 747.

By law of April 9, 1805, ch. 98, these provisions are extended to grants or leases in fee reserving rents.

12 N. Y. 301.

By law of April 14, 1860, ch. 396, the above provisions are not to apply to deeds of conveyance in fee made before the 9th of April, 1805; nor to such deeds to be made after the act.

As to the application of these statutes to leases in fee, *vide ante*, pp. 144, 145, 146, where the above statutes are fully set forth.

See also Van Rensselaer v. Bradley, 3 Den. 135; overruled, Van Rensselaer v. Chadwick, 24 Barb. 333; Van Rensselaer v. Jewett, 5 Den. 454; affirmed, 2 N. Y. 141; Van Rensselaer v. Smith, 27 Barb. 104; affirmed, 19 N. Y. 100; Main v. Green, 32 Barb. 448; 33 *Id.* 136; Main v. Davis, 32 Barb. 463; Van Rensselaer v. Secor, 32 Barb. 469; Tyler v. Heidorn, 46 Barb. 440.

Covenants to Repair.—Covenants by a lessor to repair run with the land, and bind the reversioner; and a covenant to repair implies a covenant to rebuild in case of total destruction by fire. Allen v. Culver, 3 Den. 285. *Vide*, also, *ante*, p. 180.

When a lease of land embraces also personal chattels, the lessees covenant to return or replace them, or pay for them, does not pass to the grantee of the reversion. Nor does it bind the assignee of the lessee. *Ib.*

Covenants of Renewal.—These run with the land, and the assignee of the lessee may take advantage of them. Wilkinson v. Petit, 47 Barb. 230. *Vide*, also, *ante*, p. 181, and *post*, p. 188.

Obligations and Liabilities of Assignees.—The assignee of the lease becomes liable to the landlord on covenants only so long as he remains in the legal relation of assignee; and when he assigns to another, who accepts the assignment, his liability ceases.

Stoppani v. Richards, 1 Hilt. 509; Siefke v. Koch, 31 How. Pr. 383; Carter v. Hammet, 18 Barb. 108. *Vide*, also, *ante*, p. 185.

The mortgagee of a term is not personally liable, before entering, as an assignee of the interest of the lessee in the premises. Childs v. Clark, 3 Barb. Ch. 52; Calvert v. Bradley, 16 How. U. S. 580.

J. Kent, in his Commentaries, holds that the mortgagee of the whole term is liable on these covenants, even before entry, quoting Williams v. Basanquet (1 Brod. & Bing. 288), and therefore suggests that the mortgagee

take by way of underlease, leaving a few days of the original term. His view is probably based on the former doctrine of law, that the mortgagee took the legal estate, and not a mere security. The assignee is not liable unless the whole term has been assigned. Davis v. Morris, 36 N. Y. 569.

Trustees are bound on covenants in leases made by them; also their successors in office. Greason v. Kettletas, 17 N. Y. 491.

Sublessees are bound by the covenants in the lease, as they run with the land. The Importers' Ins. Co. v. Christie, 5 Robtn. 169, and *post*, p. 192.

After the original landlord has received rent directly from a subtenant, and has thus recognized him as the person responsible to him, and accepted him as his tenant, he cannot resort to the assignors of such subtenant for the rent. Carter v. Hammet, 18 Barb. 608.

See a special case in equity by which an assignee was held bound even after transfer. Van Shaick v. The Third Av. R. R. 49 Barb. 409; 38 N. Y. 346.

An equitable assignee of a lease is liable on the covenants for rent during the period of his occupancy. Astor v. Lent, 6. Bos. 612; Close v. Wilberforce, 1 Beav. 113.

The whole term must be assigned to make an assignee liable. Davis v. Morris, 36 N. Y. 569.

Upon what Covenants the Assignee is Liable.—The assignee of the term is liable to the lessor or his grantee of the reversion upon all covenants that run with the land, although not expressly named in the lease; but he is not liable upon covenants which are merely personal or collateral, as to pay a note, build a house, &c. The general rule is, that no covenants run with the land, unless they touch or relate to the thing demised.

Gilbert v. Winan, 1 Comst. 562; Norman v. Welles, 17 Wend. 136; *vide* Comyn. Landl. v. Tenant, 257; Jaques v. Barber, 20 Barb. 269; Dolph v. White, 12 N. Y. (2 Kern.) 296.

As to the above principles, more fully, and as to when an assignee of a lessee is not bound when named, or is bound although not named, *vide* Spencer's case and notes thereon in Smith's Leading Cases, and Allen v. Culver, 3 Den. 284; Dolph v. White, 12 N. Y. (2 Kern.) 296.

As a general rule, where a covenant relates to a thing not *in esse*, but to be done upon the land demised, assignees are bound if so specified, but not if it be not so stated. Tallman v. Coffin, 4 Com. 134. But a covenant or condition that attaches to the estate (*e. g.*, not to cut wood) binds the assignee though not named. Verplank v. Wright, 23 Wend. 506.

Assignees of a lease, however, as well as grantees of real estate, are not liable for breaches of covenant, which were committed by those who have preceded them in the enjoyment of the estate. Tillotson v. Boyd, 4 Sand. 546; Hull v. Stevenson, 13 Abb. N. S. 196. See *post*, p. 188.

Covenants in Leases in Fee.—As to these *vide ante*, ch. v, title iv.

Covenant to Pay Assessments.—A lessees covenant to pay assessment runs with the land, and binds the assignee of the term. Post v. Kearney, 2 N. Y. (2 Com.) 394. *Vide post*, Title XI, as to taxes and assessments.

Rights of Grantees, Assignees, &c., of Lessor.—As above

seen (p. 144, 145) the heirs and grantees of demised lands or rents, or the reversion thereof, or the assignees of the lessor, and their heirs, executors, &c., are to have the same remedies for non-performance of covenants for rent, or for waste or forfeiture, in grants or leases for life, years or in fee, as their grantor or assignor had.

This provision was taken from the law of Feb. 6, 1788, reenacted by the revised laws of 1813 (1 R. L. 363), and by the revised statutes (3 R. S. p. 37). By law of April 9, 1805, ch. 98, it was extended to leases in fee; and by law of April 14, 1860, ch. 396, declared not to apply to deeds of conveyance in fee made before the 9th of April, 1805, nor to deeds after the act to be made.

These laws are given in full, *ante* pp. 144, 145, and also decisions bearing upon their relation to grants and leases in fee. These statutory provisions in favor of the assignees of lessors and their representatives changed, in this State, the common law rule whereby conditions in a deed could only be reserved for a grantor and his heirs, and a stranger could not take advantage of a breach of them.

See also, with relation to the above laws, Dolph v. White, 2 Kern. 296; Willard v. Tillman, 2 Hill, 274; Slocum v. Clark, 2 Hill, 475; Harbeck v. Sylvester, 13 Wend. 608; McKeon v. Whitney, 3 Den. 452; Van Rensselaer v. Jewett, 5 Den. 121; 2 N. Y. 141; Nicoll v. The N. Y. & E. R. R. 12 Barb. 460; affirmed, 12 N. Y. 121; Van Rensselaer v. Smith & Hayes, &c. 27 Barb. 104; 19 N. Y. 82; *Ib.* 100; Main v. Green, 32 Barb. 448; Tyler v. Heidorn, 46 Barb. 440; Huerstel v. Lorillard, 6 Robtn. 260.

The assignee of a lease who has been recognized as such by the tenant, may sue in his own name for the rent, although he has no interest in the reversion. Moffat v. Smith, 4 Com. 126.

The liability of an assignee of a lease extends only to covenants broken while he remains possessed of the estate, and he is not chargeable for breaches happening previous to the assignment. Day v. Swockhamer, 2 Hilt. 4; and *ante*, pp. 186, 187.

Only the grantee of the reversion of the demised premises, or of the rent reserved, can maintain an action against the assignee of the lease. There must be a privity of contract or estate. Dolph v. White, 12 N. Y. 296.

Covenants to Renew.—Covenants to renew the lease run with the land, and bind the assignee of the reversion. Piggot v. Mason, 1 Paige, 412; Wilkinson v. Petit, 47 Barb. 230. See also, as to these covenants, Carr v. Ellison, 20 Wend. 178; Willis v. Astor, 4 Edw. 594; Abeel v. Radcliff, 13 Johns. 297; Rutgers v. Hunter, 6 Johns. Ch. 215; Whilock v. Duffield, 26 Wend. 57.

Title IV. Eviction.

The rule is well settled that a wrongful eviction of the tenant by the landlord from the whole or any part of the demised premises, before the rent becomes due, precludes a recovery thereof until possession is restored. To render an eviction of a tenant a valid defence, however, against the landlord's claim for rent, it must take place before the rent falls due; and the rule is the same although the rent is payable in advance and the eviction occurs before the expiration of the period in respect of which the rent claimed accrues. It is settled also, that such eviction need not be forcible, but may be made indirectly; as where the lessor is guilty of acts, by creating a nuisance, or otherwise, which preclude the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandons the possession before the rent becomes due. In such case the lessor's right to recover the rent is barred, as his act is considered a virtual expulsion of the tenant.

It is also a principle pertaining to the law of eviction that, in case of eviction from a portion of the premises only, the lessee's rights are the same as if wholly evicted, and the law will not apportion the rents in favor of the wrongdoer. The landlord, therefore, cannot recover any compensation even for the part of the premises occupied by the tenant while the eviction continues, nor will any action for use and occupation lie therefor.

It is also a principle restricting the above rules that, if the lessor's wrongful act stop short of depriving the tenant, actually or impliedly, of the occupation of any portion of the premises, although the injury inflicted may be great, and the holding of the land by the lessee become less beneficial than it otherwise would have been from the tortious acts of the lessor, the latter will not be barred from his rent.

Also, if the tenant actually remains in possession of the demised premises his obligation to pay rent continues; and damages resulting from acts of mere tres-

pass or negligence by the landlord, cannot be set off against the rent.

For cases establishing the above principles, *vide* Cohen v. Dupont, 1 Sand. 260; Dyett v. Pendleton, 8 Cow. 728; Ogilvie v. Hill, 5 Hill, 72; Christopher v. Austin, 1 Ker. 217; Giles v. Comstock, 4 Com. 270; Edgerton v. Page, 20 N. Y. 281.

It has been also held that, where, *by the lessor's permission*, there has been a material interference with the beneficial use by the lessee, even though the act done does not amount to an actual eviction, the right to abandon the premises exists; and there can be no claim for rent after an abandonment made under such circumstances.

Rogers v. Ostrom, 35 Barb. 523. The acts complained of, however must have been by the landlord's direction or with his connivance. Gilhooley v. Washington, 4 Com. 217.

It is also held that when the estate out of which rent issues is gone (*e. g.*, when certain rooms are leased, and the building is destroyed), and the demised tenement has absolutely ceased to exist, the rent must terminate, and the obligation to pay it is at an end.

Graves v. Berdan, 29 Barb. 100; affirmed, 26 N. Y. 498.

Eviction by Title Paramount.—Where a tenant is actually evicted from the demised premises by title paramount, or surrenders possession in consequence of a judgment for its recovery, he is discharged from the payment of rent; but if he is only ejected from a portion of the premises by such title, the landlord may recover for the portion still enjoyed by the tenant.

The Home Ins. Co. v. Sherman, 46 N. Y. 370; Christopher v. Austin, 1 Kern. 11 N. Y. 216; Hurlburt v. Post, 1 Bosw. 28.

Under a covenant for quiet enjoyment, a tenant, on a partial eviction, by title paramount, is entitled to an abatement of the rent. Blair v. Caxton, 18 N. Y. 529.

The erection of a building by strangers on an adjoining lot, so as to shut off light from the demised premises, is not an eviction of the tenant by the landlord. Johnson v. Oppenheim, 12 Abb. N. S. 449.

Tenancy under a Mortgagor after Foreclosure.—It has been determined that the interest of a tenant under a

demise from a mortgagor, made after the execution of the mortgage, is extinguished by a foreclosure and sale; and if the tenant attorn to the purchaser under the sale, at his request, although he may not have been actually evicted, the right of the lessor to the future rents is extinguished, and it is an eviction in law.

It is also held, that although the lessor may assign the lease to the purchaser, and consent that the rent for the residue of the term be paid to him, the tenant may, notwithstanding, go out of possession and refuse to pay the subsequent rents. The eviction in such a case comes under the class of evictions by title paramount.

Lane v. King, 8 Wend. 584; Simers v. Saltus, 3 Den. 214.

If the lessee choose he can attorn to a mortgagee after the mortgage has become forfeited, or to the purchaser. *Ib.* and 1 R. S. 1st edit. 744; Jones v. Clark, 20 Johns. 51.

Title V. Forfeiture.

Forefeiture.—A term may be determined by conditions stipulated or covenants broken, or other act creating a forfeiture.

Formerly an alienation in fee worked a forfeiture, but by the revised statutes no conveyance of a greater estate than can be lawfully conveyed has that effect.

3 R. S. p. 30; Grant v. Townsend, 2 Hill, 554.

The premises may be forfeited by act of the lessee's assignee, as seen above, title iii.

Where the condition renders the estate voidable only, it requires the act of the lessor to determine it. If not so determined the estate continues under the lease and not as a tenancy by sufferance.

Clark v. Jones, 1 Den. 516; Garner v. Hannah, 6 Duer, 262; Stuyvesant v. Davis, 8 Paige, 427.

Before the provisions of the revised statutes adverted to in the succeeding title, to work a forfeiture and reentry, on non-payment of rent, the common law required a

previous demand of the rent due on the exact day, and at the place where payable, with circumstances of great particularity. Ejectment now stands in place of such demand.

Jackson v. Kipp, 3 Wend. 230; Van Rensselaer v. Jewett, 5 Denio, 121; 2 N. Y. 131; Tyler v. Heidorn, 46 Barb. 439.

A forfeiture operating as to a portion of demised premises worked a forfeiture of the whole. Clarke v. Cummings, 5 Barb. 339.

A forfeiture may be waved; and if so, the waiver cannot be retracted unless the forfeiting act is continuing. 26 Barb. 41; Bleecker v. Smith, 13 Wend. 530; Clark v. Jones, 1 Den. 516.

The courts may relieve when the case is one which admits of compensation, and where the breach is not wilful, or is the result of accident or mistake. Garner v. Hannah, 6 Duer, 262; Baxter v. Lansing, 7 Paige, 350.

The acceptance of rent is not a waiver of forfeiture, unless the rent received accrued subsequent to the act which works a forfeiture. Bleecker v. Smith, 13 Wend. 530; Jackson v. Allen, 3 Cow. 220; Hunter v. Osterhoudt, 11 Barb. 33.

It is not a waiver if it be so stipulated and understood. Stuyvesant v. Davis, 9 Paige, 427; Manice v. Millen, 26 Barb. 41.

If lessor is ignorant of the forfeiture it is not waived by acceptance of rent. Clarke v. Cummings, 5 Barb. 339; Keeler v. Davis, 5 Duer, 507.

Rent accrued previous to the forfeiture may be recovered after reentry by the lessor, but not that accrued after forfeiture as landlord, although he may recover them as mesne profits. Mattice v. Lord, 30 Barb. 382; 5 Rob. 169.

Mere default in the payment of rent, where there is a covenant for its payment and no condition in the lease providing for *re-entry*, does not work a forfeiture of the term, and no ejectment lies. Van Rensselaer v. Jewett, 2 Com. 141; affi'g, 5 Den. 121; Delancey v. Ganong, 12 Barb. 120; affi'd, 9 N. Y. 9.

This last case also holds that the words "yielding and rendering" in a lease import a covenant but not a condition, unless the landlord would otherwise be without remedy in case the rent should not be paid.

If, by the lease, forfeiture is provided on non-performance of covenants, if the lease also contains the clause that in case of non-performance the landlord may re-enter, the lease is voidable only, at the election of the landlord, but not void. Stuyvesant v. Davis, 9 Paige, 427; and *ante*, p. 127.

As to forfeiture under leases in fee, *vide ante* ch. v, tit. iv.

Acceptance of rent after an action commenced for forfeiture is not a waiver. Importers' Co. v. Christie, 5 Rob. 170.

Title VI. Ejectment.

The remedies which the grantor or lessor may pursue in the event of non-payment of rent or other violation of conditions, are

1. An action to recover the rent itself, either as between the original parties, or as between parties who have succeeded to their rights and obligations.

2. Ejectment to recover the premises.

There are also certain "summary proceedings," provided by the statutes of this State, to obtain speedy possession where rent is unpaid, or where a tenant holds over, that will be adverted to in a subsequent chapter (ch. 41), in which the proceedings in an ejectment suit, in order to make title under it, are given.

To work a forfeiture for non-payment of rent, as seen in the preceding title, and to authorize ejectment thereon, the common law required a previous demand of the rent due on the exact day, with circumstances of great particularity.

The revised statutes of 1830, however, provide that whenever any half year's rent or more shall be in arrear from any tenant to his landlord, and there is not sufficient distress, if the landlord have a right of re-entry for non-payment, he may bring ejectment to recover possession, and the service of the "declaration" therein shall be deemed and stand instead of a demand of the rent in arrear, and of a re-entry on the premises.

1 R. L. 440, § 23; 3 R. S. 5th ed. p. 829.

At any time before judgment, it is further provided, the tenant may tender or pay into court the rent, costs and charges, and thereupon the proceedings shall cease.

Within six months after possession taken under an execution and judgment as above, the lessee, his assigns or personal representatives may pay or tender to the lessor, his personal representatives or attorney, or pay into court, the rent, costs and charges, and the proceedings shall cease and possession be restored to the lessee, who shall hold according to the original demise without any new lease. Otherwise the tenant and all persons deriving title under the lease are barred.

Mortgagees may also redeem as above.

Provision is made as to the filing of the bill for relief by the lessee, &c., to recover possession on payment of rent, costs and charges, and for being credited

with what the lessor may have "really made" of the premises in the interim.

Ib. As to the above proceedings and the practice thereunder, reference may be made to the following cases, most of which are more particularly referred to in other parts of this chapter, under their appropriate heads: 7 Wend. 521; 1 Wend. 135; 7 Cow. 747; 18 N. Y. 529, 484; 13 N. Y. 299; 27 Barb. 176, 104; 18 Barb. 157; 2 Barb. 316; 5 Den. 127, 453, 480; 14 Wend. 172; 9 Wend. 147; 2 Duer, 507: 12 Abb. 475; 26 How. Pr. 292; 19 N. Y. 100; 2 N. Y. 141; 19 Barb. 484.

The remedy, by ejectment, to enforce a forfeiture on the non-payment of rent, is not allowed except where a right of re-entry is expressly stipulated for between the parties to the lease.

Van Rensselaer v. Jewett, 5 Den. 121; affirmed, 2 Com. 141; Tyler v. Heidorn, 46 Barb. 439.

As to the remedy by ejectment, where the land has been apportioned, *vide* title V, *supra* and *ante* p. 148.

Law of 1846 *as to Re-entry.*—By the above law, ch. 274, whenever the right of re-entry is reserved for rent due to a grantor or lessor in default of sufficient to distrain, it may be made on fifteen days' written notice after rent due, given by the grantor or lessor, his heirs or assigns, to the grantee or lessee, his heirs, executors, administrators or assigns, notwithstanding there may be sufficient property for distress. The notice may be served personally, or by leaving it at the grantee's or lessee's dwelling house on the premises.

The above provisions, requiring fifteen days notice, &c., do not apply when the right of entry arises on the breach of any other covenant than that for the payment of rent. Garner v. Hannah, 6 Duer, 262.

The statute of 1846 rendered inoperative the words in the revised statutes "and no sufficient distress can be found, &c., and authorized the landlord to re-enter, at any time after default in payment, provided he gave notice in writing as required.

This act of 1846 also abolished "*Distress*" for rent.

The provisions of the revised statutes on the subject of ejectment for non-payment of rent, are held not repealed by the above act of 1846. A

landlord also may still, it is supposed, re-enter at common law, or he may proceed under said law of 1846. The service upon the tenant of the notice required by said act is the only prerequisite to the right of re-entry under the statute. Such notice was not intended to be in addition to the formalities of the common law proceeding. Williams v. Potter, 2 Barb. 316; Van Rensselaer v. Snyder, 9 Barb. 302; affirmed, 13 N. Y. 299; The Mayor v. Campbell, 18 Barb. 156; see, also, Van Rensselaer v. Smith, 27 Barb. 104; 19 N. Y. 100.

The fifteen days' notice may be waived by the tenant. Williams v. Potter, 2 Barb. 316. As to the notice, *vide* 27 Bar. 104.

Where ejectment was brought for non-payment, and the proceedings were according to the course of the common law, a strict demand of the rent made with great nicety, viz., on the precise day and for the precise amount, required by the common law, was essential. Yet the strict demand could be dispensed with, if the plaintiff could show there was no sufficient distress on the premises. This common law demand is rendered unnecessary under our statutes, as above, whenever a half year's rent or more is due, and the landlord has a right to re-enter for the non-payment of rent; the commencement of the suit being authorized to operate as a substitute for the demand of the rent and actual re-entry.

The service of the notice under the third section of the act of 1846 (Laws of 1846, ch. 274), renders unnecessary the proof of the want of any sufficient distress.

Actual entry in order to bring ejectment is now unnecessary; but only a right to enter for condition broken and to immediate possession is requisite. Tyler v. Heidorn, 46 Barb. 439.

The case of Hosford v. Ballard, 39 N. Y. 147, holds that the clause in the statute of 1846, requiring fifteen days notice of an intention to re-enter does not apply to a grant in which the right to re-enter arises on default of payment by the tenant, but only where such right depends on the sufficiency of goods whereon to distrain. See also, Cruger v. McLawry, 41 N. Y. 219.

As distress for rent was also abolished by this act of 1846 (ch. 274), the re-entry may be made in all cases after giving a notice of fifteen days, without showing the want of a sufficient distress.

This act has been held to have a retrospective effect, and is not unconstitutional in its retrospective application.

Stocking v. Hunt, 3 Den. 274; Conley v. Palmer, 2 Com. 182; Guild

v. Rogers, 8 Barb. 502; Conkey v. Hart, 14 N. Y. (4 Kern.) 22; Van Rensselaer v. Snyder, 3 Kern. (13 N. Y.) 299.

See, also, EJECTMENT AND SUMMARY PROCEEDINGS, *post*, ch. 41.

As to forfeiture, re-entry and ejectment in cases of CONDITIONAL GRANTS AND LEASES IN FEE, *vide ante* ch. v, title IV.

TITLE VII. ESTATES AT WILL.

Another species of estates, not of freehold, is an estate at *will*. By the revised statutes, they and estates at *sufferance* are termed *chattel interests*, but shall not be, as such, liable to sales on executions. (Vol. III, p. 10, § 5.)

An estate at will, in general, is where lands and tenements are leased to be held at the will of the lessor. A reasonable notice had to be given of the election to determine the estate, so that the tenant might remove the emblements, and also his family and property.

Jackson v. Wheeler, 6 Johns. 272; Philips v. Covert, 7 Johns. 1; Bradley v. Covel, 4 Cow. 349.

Nor could the tenant determine the estate before the period of payment arrived, so as to cut off the landlord of his rent. Walker v. Furbush, 11 Cush. 366; Kent, IV, p. 111.

This was the old common law tenancy at will.

The old tenancy at will was succeeded in many cases by a tenancy from year to year, created under a contract for a year implied by the courts; such tenancy could not be determined by either party, except at the end of the year. A tenancy, for example, at an annual rent, which had been paid for several years, without lease or agreement, was considered a tenancy from year to year.

The reservation of an annual rent was the leading circumstance that turned leases for uncertain terms into leases from year to year.

But tenancies at will, properly so called, are still in existence, and have their distinctive characteristics.

Thus, a tenancy without any term prescribed or rent

reserved, or one expressly during the will of the lessor, or a simple permission to occupy, creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year.

Estates at will, however, at an annual rent, where no certain term is agreed on, and especially where the occupation continues after a determination of an estate for years, are generally now construed to be tenancies from *year to year*. The continued occupation is held to be evidence of a tacit renovation of the contract, without any definite period, and is construed to be a tenancy from year to year, requiring six months' notice of determination, by either party. Such a tenancy continues until terminated by a legal notice, and the tenant cannot withdraw at his pleasure.

Pugsley v. Aikin, 1 Ker. 494; reversing, 14 Barb. 114; Witt v. The Mayor, 6 Robtn. 441; Nichols v. Williams, 8 Cow. 13; Jackson v. Salmon, 4 Wend. 327; Conway v. Starkweather, 1 Denio, 113; Taggard v. Roosevelt, 8 How. P. 141; 2 E. D. S. 100; Jackson v. Wilsey, 9 Johns. 217; Jackson v. Miller, 7 Cow. 747.

See Wright v. Mosher, 16 How. P. 454, which holds that a tenancy at will, from year to year, may be terminated on one month's notice in writing, expiring at the end of the year. A notice should be given for the purpose of determining the tenancy, either three or six months (depending on whether the tenancy is from quarter to quarter, or year to year) prior to one of the usual quarter days. 6 Robtn. *supra*. See, also, The People v. Darling, 47 N. Y. 666; also *Ib.* 679.

A tenancy from year to year is considered, under the provision of the revised statutes as to "summary proceedings," a tenancy for one or more years; and a tenant may be removed without notice, unless there is a discretion given in the lease as to its determination by either party.

Park v. Castle, 19 How. P. 29. See, also, on this point, in a special case of tenancy, from year to year, Wright v. Mosher, 16 How. P. 454; People v. Darling, 47 N. Y. 667; *Ib.* 679.

It is frequently difficult to draw the line between and determine what are tenancies at will, properly so called, and tenancies from year to year.

The following decisions show the different aspects in which tenancies of this uncertain character are viewed:

A tenant in possession at or after a sale on execution, is tenant at will

to the purchaser, and cannot set up an outstanding title. Colvin v. Baker, 2 Barb. 206; Dickinson v. Smith, 25 Barb. 102. As would also be the former owner holding over. Nichols v. Williams, 8 Cow. 13.

A tenancy "for one year and an indefinite period thereafter," is one from year to year; also, where one enters on land by permission, as an occupant. Pugsley v. Aikin, 11 N. Y. (1 Ker.) 494; Jackson v. Bryan, 1 John. 322.

A parol gift of lands creates a tenancy at will. Jackson v. Rogers, 2 Ca. Ca. 314.

A tenant without any term prescribed or rent reserved is a tenant at will. Sarsfield v. Healy, 50 Barb. 245.

Also, one "during the will and pleasure of the lessor;" and a month's notice is sufficient. Post v. Post, 14 Barb. 253; Doe v. Wood, 14 Mees. & W. 682.

Holding over after the expiration of a lease for a year, or more, is a continuation of the former tenancy, which becomes one from year to year, under the terms of the original lease. Weber v. Shearman, 3 Hill, 547; 6 Hill, 32; Witt v. The Mayor, 6 Robtn. 441; Hall v. Wadsworth, 2 Wms. (28 Vermont), 410; Conway v. Starkweather, 1 Den. 113.

A mortgagee, it was held before the revised statutes, had to give the mortgagor six months' notice to quit before ejectment brought. Jackson v. Laughead, 2 Johns. 75.

Where possession is taken, under a parol lease void by the statute, it enures as a tenancy from year to year, and cannot be terminated by either party except at the end of the year. Taggard v. Roosevelt, 8 How. P. 141; 2 E. D. S. 100.

Where the holding is at a stated rent, it will, after notice to quit terminating the tenancy at will, become a tenancy from year to year, requiring six months' notice to quit. Bradley v. Covel, 4 Cow. 349.

Not so required, however, to remove under summary proceedings, under act of Apr. 13, 1820. Nichols v. Williams, 8 Cow. 15.

A person in peaceable possession, with the knowledge and acquiescence of the owner, is a tenant at will, entitled to notice. Marquart v. La Farge, 5 Duer, 559.

A party entering under an agreement to accept a lease for a term of 20 months, and subsequently refusing to accept, becomes a tenant at will or by sufferance. Anderson v. Prindle, 19 Wend. 391; Id. 23 Wend. 616.

Determination of Tenancy at Will by Notice under Statute.—The revised statutes provide that any tenancy at will or sufferance, created by the tenant holding over his term, *or otherwise*, may be terminated by one month's written notice requiring the tenant to remove; and the landlord may re-enter at the expiration of the month. He may also maintain ejectment, or proceed in the manner provided by law to remove the tenant, without further notice.

Laws of 1820, 177; 3 R. S. 35.

The revised statutes further provide that the above notice shall be served by delivering the same to the ten-

ant, or to some person of proper age residing on the premises; or, if the tenant cannot be found, and there be no person residing on the premises, such notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read.

Where the tenancy is expressly at will, the notice may be given at any time. Vrooman v. Shepperd, 14 Barb, 453.

The notice required by the revised statutes need not specify the time within which the premises must be surrendered. It is sufficent if the tenant has thirty days' notice of the intention to terminate the tenancy. Burns v. Bryant, 31 N. Y. 453. See *contra*, Wright v. Mosher, 16 How. P. 455.

No notice is necessary to a tenant where the terms on which a lease is to terminate are fixed by the agreement of the parties. Allen v. Jaquish, 21 Wend. 628.

Nor in cases where the relation of landlord and tenant does not exist; as in case of a trespasser. Torry v. Torry, 14 N. Y. 430; Doolittle v. Eddy, 7 Barb. 74; *Vide* 1 R. S. 1st ed. 749.

If the tenant merely holds over without assent, he is not a tenant at sufferance requiring notice. Rowan v. Little, 11 Wind. 616.

A disclaimer of the tenancy dispenses with the notice to quit, as taking a deed from a stranger. Jackson v. Wheeler, 6 Johns. 272: Woodward v. Brown, 13 Pet. 1; Sharpe v. Kelley, 5 Den. 430.

Or an act of waste. Phillips v. Covert, 7 Johns. 1.

An acceptance of rent after the expiration of notice to quit is a waiver of the notice. Prindle v. Anderson, 19 Wend. 391; 23 *Ib.* 616. *Vide*, also, People v. Darling, 47 N. Y. 666; *Ib.* 679.

Other Determination of the Estate.—An estate at will is also determined by a conveyance to a third person, or by the commission of voluntary waste; also by any written disclaimer, such as giving a deed in fee.

Philips v. Covert, 7 Johns. 1; Jackson v. Wheeler, 6 Johns. 272; Sharpe, v. Kelly, 5 Den. 431; Jackson v. Vincent, 4 Wend. 633.

Liable for Waste.—A tenant at will is liable for wilful but not for permissive waste; for which *trespass quare clausum fregit* lies.

Starr v. Jackson, 11 Mass. 519; Gibbons on Dilapidations, p. 47. See *ante*, as to Waste, p. 154.

Effect of Covenants in the Lease.—A tenant holding over holds subject to all covenants in the expired lease, which are consistent with yearly tenancy.

Hyatt v. Griffiths, 33 Eng. L. & Eq. 75; Vrooman v. McHaig, 4 Md. 450; Prockett v. Ritter, 16 Ill. 96; Conway v. Starkweather, 1 Den. 13.

Assignable Interest.—An actual tenant at will has not any assignable interest, though it is sufficient to admit of an enlargement by release; and if he assigns, the tenancy is determined. On the other hand, estates which are constructive tenancies from year to year may be assigned.

City of New York.—The revised statutes of 1830 provide that agreements for the occupation of lands or tenements in the city of New York, which shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence; and the rent, under such agreement, shall be payable at the usual quarter days for the payment of rent in said city, unless otherwise expressed in the agreement.

Laws of 1820, 178, § 4; 1 R. S. 1st ed. 744. *Vide* Wolfe v. Merrit, 21 Wend. 338; Marquart v. La Farge, 5 Duer, 559; Clarke v. Richardson, 4 E. D. S. 173; Taggard v. Roosevelt, 2 E. D. S. 100.

Contracts of Sale.—As to occupation under a contract of sale, *vide post* ch. xix.

As to the action of ejectment, summary proceedings, and other actions to recover the possession of land, *vide post* ch. 41.

See, also, "Estates at Sufferance," *infra.*

Title VIII. Estates at Sufferance.

Another estate, not of freehold, is an estate at SUFFERANCE—that is, where the tenant comes into possession of land by lawful title, but keeps it over after the determination of his interest. He has only a naked possession, without power to sell or to transmit, and was not, by common law, entitled to notice to quit, and, independent of statute, was not liable to pay rent.

Jackson v. Parkhurst, 5 Johns. 128; Jackson v. McLeod, 12 Johns. 182; Livingston v. Tanner, 12 Barb. 481.

The distinction between a tenancy at will and at suf-

ferance is, that the former is created by the consent, and the latter by the *laches* of the landlord, who may enter and put an end to the tenancy when he pleases. But, before entry, the lessor cannot maintain an action of trespass against the tenant by sufferance, as his first occupation was through the act of the lessor, and lawful.

The purchaser of a life estate, who holds over after its termination, is a tenant by sufferance to the remainderman. Livingston v. Tanner, 12 Barb. 481.

Where the grantor of land holds over after day agreed on, he is a tenant at sufferance. 4 Johns. 150, 313; 15 Johns. 106.

See, also, as to tenants at sufferance, under the common law rules, 1 Johns. Ca. 123; 4 Johns. 150, 313; 15 Johns. 106, 123.

Formerly, tenants at sufferance were not entitled to notice to quit before ejectment. Jackson v. Parkhurst, 5 Johns. 128.

Determination of the Tenancy by Notice.—By revised statutes (3d vol. p. 35, § 7), wherever there is a tenancy *at will*, or by sufferance, created by the tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice, in writing, to the tenant, requiring him to move. At the expiration of the month, the landlord may re-enter or bring ejectment, or remove the tenant.

Where a tenant for a year holds over, he is not entitled to notice to quit as a tenant at sufferance; but may be removed by summary proceedings, unless he hold over for such a length of time as to imply assent of the landlord. Rowan v. Lytle, 11 Wend. 616.

Nor is a tenant for lives, holding over without permission, a tenant at sufferance, entitled to notice. Livingston v. Tanner, 14 N. Y. 64.

See, more fully, as to the above statutory notice, its service, and when it is requisite, *ante*, pp. 198, 199.

Sales on Execution.—Estates at will or by sufferance, as such, are not liable to sales on execution.

1 R. S. 722, § 5; Colvin v. Baker, 2 Barb. 206; Dickinson v. Smith, 25 Barb. 102.

But a tenancy from year to year may be so sold. Bigelow v. Finch, 17 Barb. 394.

Grants by Tenants at Will or Sufferance.—A tenant at will or by sufferance has no estate that can be granted by him to a third person.

And one who enters under a lease or assignment from a tenant at will, is a disseizor, and is liable in trespass at the option of the landlord.

Reckhow v. Schanck, 43 N. Y. 448.

Guardians, &c., Holding Over.—Guardians and trustees of infants, and husbands seized in right of their wives only, and every other person who shall hold over

without consent, any estate determined on any life or lives, shall be adjudged a trespasser, and liable in damages.

3 R. S. p. 39. See, also, *Ejectment* and *Summary Proceedings*, *post* ch. 41.

Title IX. Merger.

A merger now is matter of fact and not of law, and must be proved aliunde.

42 N. Y. 334, Purdy v. Huntington.

The doctrine of merger is applicable not only to estates for years, but to other interests and estates, legal and equitable. Its main features are given collectively in this chapter, as being a more convenient arrangement for reference than their distribution under the various chapters to which they may respectively relate.

When the term of years and the next expectant estate meet in one person, a *merger* takes place by which the elder term merges in the latter, and becomes extinct. Or when a greater estate and a less fall together in one person, the latter is merged in the former. The more remote estate must be the next vested estate in reversion or remainder, without any intervening estate vested or contingent; and the estate in reversion or remainder must be at least as large as the preceding estate. As a general rule, also, where the estates are equal there is no merger.

The doctrine of merger applies only where there is a legal estate; as where the title and a lien, or a legal and an equitable, or a larger and a lesser estate meet.

Where the two estates are successive, and not incompatible, there may be no merger.

Doe v. Walker, 5 Barn. & Cress. 111; 4 Kent, 101; Schermerhorn v. Merrill, 1 Barb. 512; Reed v. Latson, 15 Barb. 9; James v. Morey, 2 Cow. 246.

An estate may merge for one part of the land and continue in the remaining part of it.

If the estates are held in different legal rights, there will be no merger, provided one of the estates be an

accession to the other merely by act of law, as by marriage, by descent, by executorship or by intestacy.

When the other estate had been added by act of the party, as by purchase, then the merger takes place, if the power of alienation extends to both estates.

Preston on Con. III, 25; Kent IV, 101; Hosford v. Merwin, 5 Barb. 51.

Under the above principles, an estate for years may merge in an estate in fee or for life; and an estate *pur autre vie* may merge in an estate for one's own life.

So, also, if the legal and equitable estates in land are co-extensive and unite in the same person, the equitable is merged in the legal estate, which would then descend according to the rules of law applicable to it; as, for example, if the legal estate in fee descend *ex parte maternâ*, and the equitable estate in fee *ex parte paternâ*, the equitable estate is merged in the legal, and both go in the line of descent of the legal estate (as per rules of descent, *post*, ch. 14).

Vide Nicholson v. Halsey, 1 Johns. Ch. 417.

So, also, if the owner of the equity of redemption pays off an existing mortgage and takes an assignment of it, it will be intended that the mortgage is extinguished, unless it is made to appear that he has some beneficial interest in keeping the legal and equitable estates distinct, or has so *declared* his intention. He will not be allowed to keep the mortgage on foot to the prejudice of a *bonâ fide* purchaser under him. The mortgage will be kept on foot if for the benefit of an infant's estate.

Purdy v. Huntington, 42 N. Y. 334; Gardner v. Astor, 3 Johns. Ch. 53; Starr v. Ellis, 6 Johns. Ch. 393; James v. Morey, 6 Johns. Ch. 417; *Ib.* 2 Cow. 246; *In re* DeKay, 4 Paige, 403; Cooper v. Whitney, 3 Hill, 96.

When the mortgage has become once merged, it cannot be restored so as to give priority over a junior lien. Angel v. Boner, 38 Barb. 425.

The conveyance of mortgaged premises from the owner thereof to the mortgagee, will not operate as a merger of the mortgage in the legal title, where it was not the intention of the parties that it should have that effect. Van Nest v. Latson, 19 Barb. 604.

A charge will not merge in the inheritance if contrary to the interest of the owner of the estate. Davis v. Barrett, 11 Eng. L. & Eq. 317; Johnson v. Webster, 31 *Ib.* 98.

Where the executor of a mortgagee purchased, in his own right, the premises under the foreclosure of a second mortgage, it was held that the first mortgage was merged in the fee in equity and at law. Clift v. White, 15 Barb. 70.

The case was reversed in the court of appeals, in view of the special circumstances of the case. 2 Ker. 519.

Where the owner of the equity of redemption of mortgaged premises made a second mortgage, and then took an assignment of the first mortgage, which he afterwards assigned to a third person, it was held that the existence of the second mortgage at the time of these assignments prevented the merger of the first one. Evans v. Kimball, 1 Allen, 240. See, also, Purdy v. Huntington, 42 N. Y. 334.

Although when the greater and less estate meet and coincide in the same person, the less estate, at law, becomes annihilated, in equity the rule is not inflexible. There, it depends on the intention of the parties and other equitable considerations. Merger is not favored in equity, and is generally allowed merely to promote the intention of the party. At law, merger will operate, even though one of the estates be held in trust, and the other beneficially, by the same person; or if both the estates were held by the same person on different trusts. Equity, however, would interpose and prevent the merging, if the justice of the case required it.

As a general rule, an equitable estate would merge in the legal title if subsequently acquired by the *cestui qui trust.* In equity, the rule would be modified by the intention of the party and the requirements of justice, so that the equitable estate, if necessary, might be kept in existence. Thus, if an equity of redemption were conveyed to a mortgagee, with an express agreement between the parties that the deed should not operate as a merger of the mortgage, except at the election of the mortgagee, equity would preserve the two estates distinct, unless the mortgagee appear to have elected that they should be merged. So, also, if the executor of the mortgagee purchase the fee in his individual capacity, he has the right of election in equity. So, also, if it be for the interest of a person in whom the legal and equitable estate unite, or if the person, being an infant, or lunatic, cannot elect, and it is for his interest, the law will imply an intention, to keep the equitable estate on foot.

Sheldon v. Edwards, 35 N. Y. 279; Reed v. Latson, 16 Barb. 9; Spencer v. Ayrault, 10 N. Y. 6 Seld. 202; 4 Kent, 103; Clift v. White, 2 Ker. (12 N. Y.) 519; reversing, 15 Barb. 70; James v. Morey, 2 Cow. 246; Cooper v. Whitney, 3 Hill, 95. *Vide*, also, *post* ch. 23, Mortgages.

Title X. Surrender.

Where an estate for life or years is yielded up to the next estate in reversion or remainder, the former estate becomes extinguished by act of the parties. The surrender is made by act of parties, and not by operation of law, as in case of merger.

The surrender must be to the immediate lessor or his assignee, and, as has been seen above, must be in writing (*ante*, p. 178), if the lease is for over a year.

The surrender of an estate being required by statute to be in writing (2 R. S. 134, § 6), the calling it a forfeiture, and agreeing it shall be a forfeiture, cannot dispense with the requirements of statute, or change its character. Allen v. Brown, 60 Barb. 39.

The revised statutes provide that, if a lease be surrendered to be renewed, and a new lease be made by the chief landlord, such new lease shall be valid without surrender of the under leases derived out of the surrendered lease; and the chief landlord, the lessee, and the holders of the under leases shall have the same rights as if the original lease was continued; and the chief landlord shall have the same remedies for rent, &c., as under the original lease, and to the extent of the rents and duties therein reserved.

(1 R. L. 442; 3 R. S. p. 34; Laws of 1846, ch. 274.)

Accepting a new, valid lease, operates in law as a surrender of the old. Livingston v. Potts, 16 Johns. 28; Van Rensselaer v. Pennimer, 6 Wend. 569; Schieffelin v. Carpenter, 15 Wend. 400. Such intention is presumed from the acts of the parties, but such intention cannot be presumed, if evidently against the intent of the parties, and the rules of common sense. 6 Wend. 509, *supra*.

The unexpired term of a year in a lease for three years may be surrendered by parol. Smith v. Devlin, 23 N. Y. 363.

A surrender, also, may be implied in law.

A surrender of an estate for life or years to the owner of the next immediate estate in reversion or remainder is implied by law, where an estate incompatible with the existing estate is accepted by the lessee—*e. g.*, as where the lessee takes a new lease of the same lands from the reversioner or remainderman; strictly, such new estate must be transferred by writing.

Where the tenant restores possession to the landlord, or where the tenant assents to the landlord leasing to a third person, a surrender will be also implied. In such cases, however, it is considered that no surrender will be implied in law unless there is an actual change in possession.

Schieffelin v. Carpenter, 15 Wend. 400; Van Rensselaer's Heirs v. Penniman, 6 Wend. 569; 4 Kent Com. 103; Nickells v. Atherstane, 10 Ad. & El. N. S. 944; Dodd v. Acklom, 6 Mann & Gr. 673; Lawrence v. Brown, 1 Seld. 394; Springstein v. Schemerhorn, 12 Johns. 357.

A new agreement made by a landlord with a third party, with the assent of the tenant, will also operate in law to discharge the lessee from the covenants of a lease, and will be construed as a virtual acceptance of a surrender offered by the tenant. Murray v. Shave, 2 Duer, 188.

It has been held that a recision of the lease may be implied by abandonment and other acts *in pais*, without a written surrender. Hegeman v. Arthur, 1 E. D. S. 147; Townsend v. Albers, 3 E. D. S. 560.

An agreement to surrender may be enforced. Bogert v. Dean, 1 Daly, 259. Such an agreement may be inferred. Bedford v. Terhune, 30 N. Y. 453.

Title XI. Miscellaneous Provisions.

Emblements.—The tenant for years, at the end of the term, is not entitled to emblements—*i. e.*, crops, &c., in the ground, provided the lease be for a certain period. It is otherwise where the determining event is uncertain —*i. e.*, if a tenant for life make a lease for years, the lease being determined by his death. So in the case of the determination of a tenancy at will.

As to emblements, *vide ante*, p. 153.

Estovers.—A lessee is entitled to reasonable estovers —*i. e.*, timber for fuel, fencing, &c. *Vide ante*, pp. 152, 154.

7 T. R. 234; Clarke v. Cummings, 5 Barb. 339.

But the cutting of trees, except under special circumstances, is an act of waste.

McGregor v. Brown, 6 Seld. 114.

Attornment.—By the revised statutes, the attornment of a tenant to a stranger is made absolutely void, and shall not in any wise affect the possession of his landlord, unless it be made—

1. With the consent of the landlord; or,

2. Pursuant to, or in consequence of, a judgment at law, or the order or decree of a court of equity; or,

3. To a mortgagee after the mortgage had become forfeited.

Vide decisions, *ante*, p. 184.

Notice to Quit by Tenant.—If a tenant give notice of his intention to quit, and shall not deliver up possession at the time specified, the tenant, his executors or administrators shall thenceforward pay the landlord, his heirs or assigns double rent while the tenant is in possession.

1 R. L. 440; 1 R. S. 1st ed. 745.

Tenants Holding Over after Notice to Quit.—If any tenant for life or years, or any other person, who may have come into the possession of lands, &c., under or by collusion with such tenant, shall wilfully hold over any lands, &c., after the termination of the term, and after demand made and one month's notice in writing given, in the manner prescribed, he is liable for double the yearly value of the lands or tenements for so long as he keeps the person out of possession, and also for any special damage incurred; and there shall be no relief in equity against any recovery at law therefor.

1 R. L. 440; Laws of 1820, 179; Laws of 1846, ch. 274; 1 R. S. 1st ed. 745.

Rent Payable after a Life Estate, &c.—As between tenants for life and remaindermen, rent accruing on leases executed by the testator of the parties and becoming due after the termination of the life estate, cannot be apportioned, but belongs to the remaindermen.

Marshal v. Moseley, 21 N. Y. 280.

And so it is between executors of a lessor and remaindermen. A remainderman who succeeds to the reversion is entitled to the whole rent as an entire sum due him, if it is not payable until after the decease of the testator. The heir, also, would take it as against the executors as an incident of the reversion.

Fay v. Holloran, 35 Barb. 295; Jones v. Felch, 3 Bos. 63. See, also, *ante*, p. 153.

By the revised statutes, if a tenant for life die on or after rent due and payable to him on a demise *made by him*, his executors, &c., may recover from the under tenant the whole rent due. If he die before the rent is to become due, they may recover the proportion of rent which accrued before his death.

1 R. S. 1st ed. p. 747. As to apportionment of rent charges and services, *vide* 3 Den. 135; 1 Bos. 88; 22 N. Y. 32 and *ante*, p. 148.

Deeds of Lease and Release.—The revised statutes provide that deeds of lease and release may continue to be used, and shall be deemed grants; and as such shall be subject to all the provisions in the chapter (chap. 1, art. 4, title 2, part I) concerning grants.

Vol. I, 1st ed. p. 739.
As to this form of conveyance for the transfer of fees, *vide post*, ch. xx.

Fixtures.—As to what fixtures and structures by tenants are considered as attached to and part of the realty so as to be incapable of removal by the tenant after the expiration of his term, *vide ante*, p. 107.

The law on this subject belongs more appropriately to works on the relation of landlord and tenant than to a general treatise of this nature. The cases are full of refinements on this subject, and the law undergoes frequent change. The general principle is, that nothing of a personal nature is considered a part of the realty unless it be brought within the denomination of a fixture by being in some way permanently, or at least habitually, attached to the land or some building on it. It need not be constantly fastened; nor need it be so fixed that detaching will disturb the earth, or rend any part of the building.

It is also a general principle of modern adoption that constructions, though firmly affixed by a tenant to buildings, if so fixed for the purpose of carrying on a business of a personal nature, are personal property, and may be removed by the tenant.

Vide, as to assets for administration, 3 R. S. 83, § 6, and ch. xvii. *post*; Vanderpoel v. Van Allen, 10 Barb. 157; Goddard v. Gould, 14 *Id.* 662; Laflin v. Griffiths, 35 *Id.* 58; Murdock v. Gifford, 18 N. Y. 28; Ford v. Cobb, 20 *Id.* 344; Swift v. Thompson, 9 Conn. Rep. 63; Gale v. Ward, 14 Miss. 352; Voorhies v. McGinnis, 46 Barb. 243; Cook v. The Champlain Transp. Co. 1 Den. 92.

It is also, however, a rule that whatever is annexed or affixed to the freehold, by being let into the soil or annexed to it, or to some erection upon it, to be habitually used *there;* particularly if for the purpose of enjoying the realty, or some profit therefrom, is a part of the freehold.

See Buckley v. Buckley, 11 Barb. 43, and cases cited.
But not fixtures for trade, &c., not essential for support. 2 R. S. 169.

Tenants Sued in Ejectment.—A tenant sued in ejectment, or for the recovery of the land occupied by him, or the possession thereof, shall forthwith give notice thereof to his landlord, under the penalty of forfeiting three years value of the premises, to be sued by the person of whom he holds, or his landlord.

1 R. L. 444; 1 R. S. 1st ed. p. 748.

Use and Occupation.—By the revised statutes, a landlord may recover a reasonable satisfaction for use and occupation, by any person, under any agreement, not made by deed. If any parol demise or agreement not made by deed, by which a certain rent is reserved, appears in evidence, the plaintiff may use it as evidence of the amount of the damages.

1 R. S. 1st ed. 748.
This statute is taken with certain modifications from the law of 1813. 1 R. L. of 1813, p. 444.

This action for use and occupation lies only where the relation of landlord and tenant exists. It is founded on contract, express or implied; and an action therefor cannot be sustained if that relation has ceased during the time sued for.

Bancroft v. Wardwell, 13 Johns. 489; Jennings v. Alexander, 1 Hilt. 154; Crosswell v. Crane, 7 Barb. 192; Osgood v. Dewey, 13 Johns. 240; Cleves v. Willoughby, 7 Hill, 83; Featherstonaugh *ads.* Bradshaw, 1 Wend. 134.
The lessee may be sued for the use and occupation of his under tenant. Moffat v. Smith, 4 Com. 126; Bedford v. Terhune, 30 N. Y. 453.

It was held at first that a landlord could only recover in an action for use and occupation, for the time the tenant had actually entered into possession and occupied

the premises, either by himself or by his sub-tenant or agent.

Crowell v. Crane, 7 Barb. 191; Seaman v. Ward, 1 Hilt. 52.

It is held, however, in the case of Hoffman v. Delihanty (13 Ab. 388), that the action would lie where the lands were held by the defendant without being actually occupied, even since the revised statutes.

The cases of Wood v. Wilcox (1 Den. 37), and Beach v. Gray (2 Ib. 84), were overruled in that particular. The above case of Hoffman v. Delihanty was sustained in Hall v. The Western Transportation Co., 34 N. Y. 284, where it is held that if the power to use and occupy is given by the landlord to the tenant, so far as the landlord is concerned, he has performed on his part, and the action is maintainable.

The action for use and occupation lies where the holding is under an implied, as well as where it is under an express permission, and the tenant who goes in under an implied license, is not to be permitted to dispute the title.

Pierce v. Pierce, 25 Barb. 243.

As to the evidence of value in the action, *vide* Williams v. Sherman, 7 Wend. 109.

The action will not lie against a vendee who took possession, but did not complete the purchase. Smith v. Stewart, 6 Johns. 46; Bancroft v. Wardwell, 13 Johns. 489.

It lies against a lessee holding over, Abeel v. Radcliffe, 13 Johns. 297; see also, Vernan v. Smith, 15 N. Y. 328.

Waste.—Tenants for years are liable for waste.

Vide ante, p. 154; and McGregor v. Brown, 6 Seld. 114.

A condition in a lease giving a right of re-entry in case of waste, is not a limitation of the estate, but a condition which makes the estate a conditional one, which could only be determined by a trial and adjudication, or by the legal surrender of all the rights of all the parties in interest.

Allen v. Brown, 60 Barb. 40.

The Words "Real Estate" and "Conveyance" as applied to "Leases."—The revised statutes provide that the term "real estate," as used in the chapter relative to the proof and recording of deeds shall be construed as co-ex-

tensive in meaning, with "lands, tenements, and hereditaments," and as embracing all chattels, real, except leases for a term not exceeding three years. The word "conveyance" is to include similar leases.

35 B. 334: 1 R. S. 1st ed. 762; 16 N. Y. 152; 35 Barb. 334.

The provisions of the chapter were not to extend to leases for life or lives, or for years in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware, and Schenectady. Laws of 1823, 413, 1 R. S. p. 763.

Remainders on Terms of Years.—Vide Post, ch. ix.

Tenants who have Paid Taxes.—Where taxes have been collected against tenants, where others are liable therefor, they may recover the same, or deduct the same from rent due or accruing.

1. R. S. 1st ed. p. 419.

Assessments.—Tenants for a less term than twenty-five years may also deduct from their rent assessments for work on the highway, at one dollar per day, unless otherwise agreed.

Laws of 1826, 228, as amended laws of 1864, ch. 395; see laws of 1849, ch. 250; 1837, ch. 431; 1832, ch. 107.

Debt on Leases for Life.—Any person having rent due on a lease for life or lives may have the same remedy to recover such arrears by action of debt as if such lease were for years.

1 R. S. 1st ed. 747.

This also applies to rents dependent on the life of another, *Ib.* 1 R. L. 438.

Executors and Administrators.—May have the same remedies for rent due their testator that he might have had if living.

1 R. S. 1st ed. 747.

Computation of Time.—Time is to be computed according to the Gregorian or new style: the 1st of January to be reckoned the first day of the year since the year 1752.

Whenever the term "years" is used in any statute,

deed, contract, or public or private instrument, it shall be deemed to consist of 365 days; a half-year of 182 days; and a quarter of a year, of 91 days; and the added day of a leap year, and the day immediately preceding shall be reckoned as one day. The word "month" is to be taken, when used as above, as a calendar, and not a a lunar month.

1 R. S. 1st ed. p. 610.

Taxes on Leases.—As to assessment of leases against persons entitled to rents in leases for over twenty-one years.

Vide Law of May, 13, 1846, ch. 327, as amended law of April 19, 1858, ch. 357; see also, 15 N. Y. 452; 7 Barb. 250; 4 Barb. 11.

Champerty.—Leases in violation of the spirit as well as the letter of the statutes against champerty are void.

The People v. The Mayor, 19 How. P. 289.

Leases of State Salt Lands.—*Vide* Law of April 15, 1859, Ch. 346, §§ 23, 44.

Leases by Executors.—When an order has been made by the surrogate for the mortgage, lease or sale of a decedent's estate, if the executor, administrator, etc., is disqualified or removed, etc., the order may be carried out by the Administrator, *de bonis non.*

Law of April 6, 1850, ch. 162.

Railroads Held Under Lease.—*Vide* Law of April 3, 1867, ch. 254; and law of May 11, 1869, ch. 844.

Leases on Land taken for Streets in New York City.—By law of April 9, 1813 (2 R. L. p. 417, § 181), where land is taken in New York city for streets held under lease, all parties are discharged therefrom. Where part only of the lands is taken, the lease continues as to the remainder, and a proportionate part of the rent is payable therefor.

The above provisions in favor of the tenant may be waived by him. Phyfe v. Conner, 45 N. Y. 102.

Assets for Administration.—Leases for year and lands held from year to year, are assets for administration.

2 R. S. 1st ed. 82; 1 R. L. 365.

Judgments as Liens on Estates for Years.—Vide post, Ch. xxxvii.

Bawdy Houses.—If lessees are convicted of a misdemeanor in keeping a bawdy house on the demised premises, the lease or agreement shall be void, and the landlord may have the same remedies as against a tenant holding over.

4 N. Y. 217; 2 R. S. 1st ed. 702; 3 Sand. S. C. 332; 3 Parker's Crim. R. 544.

By law of 1868, ch. 764, persons keeping such houses may be removed by the landlord or others.

Possession by Tenant.—The possession by a tenant shall be deemed the possession of the landlord until the expiration of twenty years from the determination of the tenancy, or where there has been no written lease until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the said periods. In 3 R. S. 5th ed. p. 590.

2 R. S. 1st ed. 294; Code, § 86; Tyler v. Heidorn, 46 Barb. 439.

Redemption of Leases under Sales on Execution.—Vide post, ch. xxxviii. Sales on Execution, and law of May 16, 1837, ch. 462.

Rents Payable by Estate of a Decedent.—The revised statutes provide that a surrogate may give a preference to rents due or accruing upon leases held by a testator or intestate, over debts of the fourth class in the payment of debts, if it appear of benefit to the estate.

Distress for Rent.—Was abolished by law of 1846, ch. 274.

St. Regis Indians, Leases by.—Law of 1841, ch. 143.

Summary Proceedings to recover Possession of Lands.—As to these and the rights of lessees for over five years to redeem. *Vide post,* ch. xli.

Forcible Entry and Detainer.—*Vide post,* ch. xli.

Falsifying Recoveries.—*Vide post,* ch. xli.

Merger of a Precedent Estate into a Remainder.—*Vide post,* p. 218.

CHAPTER IX.

EXPECTANT ESTATES.

By the revised statutes, *estates in expectancy* are defined to be those where the right of possession is postponed to a future period, and are divided into,

1. Estates commencing at a future day, denominated *future estates.*

Future Estates.

2. *Reversions.*—A future estate is one limited to commence in possession on a future day, either without the intervention of a precedent estate, or on the determination by lapse of time, or otherwise, of a precedent estate created at the same time.

TITLE I.—ESTATES IN REMAINDER.

An estate in remainder is a future estate, depending upon a particular prior estate created at the same time, and limited to take effect and be enjoyed after that prior or precedent estate is determined—the two together constituting only one entire estate in fee.

Definition under the Revised Statutes.—In the New York Revised Statutes of 1830, a remainder is defined to be an estate limited to commence in possession, at a future day, on the determination by lapse of time, or

otherwise, of a precedent estate created at the same time.

Where it is uncertain whether the person holding the antecedent estate is still alive, provision is made by statute to ascertain the fact, and to establish the presumption of decease. A person being absent for seven years together, is presumed dead in any action concerning lands, unless there is proof to the contrary.

3 R. S. p. 39, § 6, based on law of Feb. 6, 1788, 2 Greenl. 20 (*vide ante*, p. 155.)

The revised statutes also declare, that where a *future* estate is dependent on a precedent estate, it is a *remainder*, and may be created and transferred as such. (3 R. S. p. 11.) The law of remainders under the common law is intricate and voluminous. It is now much simplified by the statutes of this State.

Some of the most important common law rules, however, as well as the statutory enactments modifying them, it may be well to refer to, particularly as the statutory provisions of 1830 would not affect rights vested before they took effect.

Remainders on a Fee.—By the common law no remainder could be limited after the grant of an estate in *fee* simple (although this might be done as a future use, or executory devise). The revised statutes, however, declare, that two or more future estates may be created to take effect in the *alternative*, so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly. They have also altered the common law, so as to allow contingent remainders *in fee*, to be created on a prior remainder *in fee*, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined, before they attain their full age.

Temple v. Hawley, 1 Sand. Ch. 154.

They also allow a fee to be limited on a fee, on a contingency to happen within two lives in being.

Vide infra, title IV.

The Precedent Estate.—By the common law, there must always be a *precedent* or *particular* estate, supporting the remainder, which precedent estates had to be created by livery of seizin, even if a chattel interest or a term of years, because no freehold estate could pass without immediate *livery of seizin*. The livery to the tenant of the particular estate enured to the benefit of the remainder man, the two estates being considered one in law. If the particular estate was void in its creation, or was afterwards defeated, the remainder was defeated also, if it rested upon the same title as the particular estate; and, by the common law, the remainder had to vest during the continuance of the particular estate, or *eo instanti*, it determined. The rule was somewhat relaxed in WILLS and CONVEYANCES TO USES.

Inasmuch as if there was any interval between the remainder and the particular estate the remainder became void, on the principle that a freehold could not be made to commence *in futuro*, the particular estate was often vested in trustees, to prevent the defeat of the remainder by the cessation of the particular estate.

Remainders were thus upheld by way of use, the inheritance or use, until the contingency arose, resulting to the grantor or his heirs, or springing or shifting as provided. Remainders were also upheld as *executory devises*, when they would as remainders be void (*vide* title iii, *post*).

As to limitations in trust to preserve contingent remainders when such trusts were legal in this State, *vide* Vanderheyden v. Crandall, 2 Den. 9; 1 Com. 491; Van Rensselaer v. Poucher, 5 Den. 35.

As will be seen hereafter (*post*, ch. x) all uses and trusts are by the revised statutes abolished in this State, except as specially provided, and are now turned into legal estates; and, under the laws applicable to expect-

ant estates, as herein set forth, there is no necessity for such legal machinery as above to preserve remainders.

The old conveyances to use would not now be valid under our statutes, but the use would vest in the beneficiary as a legal estate.

Vide post, ch. x.

The revised statutes provide that no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or *precedent* estate, nor by any destruction of such precedent estate, by disseizin, forfeiture, surrender, merger, or otherwise. The above provision is stated not to be construed to prevent an expectant estate being defeated in any manner or by any means provided by the party creating the estate, nor shall any expectant estate, thus liable to be defeated, be on that ground adjudged void in its creation.

Vol. III, p. 13, §§ 32, 33.

The statute also prescribes that no remainder valid in its creation, shall be defeated by the determination of the precedent estate, before the happening of the contingency; but the remainder shall take effect on the happening of the contingency.

§ 34, *Ib.*

Two or more future estates may be created to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly.

§ 25, *Ib.*

Commencement of the Estate.—The revised statutes provide that the delivery of the grant where an expectant estate is created by grant, and where it is created by devise, the death of the testator shall be deemed the time of the creation of the estate.

Remainders are either vested or contingent.

Vested Remainders, or remainders executed, are those where there is a present fixed right of future enjoyment;

when the interest is fixed, though it is uncertain whether it will ever vest in possession.

Hawley v. James, 5 Paige, 318; 16 Wend. 61.

The revised statutes define them as "When there is a person in being, who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."

Vol. III, p. 11, § 13; Crowall v. Shererd, 5 Wall. 268.

Where a devise is to minors, for example, but that they should not take *until* they severally arrived at full age, the estate vests in interest on testator's death, although possession is postponed.

Post v. Hayes, 30 Barb. 312.

No remainder will be construed to be contingent, which may be held vested.

Moore v. Lyons, 25 Wendell, 119; 5 Wall, *supra;* Williamson v. Fields, 5 Sand. Ch. 533.

The distinction is often nice and difficult to draw, but is important, as it may affect the right of survivorship and inheritance, as well as the right of conveyance, before the revised statutes, allowing the transfer of expectant estates.

Where an estate is limited to a man for life, remainder to his children, the children living at the death of the testator, take vested remainders, subject to open and let in subsequent born children for their vested proportions.

Miller v. Macomb, 26 Wend. 229; affi'g, 9 Paige, 265; Baker v. Lorillard, 4 Com. 257; Vanderheyden v. Crandall, 2 Den. 9; affi'd, 1 Com. 491; Harman v. Osborne, 4 Paige, 336; Moore v. Little, 41 N. Y. 66; Doe v. Provost, 4 Johns. 61.

Contingent or Executory Remainders.—These are where the estate in remainder is limited to take effect, either to a dubious or uncertain person, or upon a dubious and uncertain event, so that the particular estate may chance to be determined, and the remainder never take effect. The revised statutes define a remainder as *contingent,*

whilst the person to whom, or the event upon which it is limited to take effect, remains uncertain.

A remainder is vested where the interest is fixed, although it will be uncertain whether it will ever take effect in possession.

It is not the uncertainty of *enjoyment* in future, but the uncertainty to the *right* of that enjoyment, which makes the difference between a vested and contingent interest.

30 Eng. Law & Eq. 435; Crofts v. Middleton, 35 *Ib.* 466; 34 *Ib.* 207; Williamson v. Field, 5 Sand. Ch. 533; Wolfe v. Van Nostrand, 2 Com. 436; Grout v. Townsend, 2 Den. 336.

The Contingency.—A general rule by the common law as to contingent remainders, was that the remainder must be limited to some one that might by common probability be *in esse* at the time or before the particular estate determined. It had to be a common or near possibility, as death, or death without issue, or coverture. If founded on a remote possibility it was void.

In a devise, a limitation over to the heirs of B. would pass a fee, although B. were living, otherwise if the devise were of a present estate. Campbell v. Rawdon, 19 N. Y. 412; rev'g, 19 Barb. 494.

A possibility upon a possibility held void (Jackson v. Brown, 13 Wend. 437), on a devise to the son of an unborn child, made before the revised statutes.

Our revised statutes provide that no future estate otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect.

Vol. III, p. 12, §§ 26 and 27.

Conditional Limitations.—As above seen, by the rules of the common law, a remainder had to be limited so as to await the natural determination of the particular estate, and not to take effect in possession upon an event which prematurely determined it; as in case of a forfeited condition, which would determine the precedent estate before its natural limitation.

If limitations on such estates, however, were made in conveyances to uses and in wills, they were good as con-

ditional limitations, or future or shifting uses, or executory devises; and upon breach of the condition, the first estate *ipso facto* determined, without entry, and the limitation over commenced in possession. By our revised statutes, a remainder may be limited on a contingency which in case it should happen would operate to abridge or determine the precedent estate, and every such remainder shall be construed a *conditional limitation*, and shall have the same effect as such limitation could have by law.

3 R. S. p. 12, § 27.

By the revised statutes also, when a remainder on an estate for life or years shall not be limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect only on the death of the first taker, or the expiration by lapse of time of such term of years.

Ib. § 29.

Transfer of Remainders.—All contingent and executory interests were assignable in equity. And all contingent estates of inheritance, as well as springing and executory uses and possibilities coupled with an interest where the person to take was certain, were transmissible by descent, and were devisable and assignable. If the person were not ascertained, they were not then possibilities coupled with interest, and they could not be either devised or descend, at the common law.

A mere contingency or possibility not vested, where the grantor had no right at the time but a mere possibility, could not prior to the revised statutes of 1830, it was held, be transferred, and would not pass a title subsequently acquired, except where there was a warranty in the conveyance which operated by way of *estoppel.*

This was considered the settled law of this State prior to the revised statutes, as decided in the following well known cases: Jackson v. Wright, 14 Johns. R. 193; Jackson v. Winslow, 9 Cow. R. 1; Pelletreau v. Jackson, 11 Wend. 110; Jackson v. Waldron, 13 Wend. 178; Edwards v. Varick, 5 Denio, 664. Not fully followed in the more recent case, however,

of Lintner v. Snyder, 15 Barb. 621. It was there held a present right, though not to vest in possession until a future event, might be released to one in possession; and in Miller *v.* Emans, 19 N. Y. 385, it was held that a future contingent interest could pass by release, and the old cases were overruled so far as conflicting in that particular. See, also, Moore v. Little, 41 N. Y. 66; Pond v. Bergh, 10 Paige, 140; and Wilson v. Willson, 32 Barb. 328, which holds that such an interest could be mortgaged.

By our Revised Statutes (*Vide* Vol. III, p. 13, 5th ed.), all estates in *expectancy* are descendible, devisable and alienable, in the same manner as estates in possession.

Even since the revised statutes, however, it is held that contingent remainders cannot be sold under execution. Jackson v. Middleton, 52 Barb. 9; Nichols v. Levy, 5 Wall. 433; 12 N. Y. 133; 7 Paige, 76; 45 B. 469.

Title II. The Rule in Shelley's Case.

It has been seen (*ante*, p. 118) that a grant without additional words of inheritance gave only an estate for life. Hence the word *heirs* was necessary to create a fee simple, and *heirs of the body*, a fee *tail*. These are called words of *limitation*, as limiting or describing the interest.

But if a remainder were given to the *heirs of A.*, where an estate of *freehold* is at the same time given to A., the heirs took by *descent*, and not by *purchase*. Taking by "*purchase*," in law, comprehends every species of acquisition in contradistinction to hereditary descent and escheat. The celebrated rule in Shelley's case (1 Co. 104) is this, *viz.*: "When the ancestor, by any gift or conveyance, takes an estate of *freehold*, and in the *same gift or conveyance*, an estate is *limited*, either mediately or immediately, to his *heirs* in fee or in tail, in such cases the word *heirs* is a word of *limitation* of the estate, and not a word of *purchase*," and the remainder was said to be *executed* in the ancestor, where there is no intermediate estate, or *vested* where an estate for life or in tail intervened. By force of the rule, the ancestor took the whole estate, and the heirs, if they took at all, could only take

by *descent*, which of course might be barred by grant or devise. The technical legal principle of the rule was that the words "heirs" or "heirs of the body" created a remainder in fee or in tail, which the law, to prevent an *abeyance*, vested in the ancestor, who is tenant for life; and by the conjunction of the two estates, he became tenant in fee or in tail.

The word *heirs* had to be used to make the rule applicable, and the estate of the ancestor had to be a freehold. The words "lawful issue" have been held to have as extensive a signification as heirs of the body. (Kinsland v. Rapelyea, 3 Ed. Ch. 1.) If the heirs were designated *nominatim* or as a class, the rule did not apply, nor if the person to take the first estate were deceased. (Brunt v. Gelston, 2 John. Ca. 384.) The rule was also often relaxed in interpreting wills and marriage settlements, and in executory trusts. (Tallman v. Wood, 26 Wend. 9.) If the word "issue" was defined as referring to a certain class, as issue living at *the time* of the devisee's death, or "children," the rule did not apply. (4 Paige, 345; Ib. 293; 3 Sand. Ch. 64; Christie v. Phyfe, 19 N. Y. 344; Post v. Post, 47 Barb. 72; 3 Wend. 503; Campbell v. Rawden, 18 N. Y. 412.) The origin and polity of the rule arose from the feudal tenure, which favored *descents*, among other reasons, because if the heirs took as purchasers, the lord would be deprived of certain feudal incidents. By reflecting on this *theory* of the rule, the rule itself is easily remembered. Upon the abolition of feudal tenures, the *reason* for the rule no longer existed, but the *rule itself remained.*

This rule in Shelley's case was recognized and adopted in the courts of this State, and considered to be of binding authority, and where words of procreation were used the fee tail was turned into a fee simple, under the statute of 1786, *ante*, p. 121.

The rule was held applicable alike to equitable and to legal estates (Brant v. Gelston, 2 Johns. Cas. 384; Kingsland v. Rapelyea, 3 Eds. Chan. 1; Schoonmaker v. Sheeley, 3 Den. 485; Brown v. Lyon, 2 Seld. 419), but not to an executory trust under a will in certain cases. Wood v. Burnham,

6 Paige, 513; 26 Wend. 9. See, also, Croxwell v. Shered, 5 Wallace, 268, and the cases above cited; also the more recent case, Post v. Post, 47 Barb. 72.

The revisers of the statutes in 1830, however, recommended the abolition of the rule as being one "purely arbitrary and technical, and calculated to defeat the intentions of those who are ignorant of technical language."

Abolition of the Rule since 1830.—The New York Revised Statutes have accordingly declared that where a remainder shall be limited to the heirs, or heirs of the body of a person, *to whom a life estate in the same premises* shall be given, the persons who, on the termination of the life estate, shall be the heirs or heirs of the body, of such tenant for life, shall be entitled to take as *purchasers*, by virtue of the remainder so limited to them.

Vol. III, p. 12; 11 N. Y. 401.

The practical operation of the abolition of the rule is, in cases where the rule would otherwise apply, to change what would under the rule be a fee, into a precedent estate and remainder.

A devise therefore, or grant, since the revised statutes of 1830, to A. for life, and after his decease to his heirs and assigns for ever, would give the heirs a *vested* interest in the land, subject to open and let in after born children; the interest of each, however, being liable to be defeated by his death before the first taker.

Moore v. Little, 40 Barb. 488; affirmed, 41 N. Y., 66; Campbell v. Rawdon, 18 N. Y. 416.

Title III. Executory Devises.

The above and other strict rules applicable to remainders were, in the case of *devises*, somewhat relaxed. By will, what would often be a bad remainder under the

above rules, would, in order to effectuate the intention of the testator, be upheld as an executory devise.

Though, by rule of law, what is capable of being supported as a contingent remainder, is never construed an executory devise (Wolfe v. Van Nostrand, 2 Comstock, 436); and it is often questionable whether a devise will be held a contingent remainder, or a conditional fee with an executory devise over on the determination of the fee. 30 Eng. L. & Eq. 435.

An *executory devise* of lands is defined as such a disposition of them, by will, that thereby no estate vests at the death of the devisor, but only on some future contingency; and it is one that *could not* take effect as a contingent remainder.

Thus, it needed no particular estate to support it, and might limit a fee to commence in *futuro* on a contingency—a fee also might be limited on a fee, which could not be done as a contingent remainder. Nor could an executory devise be defeated by destruction of the precedent estate, nor by a common recovery, generally.

Jackson v. Bull, 10 Johns. 19; Jackson v. Robins, 16 Johns, 537.

Any contingencies provided for, however, had to be such as would happen within a reasonable time, *i. e.*, lives in being and 21 years. Jackson v. Billinger, 18 Johns. 368. Otherwise it might be void as creating a perpetuity. See *post*, title IV, as to Perpetuities.

In an executory devise also, a term of years might be limited over, after a life estate created in the same term.

An executory devise has been held valid to a corporation to be created. Inglis v. Trustees, &c. 3 Pet. 99. But a contingent remainder would not take effect limited to a corporation that had no power to take. Leslie v. Marshall, 31 Barb. 560. See *post*, ch. x, Trusts for Charitable uses, and *post*, ch. xv, Devises to Corporations.

A change of circumstances either before or after testator's death might convert an executory devise into a remainder. Where there is a valid executory devise, and the freehold is not in the meanwhile disposed of, the inheritance descended to the testator's heir, until the event happened. As to distinction between contingent remainders and executory devises, *vide* Leslie v. Marshall, 31 Barb. 560.

TITLE IV. SUSPENSION OF THE POWER OF ALIENATION.

By the common law perpetuities and restraints upon alienation were not encouraged or sustained, and limitations were resorted to, by way of executory devise, to continue the possession of estates in families and prevent alienation; thereby avoiding the strict rules of the common law which prohibited the limitation of a fee on a fee, or the creation of a freehold in *futuro*, except as a remainder. In time, the principles establishing the limitations of terms in remainder, in succession, were firmly settled by judicial decision.

Time.—The utmost length allowed by the English law, for the contingency of an executory devise of any kind to happen, is that of *a life or any number of lives in being, at the time of the creation of the estate, and twenty-one years afterwards*, and the period of gestation for a person not in *esse*. This was the rule established in the case of the Duke of Norfolk (3 Cases in Chan. 1), in 1685, and in Stevens v. Stevens, 2 Barn. K. B. 375, in 1736, where the doctrine was finally settled and defined by precise limits. It was recognized in this State in the case of Jackson v. Billinger, 18 Johns. 368, and others; and any further period held too remote, as tending to create a perpetuity.

See also Lorillard v. Coster, 5 Paige, 177–188 and 219; Hawley v. James, 16 Wend. 61–114.

The law was changed by our revised statutes of 1830, and the absolute power of alienation can not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than *two lives in being at the creation of the estate*, except in the single case of a *contingent remainder in fee*, which may be created on a *prior remainder in fee*, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of *twenty-one* years, or *upon any other contingency by which the estate*

of such persons may be determined before they attain the full age."

Vol. III, p. 11.

The construction and application of this apparently plain provision of our statutes has been attended with great difficulty and much diversity of opinion. The leading features of construction evoked in its interpretation will be here briefly given.

The revised statutes further provide as follows:

§ 14. Every future estate is declared to be void in its creation, which suspends the absolute power of alienation, for a longer period than is above prescribed, and such power of alienation is declared to be suspended, *when there are no persons in being* by whom *an absolute fee in possession can be conveyed.*

The suspension which it is the purpose of the statute to limit, may be effected by one of two methods; either by providing for the creation of future estates to take effect upon the happening of some prospective event, the occurrence of which is essential to the vesting of such future estate, or by conveying the estate to trustees upon some authorized trust. The law against the suspension of the alienation is held applicable to every species of conveyance and limitation, whether it be by deed or will; whether it be directly to a party or indirectly in trust to the use of a party, or to one thereafter to come into existence; and whether limited by an executory devise or a springing use, and whether in the form of a power in trust or of a legal express trust.

It also applies to present as well as to future estates, and to naked powers as well as to estates in trust.

Hawley v. James, 16 Wend. 61; Coster v. Lorillard, 14 Wend. 265; Amory v. Lord, 5 Seld. 403; Yates v. Yates, 9 Barb. 324.

Character of the Limitation.—The rule is well settled that any limitation is void by which the suspension of the power of alienation will not necessarily, under all

possible circumstances, terminate within the prescribed period. It is not enough that it *may* so terminate.

If the limitation may, by possibility, exceed two lives in being, it is void. The validity of the limitation is to be determined by the character of the limitation, when created, and not by the event as it turns out in fact.

Coster v. Lorillard, 14 Wend. 265; 5 Paige, 172; Schetler v. Schetler, 41 N. Y. 328; Fowler v. Depau, 26 Barb. 224; Hawley v. James, 16 Wend. 61; Everitt v. Everitt, 29 Barb. 112; 29 N. Y. 39; Williams v. Conrad, 30 Barb. 524; Amory v. Lord, 5 Seld. 403; Tayloe v. Gould, 10 Barb. 398; Brown v. Evans, 34 Barb. 594; De Barante v. Gott, 6 Barb. 492. In the cases of Lang v. Ropke 5 Sand. 363; and Griffin v. Ford, 1 Bos. 123, a contrary view is expressed.

The Lives in Being.—Lives in being at the death of the testator, or the time of the conveyance, are alone to be considered. By the statute, successive estates for life can only be limited to persons in being at the creation thereof.

The lives must be designated, either by naming the persons in particular, or by limiting the estate on the first and second lives in a designated class, so that the persons whose lives are to furnish the measure of suspension can be ascertained in the instrument by which the disposition is made.

Hawley v. James, 16 Wend. 61; Jennings v. Jennings, 5 Sand. 174; 7 N. Y. 547; Lang v. Ropke, 5 Sand. 363; Dodge v. Pond, 23 N. Y. 69; Griffin v. Ford, 1 Bos. 123; Gott v. Cook, 7 Paige, 521; affirmed, 24 Wend. 641; Everitt v. Everitt, 29 N. Y. 39; Manice v. Manice, 43 N. Y. 303.

A future estate or interest in property may be valid if it is so limited as to vest in interest, so as to be alienable at the termination of two lives in being at the time of the creation thereof, although it will not vest in possession immediately upon the determination of such two lives.

Kain v. Gott, 7 Paige, 521; affirmed, 24 Wend. 641.

Absolute Term in Lieu of Lives.—No absolute term, however short, in lieu of lives, is valid. Life must, in some form, enter into the limitation.

Hone v. Van Schaick, 20 Wend. 564; Tucker v. Tucker, 1 Seld. 408; Boynton v. Hoyt, 1 Den. 53; Hawley v. James, 16 Wend. 61; Dodge v. Pond, 23 N. Y. 69.

But an absolute term in the alternative would not vitiate. Phelps v. Phelps, 28 Barb. 121.

So suspension to a day named would be void. DeKay v. Irving, 5 Den. 646; Williams v. Williams, 4 Sel. 525.

Or to hold property until a certain corporation might be created. Yates v. Yates, 9 Barb. 324.

Or to suspend alienation until certain mortgages are paid. Killam v. Allen, 52 Barb. 605.

Or to trustees to manage an estate for life and a year after. Tucker v. Tucker, 5 Barb. 99; affirmed, 5 N. Y. 408.

A suspension for three years is also held invalid. Moore v. Moore, 47 Barb. 257.

The Remainder need not be to a Person in Being.—A remainder in fee in real estate to take effect after the expiration of two lives in being at the testator's death, may be created in favor of a person not in being at the time; and in such a case a further contingent remainder in favor of a person not in being at the creation of the estate may be limited to take effect in the event that the person to whom the remainder is first limited shall die under the age of twenty-one years.

Vide ante, p. 226; Manice v. Manice, 43 N. Y. 303.

A trust to accumulate rents, &c., during the minority of the first of such remaindermen, and for his benefit, is valid. *Ib.*; Kilpatrick v. Johnson, 15 N. Y. 322.

Minorities.—A limitation upon minorities is held virtually a limitation upon lives.

Post v. Hover, 30 Barb. 312; Tayloe v. Gould, 10 Barb. 388; Lang v. Ropke, 5 Sand. 363; Jennings v. Jennings, 7 N. Y. 3 Seld. 547; Everitt v. Everitt, 29 N. Y. 39.

An express trust suspending alienation during a minority is not an absolute term of years, irrespective of life, but is determined by the death of the minor before he arrives at full age.

Lang v. Ropke, 5 Sand. 363; McGowan v. McGowan, 2 Duer, 171.

Where trustees, however, are directed to hold and manage an estate until the youngest of three children becomes of age, it is held that the provision is void if the interest in the fund does not vest in the children, until the youngest becomes of age. But if the respective interests vest distributively in the children on the death

of the testator, but the fund is not payable to them until the happening of the event mentioned, then the power of alienation is not unduly suspended, and the trust is valid. So, also, if the interests were joint instead of in common, and the whole remained contingent and unvested until the majority of the youngest of the three children, the absolute ownership would be suspended during three minorities, which would be illegal.

Everitt v. Everitt, 29 N. Y. 39; Hawley v. James, 16 Wend. 61; Coster v. Lorillard, 14 *Id.* 265; Patterson v. Ellis, 11 Wend. 260.

The leading inquiry upon which the question of vesting or not vesting turns, is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving at full age or surviving some other person, or the like. If futurity be annexed to the *substance* of the gift, the vesting is suspended; but if it appear to relate to the time of payment, only, the gift vests instanter; and words directing division or distribution between two or more objects at a future time, are equivalent to a direction to pay.

Jarman on Wills, 700; Gilman v. Reddington, 24 N. Y. 9.

A trust to continue until the testator's youngest child, if living, attain the age of twenty years, has been held void; or for a life, and until five minors attain full age. Boynton v. Hoyt, 1 Den. 53; Tayloe v. Gould, 10 Barb. 388; Post v. Hover, 30 Barb. 312; Savage v. Burnham, 17 N. Y. 561.

In a certain case, however, the words, "on my youngest child attaining twenty-one," were construed as the youngest child living at the death of the testator. Eels v. Lynch, 8 Bos. 465.

Also, a trust for the education of four minors, with a provision for the accumulation of the surplus, and the division of the fund as they successively become of age, when each *cestui qui trust* was to receive his portion of it, has been held void. Jennings v. Jennings, 3 Seld. 7 N. Y. 347; affirming, 5 Sand. 174; Vail v. Vail, 7 Barb. 226; affirmed, 10 N. Y. 69.

In the case of Burke v. Valentine, 52 Barb. 412, it is held, that where the executors do not take an estate in trust, but the interest of the estate is in the wife and children, a direction to the executors to convert the estate into money and apply it to the use of the wife and children, and after the youngest child should arrive at age to divide it among the children, share and share alike,

was valid. This case was so decided on the principle that the limitation would depend on the life or minority of the youngest child, and would vest at once in all the children living when either event happened—*i. e.*, the child's majority or his decease.

The principle of the distinction between the above cases seems to be that where the youngest of a class is specifically referred to, the limitation may be valid, but otherwise if the limitation is made to an entire class.

In construing the clauses of the James will, in Hawley v. James, above referred to, Nelson, C. J., states, in holding the limitation invalid, that the words, "youngest of my children and grandchildren," *standing alone*, might well enough refer to the youngest of each class. The clause was held invalid, because it, in addition, specified the youngest living and attaining the age of twenty-one years, by which the intent to apply it to all the children was apparent.

The above is also the distinction made in McGowan v. McGowan, 2 Duer, 57, where the limitation was made that upon the youngest son (being named) coming of age the estate was to be divided among testator's seven children (naming them), and should any die, that the estate should be divided among the survivors.

It is held, also, that although, by statute, the power of alienation of real estate may be lawfully suspended for the term of a minority, after the expiration of two lives in being, by means of a contingent remainder, to take effect in the event of the death of the first remainder man in fee during his minority; the absolute ownership of *personal* estate cannot be suspended beyond two lives in being. Manice v. Manice, 43 N. Y. 303; Howe *ads.* De Hay, 5 Denio, 646.

A suspension by a condition limiting an estate over on the contingency that a person shall leave no children that arrive at the age of 21, was held void; inasmuch as it was on the lives of an uncertain number of children who might die before 21. Brown v. Evans, 34 Barc. 594; see also Tayloe v. Gould, 10 Barb. 389.

The Statute has reference only to lives that suspend the power of alienation.—In the case of Hunter v. Hunter, 17 Barb. 25, it is held that a devise to E. for life, then to I. in fee, and on his dying without *leaving lawful issue at the time of his death*, over to his sisters in fee, is not too re-

mote, the power of alienation not being suspended by the lives of the children of I. The statute is held to have reference to lives only the continuance of which actually suspends the power.

This case also holds that a suspension of the power of alienation resulting simply from minority, is not such as is contemplated by the statute.

Annuities and Charges.—In view of the provisions of statute which forbid the alienation of trust estates, directions to trustees for the disposition of property will be upheld, as powers in trust or as mere charges on the realty, if possible, instead of trust *estates* in the lands, so that the provisions may be saved from invalidity, as against the law relative to perpetuities; and the lands will be treated as subject to alienation in spite of the power in trust, or as not held through the trust as one of the estates on the existence of which the limitation is based. Annuities therefore will be upheld, if possible, as charges on real estate, where the trust for their payment is void.

Tucker v. Tucker, 1 Seld. (5 N. Y.) 408; McGowan v. McGowan, 2 Duer, 57; Emmons v. Cairns, 3 Barb. 243; Hunter v. Hunter, 17 Barb. 23; Manice v. Manice, 43 Barb. 303; Killam v. Allen, 52 Barb. 605; Griffin v. Ford, 1 Bos. 123; Lang v. Ropke, 5 Sand. 363.

A charge upon the income of a testator's estate for the education of his grandchildren, is held not void as illegally suspending the power of alienation of the real estate, and the absolute ownership of the personal property. Hunter v. Hunter, 17 Barb. 25.

And a mere charge on lands to raise annuities is held not to suspend the power of alienation. O'Brien v. Mooney, 5 Duer, 51; Bells v. Lynch, 8 Bos. 465.

Separate Estates or Distributive Interests.—There should be a specific division and several appropriations, otherwise if there is a devise in trust to more than two for life jointly of the whole fund or estate, the courts will not divide the shares as independent trusts; although they will construe them so if they can. Limitations over would refer to the time appointed for the division, and not its completion, unless there is direction otherwise.

Westerfield v. Westerfield, 1 Brad. 137; Thompson v. Thompson, 28

Barb. 432; Tucker v. Bishop, 16 N. Y. 402; McSorley v. Wilson, 4 Sand. Ch. 515; Mason v. Jones, 2 Barb. 229; Coster v. Lorillard, 14 Wend. 265; Hone v. Van Schaick, 7 Paige, 221; Kain v. Gott, 7 Paige, 521; 24 Wend. 641; Wagstaff v. Lowerre, 23 Barb. 209; Van Vechten v. Van Vechten, 8 Paige, 104; Cromwell v. Cromwell, 3 Edw. 495; Harrison v. Harrison, 42 Barb. 162; Everitt v. Everitt, 29 N. Y. 39; Jennings v. Jennings, 3 Seld. 547; Amory v. Lord, 5 Seld. 403; Manice v. Manice, 43 N. Y. 303; Vail v. Vail, 7 Barb. 226.

When, therefore, a capital is appropriated for annuities, there should be a distinct capital for each annuity, and the lives are applied to such capital distinctively. Mason v. Mason, 2 Sand. Ch. 432; Lang v. Ropke, 5 Sand. 363; Boynton v. Hoyt, 1 Den. 53; Savage v. Burnham, 36 N. Y. 561.

Effect of a Power to Exchange or Reinvest.—A mere power to exchange, change, or reinvest the estate or fund does not obviate the objection as to inalienability within the rule against perpetuities.

Hawley v. James, 16 Wend. 61, and 9 Paige, 318; Belmont v. O'Brien, 2 Ker. 394.

A power of sale cannot be deemed to contravene the statute restricting suspension of the power of alienation. *Ib.* and Eels v. Lynch, 8 Bos. 465; Manice v. Manice, 43 N. Y. 303.

Power to Lease or Sell.—The absolute power of alienation is considered suspended, notwithstanding a qualified power is given to trustees to lease the estate, and to sell such portions as might be necessary to discharge liens, &c.

Amory v. Lord, 5 Seld. (9 N. Y.) 404.

Any direction for the holding beyond two designated lives in being is not invalid, however, if there are persons in being by whom a valid legal title to the property may be conveyed.

Everitt v. Everitt, 29 Barb 112; 29 N. Y. 39; Gilman v. Reddington, 24 N. Y. 9.

Successive Life Estates.—By the revised statutes, also, successive life estates shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void. And upon the death of those persons, the remainder

shall take effect in the same manner as if no other life estates had been created.

3 R. S. 5th ed. p. 11, § 17; *vide post*, title VI.

Valid and Invalid creation of Future Estates.—If successive legal estates are created beyond the terms allowed by the revised statutes, as above, the first two would be valid, and the others void; but if mere equities all dependent upon a trust which is continuous are created, and the trustees are clothed with the entire estate, legal and equitable, and the trust is void, the equitable interests have been held all to fail, as they are all dependent upon the trust, and fail with it.

Tucker v. Tucker, 5 Barb. 99; affirmed, 5 N. Y. 408; Hone v. Van Schaick, 20 Wend. 564.

If the trust sought to be created fail or be ineffectual, a bequest may be supported. So, if the purposes of the trust are separable, and some of them must arise within two lives, and others only become operative after two lives, the former may be sustained and not the latter; but not if all parts of the trust are dependent and entire.

Everitt v. Everitt, 29 N. Y. 39; Post v. Hover, 33 N. Y. 593; Clemens v. Clemens, 60 Barb. 366; Manice v. Manice, 43 N. Y. 303.

The equitable and later view in this State is that courts will, if possible, separate the trust, if not absolutely entire, and pronounce ulterior limitations invalid, and uphold less remote ones, so as to carry out, at least partially, the intent of the testator.

Harrison v. Harrison, 41 Barb. 162; Savage v. Burnham, 17 N. Y. R. 561; overruling, Amory v. Lord, 5 Seld. 403.

The doctrine held by the earlier cases and the Court of Appeals, in Amory v. Lord, 9 N. Y. 5 Seld. 404, seems modified by the later and more liberal doctrine of the courts in subsequent cases, and it appears now to be established as a principle controlling the interpretation of

trusts, that although limitations bad by statute may be enveloped in a single trust with others that are good, the trust may be supported for its valid purposes.

The revised statutes also provide, as a rule of guidance for the courts, that in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and it is consistent with the rules of law.

1 R. S. 1st ed. 747; see also Westerfield v. Westerfield, 1 Brad. 137; Wookruff v. Cook, 47 Barb. 304. As to the construction of the above last-named provision, reference may be made to the following cases; 8 N. Y. 539; 32 Barb. 45; 13 *Ib.* 127; 5 *Ib.* 103; 2 *Ib.* 368; 22 Wend. 489; 9 Paige, 116; 1 Sand. Ch. 275; 3 S. S. C. 110; 3 Duer, 554; 20 How. P. 321; 11 Ab. 37. See, also, more fully, *post*, ch. x, title IV.

Limitations in the Alternative.—Limitations made to take effect on alternative events, one which is too remote, and the other valid, as within the prescribed limits, although the limitation be void, so far as it depends on the remote event, will be allowed to take effect on the happening of the alternative one.

Fowler v. Depau, 26 Barb. 234; Schetter v. Schetter, 41 N. Y. 328; 1 R. S. 1st ed. 724, § 25.

Suspension of Ownership of Personal Property.—By the revised statutes, the absolute suspension of personal property shall not be suspended by any limitation or condition whatever for a longer period than during the the continuance and until the determination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator.

In all *other* respects, limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the chapter relative to real estate.

1 R. S. 1st. ed. p. 743, § 1; Act of Dec. 10, 1828; 6 N. Y. 322; 13 N. Y. 280; 8 N. Y. 531; 7 N. Y. 242; 32 Barb. 501; 27 Barb. 394; 15 Barb. 145; 10 Barb. 388; 9 Barb. 344; 7 Barb. 226, 596; 4 B. 88, 282; 2 B. 470;

7 Paige, 521; 4 Paige, 342; 3 Paige, 30; 2 S. Ch. 377; 2 Edw. 496, 561; 24 Wend. 641; 3 Barb. Ch. 355; 34 N. Y. 609; 31 N. Y. 19; 13 N. Y. 273; 28 Barb. 145, 193; 25 Barb. 136; 4 Paige, 342; 3 Barb. Ch. 93; 35 N. Y. 371.

The rules respecting *perpetuities* are substantially the same as to trusts, both in personal and real property; except that the absolute ownership of personal property cannot be suspended for a longer period than the two lives in being, *in any case.*

Vail v. Vail, 7 Barb. 226; Kaine v. Gott, 7 Paige, 521; 24 Wend. 641; Everitt v. Everitt, 29 N. Y. 29; affirming, 29 Barb. 412; Thompson v. Livingston, 4 Sand. 539; Manice v. Manice, 43 N. Y. 303.

The above provisions specified in this title, and the provisions embraced in the ensuing titles of this chapter, apply as well to remainders as to executory devises (formerly so called), and are contained in Article I of title III, part ii, of the Revised Statutes.

Title V. Directions for Accumulation.

Dispositions of the rents and profits of lands, it is provided by the revised statutes, to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in the article of the statutes in relation to future estates in lands.

Provision is made relative to the disposition by will or deed of the rents and profits of lands, to be governed by the above rules, and if accumulation be directed to commence on the creation of the estate, it must be made for the benefit of one or more minors in being, and to terminate with their minority; and if the accumulation is to commence at any time subsequent to the creation of the estate, it shall commence within the time above limited for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and terminate on their attaining full age. All accumulations beyond such minorities are void.

If there be at any time a valid suspense of the power

of alienation or of the ownership, during which time the rents are undisposed of, and there is no valid direction for their accumulation they will belong to the person presumptively entitled to the next eventual estate.

3 R. S. 5th ed. p. 13, §§ 36 to 39.

All directions for the accumulation of the rents and profits of real estate, except such as are allowed in the article as above are declared void. *Ib.* § 38.

Savage v. Burnham, 17 N. Y. 561.

An accumulation for three and also ten years held invalid, Morgan v. Masterton, 4 Sand. 442; Converse v. Kellogg, 7 Barb. 590; or until the longest liver of a class die, Lovett v. Kingsland, 44 Barb. 561.

The above prohibition of the revised statutes does not apply to trusts created before they went into effect. Bryan v. Knickerbocker, 1 Barb. Ch. 409.

If the trust be void, the income descends as if the testator had died intestate. Vail v. Vail, 4 Paige, 317; 7 Barb. 226.

If the accumulation operates for the benefit of adults as well as minors, the trust is void; and the beneficiaries must, by the terms of the will, be minors at the decease of the testator. Kirkpatrick v. Johnson, 15 N. Y. 322.

A postponement of a division of a testator's estate, makes in law an accumulation. Converse v. Kellogg, 7 Barb. 590; Vail v. Vail, *Ib.* 226.

A trust to accumulate rents and profits for the benefit of the testator's wife and minor children would be void; such trusts being allowed for the benefit of minors only. Boynton v. Hoyt, 1 Den. 53.

A trust to accumulate income for children not in existence at the time when the accumulation is to commence, or whose right to the accumulated fund is contingent, is void. Haxtun v. Corse, 2 Barb. Ch. 506; Kilpatrick v. Johnson, 15 N. Y. 322. *Vide* also, *infra*, as to minors *in esse*.

If the estate limited to an infant is contingent, the accumulation cannot be considered to be for his benefit. Manice v. Manice, 43 N. Y. 303.

A trust for accumulation for a lunatic would be void, unless a minor. Craig v. Craig, 3 Barb. Ch. 76.

A trust for accumulation may be implied from the general terms of a will. Vail v. Vail, 4 Paige, 317.

Where a class is designated, it is not necessary that all should be living when the accumulation commences, provided that at the commencement it goes for the benefit of such as are *in esse* exclusively, and that those who subsequently become entitled fall within the prescribed rules laid down by the statute. Such a succession of accumulations is not objectionable, if they are all made to terminate within the prescribed legal limits. Mason v. Mason, 2 Sand. Ch. 432.

A trust to accumulate rents and profits for the benefit of an infant who was not *in esse* at the creation of the trust, in order to be valid, must be so limited, that the accumulation will commence and terminate within the compass of some two ascertained lives in being at the creation of the trust. Gott v. Cook, 7 Paige, 521; Craig v. Craig, 3 Barb. Ch. 76.

A void direction for accumulation not render a legacy wholly void. The direction might be stricken out of the will, and the legacy and the general purposes for which it was given might remain. Williams v. Williams, 8 N. Y. 4 Seld. 525.

See also as to the above statutory provisions. Dodge v. Pond, 23 N. Y. 67; Robison v. Robison, 5 Lan. 165; Manice v. Manice, 43 N. Y. 303.

Accumulation of Personal Property.—The revised statutes provide that an accumulation of the interest money, the produce of stock, or other income or profits arising from personal property may be directed by any instrument sufficient in law to pass such personal property, as follows: If it be directed to commence from the date of the instrument or the death of the person executing the same, it must be for the benefit of one or more minors then in being, or in being at such death, and to terminate at the expiration of their minority. If the accumulation is to commence at any period subsequent to the above, it must be directed to commence within the time allowed in the provision, as to the suspension of alienation of personal property, and at some time during the minority of the persons for whose benefit it is intended, and must terminate at the expiration of their minority. All other directions are void, except that those for a period beyond the minorities are only to be void for the excess.

1 R. S. 1st ed. p. 773. The following cases may be consulted as to the above. 15 N. Y. 325; 8 N. Y. 531; 7 N. Y. 257; 31 Barb. 82; 30 *Ib.* 128; 15 *Ib.* 139; 2 *Ib.* 248; 3 B. Ch. 92; 5 Pai. 480; 4 Pai. 328; 2 S. Ch. 474; 16 How. Pr. 352; 2 B. Ch. 518; 4 Barb. 282; 7 *Ib.* 590, 226; 16 N. Y. 322.

An accumulation of the income of personal estate, if it is to commence at any period subsequent to the death of the testator, must be directed to commence "*within* the time allowed by the first section of the title for the suspension of absolute ownership," which time is, "during the continuance and until the termination of not more than two lives in being at the death of the testator. 1 R. S. 774, 773, 1st ed.; 43 N. Y. 303.

As to real estate, the statutory provisions allow an accumulation to commence at a time when a future estate might be allowed to vest, viz., immediately *after* the termination of two lives; but as to personal property, it must commence within the period which is allowed to precede the vesting, viz., "during the continuance, and till the termination of the two lives; and therefore *before* the expiration of the second life. Kane v. Gott, 7 Paige, 521; 24 Wend. 641; Manice v. Manice, 43 N. Y. 303.

A void trust for the accumulation of the income of personal property does not invalidate a bequest of the principal where the direction for such accumulation does not involve an illegal suspension of the absolute ownership. The direction only will be held void, and the income received will

belong to the persons presumptively entitled to the next eventual estate in the Principal, Kilpatrick v. Johnson, 15 N. Y. 322; Lang v. Ropke, 5 Sand. 363.

Accumulations of the income of personal property are placed in the same general footing, and are governed by the same rules as accumulations of the rents and profits of real estate, except as specificd otherwise, Mason v. Jones, 2 Barb. 229; see Savage v. Burnham, 17 N. Y. 561.

When Accumulations may be taken for Education of Minors.—By the revised statutes, when any minor for whose benefit a valid accumulation of the interest or income of personal property shall have been directed, shall be destitute of other sufficient means of support or of education, the Supreme Court upon the application of such minor or his guardian, may cause a suitable sum to be taken from the monies accumulated, or directed to be accumulated, and to be applied to the support or education of such minor.

1 R. S. 1st ed. 173.

Maintenance for infants cannot be allowed by the Court of Chancery out of a fund which, upon the happening of the event contemplatcd by the testator in the bequest of such fund, will not belong to the infants but to some other person. *In re* Davison, 6 Pai. 136.

Posthumous Children.—These would take under a direction for accumulation for "children" or "issue," and they will be construed to be "children" during the lifetime of the father.

Mason v. Jones, 2 Barb. 299.

See, also, *ante*, Title IV, as to provisions for the benefit of minors that may unduly suspend the power of alienation.

Title VI. General Provisions Affecting Future Estates.

The revised statutes on the subject of the limitation and creation of future estates *by act of parties* have in effect destroyed the distinctions between contingent remainders and executory devises.

There are now equally future or expectant estates, subject to the same provisions, and may be equally

created by grant or will, and every species of future limitation is brought within the same definition and control.

The rules for the creation and construction of future estates established by the common law, however, apply to cases arising previous to the revised statutes, and in that view are still a necessary branch of legal knowledge. They cannot, in a work of this kind, be more than briefly alluded to, and the various refinements and intricacies of the subject, built up through the course of centuries, under the requirements of social intercourse, will have to be specially referred to when cases necessitating further investigation may arise. The revised statutes abolish *all* expectant estates other than provided for in Article I.; Part II, title II, ch. i.

Vide Kent, Vol. 4, as to the prior law regulating expectant estates.

Through the operation of our statutes also, uses being abolished, as will be adverted to more particularly hereafter, all expectant estates, in the shape of springing, shifting or secondary uses created by conveyances to uses have, in effect, become contingent remainders, and subject to the same rules. In this connection, the law relative to uses and trusts, *post.* ch. x, will have to be attentively considered.

The following additional general provisions affecting future estates were enacted by the Revised Statutes of 1830, in Part II, Art. I, ch. i, title II.

The old sections of the statutes are given.

Successive Estates for Life.—§ 17. Successive estates for life cannot be limited, unless to persons in being at the creation thereof.

And where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those persons, the remainder shall take effect in the same manner as if no other life estates had been created.

Estates for Life on a term of Years.—§ 21. Nor can

an estate for life be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

Life Estate in a Term.—A point of difference formerly existing between a remainder and an executory devise was, that by an executory devise, a term of years might be given to one man for his life, and afterwards limited over to another, which could not be done by deed. At common law, the grant of the term, to a man for life, would have been a total disposition of the whole term, and a freehold had to be limited on a freehold.

The revised statutes provide that an estate for life may be created in a term of years, and a remainder limited thereon. (§ 24.)

Remainder on Life Estate, pur autre vie.—By the revised statutes, also, it is provided that no remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created on such an estate, in a term of years, unless it be for the whole residue of such term.

Vol. III, p. 11, § 18.

When a remainder shall be created on such a life estate, and more than two persons shall be named as the persons during whose lives the life estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced. (§ 19.)

§ 20. *Remainder on a Term.*—A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest during the continuance of not more than two lives in being, at the creation of such remainder, or upon the termination thereof.

Vide Butler v. Butler, 3 Barb. Ch. 304.

§ 23. *Chattels Real.*—All the above provisions relative to restriction on alienation, shall also apply to chattels real, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

Of the Words "Dying without Issue."—Previous to the revised statutes, if an executory devise were limited to take effect on a dying without *heirs*, or on failure of issue, or "without leaving issue," or "without *issue*," the limitation was held to be void, because the contingency was *too remote*, as it was interpreted not to take place until after an *indefinite failure of issue*, *i. e.*, until the *line* became extinct, and the estate might not vest within the compass of twenty-one years and nine months after lives in being, unless a contrary intention were manifested in the will, limiting the vesting of the estate to the time of the death of the first taker, and showing that a definite failure of issue was intended.

Jackson v. Billinger, 18 Johns. 368; 3 Sandf. Ch. 64; Miller v. Macomb, 26 Wend. 229; Patterson v. Ellis, 11 Wend. 259; and see cases, *infra*.

The case of The Trustees, &c. v. Kellogg, 16 N. Y. 83, holds that the words "dying without lawful issue," meant issue living at the death of the first taker, as judged by the context in that case.

In case the remainder over was so held to vest on *an indefinite failure* of issue, the courts determined that the first taker took a *fee*, cut down to a fee tail which the New York statute turned into a fee (Kingsland v. Rapelye, 3 Eds. Chan. I; Jackson v. Billinger, 18 Johns. 368), and the limitation over was void as being too remote.

The strict rule was often relaxed, however, where a contrary *intent* to creating the perpetuity was manifested from the context or qualifying words, and the limitation might be construed as an executory devise, without contemplation of indefinite failure of issue.

Unless such qualifying words, however, were used, on the interpretation of wills made before the revised statutes, the words, "*dying without issue,*" were construed as meaning an indefinite failure of issue.

The cases in this State are numerous, and support the strict English common law rule above given. The leading ones are Patterson v. Ellis, 11 Wend. 259; Miller v. Macomb. 26 Wend. 229; Van Vechten v. Pearson, 5 Paige, 512; Jackson v. Waldron, 13 Wend. 178; Wilkes v. Lyon, 2 Com. 333; Tator v. Tator, 4 Barb. 431; Wilson v. Wilson, 32 Barb. 328; Lott v. Wyckoff, 2 Com. 355.

A contrary intent would be inferred by the use of the words "living," or "leaving issue behind," or "without children," or to the "survivors of issue," or "brothers." Or if the devise over were of a life estate, or the estate were charged with payments to a person in being, or his executors, a *definite* failure of issue would be inferred as the intention of the testator. As if the devise over were to a collateral; *e. g.*, a brother of the first taker.

Anderson v. Jackson, 16 Johns. 382; Cutter v. Doughty, 23 Wend 513; Lovell v. Buloid, 3 Barb. Ch. 137; Ferris v. Gibson, 4 Edw. 707; Hill v. Hill, 4 Barb. 419; Wilson v. Wilson, 32 Barb. 328; Heard v. Horton, 1 Den. 165; Trustees, &c. v. Kellogg, 16 N. Y. 83; Weller v. Weller, 28 Barb. 588; Jackson v. Elmendorf, 3 Wend. 222.

Where there was a devise to two or more, and upon the death of either without issue, then to the survivors, the mention of survivors and the devise over to surviving devisees were sufficient to show that the testator intended a definite failure of issue, *i. e.*, at the death of the first devisee. Fosdick v. Cornell, 1 Johns. 440; Jackson v. Staats, 11 Johns. 337; Anderson v. Jackson, 16 Johns. 382; Wilson v. Wilson, 32 Barb. 328; Cutter v. Dougherty, 23 Wend. 513.

Change by Revised Statutes as to the words "dying without issue."—By our revised statutes it is declared that where a remainder in fee shall be limited upon any estate, which would be adjudged a fee tail, according to the law of the State, as it existed before the abolition of entails, *i. e.*, July 12, 1782, the remainder shall be valid as a *contingent limitation* upon a fee, and shall vest in possession on the death of the *first taker* without issue living at the time of *such death.*

Vol. III, p. 10, § 4.

It is further declared, that when a remainder shall be limited to take effect on the death of any person

without *heirs* or *heirs of his body*, or without "*issue*," the words "heirs" or "issue" shall be construed to mean *heirs* or *issue* living at the death of the person named as *ancestor*.

Rev. Stat. Vol. III, p. 12, § 22; Sherman v. Sherman, 3 Barb. 385.

The introduction of these words "*without issue living at the time of such death*," removes the former obscurity, which, on this subject, was a fruitful source of litigation, and was the cause of legal controversy for many years.

This provision is applicable to wills made before the statute, where the testator died after it. Depeyster v. Clendennin, 8 Paige, 295; affi'd, 26 Wend. 23; Bishop v. Bishop, 4 Hill, 138; Sherman v. Sherman, 3 Barb. 385.

Posthumous Children.—Posthumous children are also allowed to take in the same manner as if living at the death of their parents, and are considered included in the words "*heirs, issue, or children.*" And a future estate dependent on a decease without issue, &c. may be defeated by the birth of a posthumous child capable of taking by descent. (§§ 30, 31.)

An unborn child, after conception, if it be subsequently born alive, and so far advanced towards maturity as to be capable of living, is considered as *in esse* from the time of its conception.

Home v. Van Schaick, 3 Barb. Ch. 488.

Freehold Estates in futuro and other Provisions by Statute.—The revised statutes further prescribe, *Ib.* § 24; "Subject to the rules established in the preceding sections of this *article*, a freehold estate, as well as a chattel real, may be created to commence at a future day. An estate for life may be created in a term of years, and a remainder limited thereon. A remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years, and a fee may be limited on a fee, upon a contin-

gency, which, if it should occur, must happen within the period prescribed in this article."

At common law, owing to the necessity of an immediate *livery of seizin*, a freehold estate could not be created to commence in possession at a future day, unless as a remainder, and if an estate in remainder were limited in contingency, and amounted to a freehold, a vested freehold had to precede it, and pass at the same time out of the grantor.

Transfer of Expectant Estates, vide ante, p. 221.

Charitable Uses.—As to the law of trusts for charitable uses as affecting restrictions on the alienation of property, *vide* ch. x, title VIII, *post.*

Other Provisions affecting Expectant Estates.—Vide ante, title I, and ch. x, *post*, on USES AND TRUSTS.

Abolition of other Expectant Estates.—The revised statutes provide that all expectant estates except those enumerated therein, and as above set forth, are abolished. (§ 42.)

The complicated law on the above subjects, in connection with the law of uses and trusts, which, based on the feudal relation, grew up with the development of the English nation into proportions ever extending as the requirements of the age demanded, which became a science so subtile and so profound as to occupy the lives and engross the intellects of the most cultured thinkers of the day, and which taxed all the learning and logical discrimination of a Mansfield, a Hale and a Hardwicke to expound and apply; this law has been, as is above seen, by wise legislation, reduced into simple and express rule, consonant with the institutions and polity of this country.

The revision of 1830 has cut away the complex forms and stubborn dogmas that had grown, through

time, around the law of future estates, arising out of feudal rules and the efforts at their evasion, and has placed before the modern student such law modified, shaped and reduced into strong, plain features, adapted not only to modern requirement, but to modern legal attainment.

Apportionment and Sales of Real Estate for Taxes and Assessments where there are Future Estates.—By law of May 26, 1841, ch. 341, where there are several persons having estates in possession, reversion or remainder, in any village or city in the State, and it is sold, or liable to sale, for taxes or assessments, a suit may be instituted for an apportionment of moneys for their payment, or for redemption of the lands, and the court may extend the time for redemption to six months after the judgment, or may order a sale of a portion for such payment or redemption. Contingent owners, if unknown, need not be made parties to make title. Interests that have been unduly charged may be equalized by charges against other estates, and shall be a lien thereon. The act is not to affect contracts or covenants as to taxes, nor relative rights of persons as to their liability for such payments.

By law of 1842, ch. 154, sales shall be made by a master in the county where the land lies; and a conveyance by a master, under direction of the supreme court, vests the entire estate in the purchaser, as well present as future of each and every of the parties to such suit or suits. The court may order a feigned issue to test the validity of any assessment.

By law of April 17, 1854, ch. 393, a further order may be made directing lots embraced in the decree, but not sold, to be sold. Such order is to be made on notice to all parties interested as directed.

By law of 1855, Ap. 12, ch. 327, the law was made applicable also to persons being presumptively entitled by virtue of any deed or will, on the death of any person in being, or on the happening of any contingency in the

instrument expressed. The court may order a sale in fee simple absolute. Redemption may be made by agreement with the purchaser, under direction of the court. If any owners are unknown or can not be found, or reside out of the State, they may be summoned by publication, and judgment by default may be given against those not appearing. Presumptive owners may be made parties. Sales shall be made by a referee, and will vest in the purchaser "a fee simple absolute in law and in equity."

By Law of May, 1869, ch. 859, the law was made applicable to all real estate in the State.

It is to be observed that before the law of 1855, the judgment and sale only passed the rights of parties to the suit. This law of 1855 has been held constitutional, and that possible or contingent interests, and those of persons not in being, could be cut off by a sale. The same principle applies as in partition suits, where future contingent interests of persons not in being are barred by the proceedings, as being virtually represented by those in whom the present estate is vested.

Jackson v. Babcock, 16 N. Y. 246; Mead v. Mitchell, 17 N. Y. 210; Leggett v. Hunter, 19 N. Y. 445.

Apportionment may also be made as to a dowress and the other owners.

Law of 1858, Ap. 12; Linden v. Graham, 34 Barb. 316; Graham v. Dunigan, 2 Bos. 516; *Ib.* 6 Duer, 629.

The above cases it may be well to consult as to the practice in such actions, form of decree, &c. See also 2 How. Appl. Cases, 489.

Presumed Death of Life Tenant.—If any person, upon whose life any estate in lands or tenements shall depend, shall remain beyond sea, or shall absent himself in this State or elsewhere, for seven years together, such person shall be accounted naturally dead, in any action concerning such lands or tenements, in which his death shall come in question, unless sufficient proof be made, in such case, of the life of such person.

Vid. 1 R. L. 103, § 1; 1 R. S. 1st ed. 749; 13 How. 120; 3 Abb. 224; 1 Barb. Ch. 462.

Liability of Guardians and others holding over.—Every person who, as guardian or trustee for an infant, and every husband seized in the right of his wife only, and every other person having an estate determinable upon any life or lives, who, after the determination of such particular estate, without the express consent of the party immediately entitled after such determination, shall hold over and continue in possession of any lands, tenements, or hereditaments, shall be adjudged to be a trespasser; and every person and his executors and administrators, who shall be entitled to such lands, tenements or hereditaments, upon the determination of such particular estates, may recover in damages against every such person so holding over and against his, her or their executors or administrators, the full value of the profits received during such wrongful possession.

1 R. L. 167, § 7; 1 R. S. 1st ed. p. 749; *vide* 14 N. Y. 64, 430.

Remedies of Reversioners and Remaindermen for Waste or Trespass.—A person seized of an estate in remainder or reversion may maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years.

1 R. L. 527, § 33; 1 R. S. p. 750, 1st ed.; 29 Barb. 15; 13 J. R. 208; 29 N. Y. 24; 25 N. Y. 257; 47 Barb. 309.

Ejectment.—As to the rights of reversioners and remaindermen to have ejectment after decease of the person holding the life estate, who has yielded up the estate or made default. *Vide post*, "Ejectment," ch. xli.

Recoveries in Real Actions as affecting Remaindermen and Reversioners.—As to recoveries by agreement of parties or by fraud affecting such persons, *vide post*, "Ejectment," ch. xli.

Partition Suits as affecting Remainders.—*Vide post*, "Partition," ch. xxx.

Writs of Error by Reversioners and Remaindermen.—As to these, *vide* 2 Rev. Stat. 1st ed. p. 591.

Real Actions.—Rights of reversioners and remaindermen in, *vide post*, ch. xli.

Private Statutes divesting the Estates of Remaindermen.—As to these, *vide infra*, title VII.

TITLE VII. ESTATES IN REVERSION.

This is the residue of an estate left with the grantor or his heirs, to commence in possession after the determination of some particular estate granted by him. It arises not by deed or devise, but by operation of law, and is transferable as other estates. It is founded on the feudal principle of the fief reverting to the lord on the death of the feudatory and his heirs.

The revised statutes describe a *reversion* as "the residue of an estate left in the *grantor* or his heirs, or in the heirs of a testator, commencing in *possession* on the determination of a particular estate granted or devised."

There can be no reversion upon a fee, whether the fee be absolute or conditional; and where a condition is annexed to the grant of a fee, the estate granted is not determined by a breach of a condition, but by entry, and therein it differs from a reversion, which takes effect immediately on the determination of the particular estate.

Vide ante, ch. v, Titles III and IV, Estates on Condition; and Phœnix v. Commissioners, &c. 12 How. P. 1.

Acts Divesting Title of Owners in Remainder or Reversion.—A private statute authorizing proceedings divesting such owners of their estates by sales through trustees is unconstitutional, they being not incapacitated by infancy or otherwise, and no necessity for legis-

lation being apparent, none such will be presumed. And the existence of a necessity for legislative action will not be presumed when the facts which would create it are neither shown by proof nor recited in the statute.

Powers v. Bergen, 6 N. Y. (2 Seld.) 358; Legget v. Hunter, 19 N. Y. 446; *vide*, also, *post*, ch. xxv, Infants' Estates.

Any title, therefore, through trustees, under such a statute would be invalid. It is held, however, that the legislature, in the exercise of its tutelary power over the persons and property of infants and others under disability, may provide by public or private acts for converting real estate in which they have vested or contingent interests into personal property or securities, when necessary for their benefit, and may exercise this power as well in respect to the rights of persons *in esse* as to the contingent interests of persons yet to be born.

Vide above cases, and *post*, ch. x, Trusts; ch. xxv, Sales of Infants' Estates; and ch. xviii, Sales by Order of Surrogates.

Apportionment of Taxes and Assessments and Sales of the Estates of Reversioners therefor.—As to this, *vide ante*, p. 246.

Sale on Execution.—A reversionary interest, although it is uncertain, may be sold on execution.

Woodgate v. Fleet, 44 N. Y. 1.

CHAPTER X.

USES AND TRUSTS IN REALTY.

TITLE I. USES AND TRUSTS BEFORE THE REVISED STATUTES.

A *use* is defined as existing where the *legal* estate of lands is in one person in trust or confidence, that another shall enjoy the possession, take the profit, and direct their conveyance for his own benefit. While the formal legal title remains in the former, the beneficial interest is vested in the latter.

Uses were originated by sacerdotal corporations to evade the statutes of *mortmain*, and were gradually established to mitigate the evils of the feudal system, and save lands from attainder, forfeiture, and other incidents.

Before the *Statute of Uses* hereafter adverted to, a use was a mere beneficial interest of an equitable nature, the feoffee or trustee being the real owner of the estate at law, and the *cestui que use* having only a beneficial enjoyment arising out of the confidence or trust.

The confidential obligation required no consideration to raise it, and would be enforced in equity; and if no use were declared, and the feoffee had taken without consideration, a use *resulted* to the feoffor. The Court of Chancery would not compel the execution of a use unless

it had been raised for a good and valid consideration; and where one made a feoffment to another without any consideration, equity presumed that he meant it for the use of himself, unless he expressly declared it to be to the use of another; the grantor in the former case became entitled to the use of the lands conveyed. If a valuable consideration appeared, equity raised a use correspondent to such consideration; and if, in such case, no use was expressly declared, the person to whom the legal estate was conveyed, and from whom the consideration moved, was entitled to the use.

Whenever the use limited by a deed expired or could not vest, the title reverted to him who raised it, unless on consideration paid, when it passed to him who paid it, if the conveyance was in fee. Vandervolgen v. Yates, 9 N. Y. 219; affirming, 3 Barb. Ch. 242; Jackson v. Myers, 3 Johns. 388; Fisher v. Fields, 10 Johns. 504.

Uses were descendible, and alienable without words of limitation, and devisable, and might be created *in futuro* without previous limitation, and might be shifted to vest in the alternative, or depend upon contingencies, or be made revocable and the use changed; and might be limited over upon the happening of future events to an indefinite extent.

Uses being serviceable in evading the strict rules of the common law, and in facilitating transfers of property not allowed by it, became perverted to mischievous purposes, and led to the practice of abuses, the defrauding of creditors and purchasers, the defeating of dower and curtesy, and great confusion and obscurity of title prevailed.

The Statute of Uses.—An entire reform of the law was made by the statute of 27th Henry VIII (ch. 10), commonly called the *Statute of Uses*, which transferred the *uses into possession*, by turning the beneficial interest of the *cestui que use* into a legal estate, and declared that the *legal estate* should be annexed to the *use*. The object of the law was to destroy that double property in land, which had been introduced by the invention of uses. After the

statute, as every deed capable of raising a use was, *by force of the statute*, rendered also capable of passing the legal estate, new forms of conveyances were introduced, by which the title and the possession of lands were transferred without *livery of seizin*, which at common law was indispensable to pass a freehold. These conveyances will be specially referred to in a subsequent chapter.

The Statute of Uses, however, did not in effect, as will be seen, change the *qualities* or *properties* of uses, although the beneficial interest was transferred into a direct legal estate in the land. It might still be subject to the conditions and limitations characteristic of uses, and future interests in land were created and upheld as contingent, springing, shifting, or secondary and resulting uses, to be limited under the restrictions adopted against perpetuities, the abstruse law on which subjects cannot be here pursued. The revised statutes, in allowing all conveyances of *future* as well as present interests in lands to be made by *grant* or assignment (3 Revised Statutes, p. 14), as well as devise, and by abolishing uses except as specified, have simplified the means of transfer of real estate, and rendered most of the common law on the subject of uses and trusts inoperative here, although cases may still arise under instruments made before the revised statutes, that may require special investigation of this intricate subject.

Under the construction given by the courts to the Statute of Uses, the object of that statute, which was to convert nominal uses into legal estates, was not carried out.

The construction of the *statute*, by the courts of equity, operated so as not altogether to destroy uses, but upheld them under another name. Although a use upon a use was void at law, the statute, it was held, executed the first use, and the courts of equity enforced the second use as a *trust*, under the plea that the second uses were uses to which the statute did not transfer the possession, but that they still continued distinct from the legal estate.

Therefore, under a bargain and sale deed to A. in fee, to the use of B. in fee, the statute (through the bargain raising the use) passed the estate to A. by executing the use, and effectuated the use to B., as a *trust* to be enforced in equity, although void, nominally, as a use.

In the interpretation of the Statute of Uses by the courts, it was considered that it was not the intention of the statute to defeat and destroy the beneficial interest of the *cestui que use*, but only to change his mere equitable interest in the *use* of the property into a legal estate, in the property itself, of the same quality and duration as the equitable one. Where the beneficial use therefore could not take effect, as a legal estate, in the *cestui que use*, it was held to take effect as a trust, in the same manner as if the statute had not been passed, where it could take effect as a trust, consistently with the rules of law.

Thus, secondary uses were established as *trusts*, and a system of trusts was gradually formed as fiduciary estates distinct from the legal estate, and to be enforced in equity, and a trust became what a use was before the statute, and was said to be a use not executed by the statute. The *cestui que trust* was considered seized of the freehold in equity, and his interest was disposable, descendible, and devisable as if a legal estate, and might be created subject to the same limitations; and curtesy, though not dower, was also allowed in trust estates. An assignment of the trust, if the intent were manifest, carried the fee without words of inheritance; and the *cestui que trust* might pass his interest without the technical forms required by the common law to pass the legal estate. The whole practical effect of the act, therefore, was to change, not the estate, but the trustee, by executing the first use, but preserving the second. Thus, by a strict construction of the statute of uses, *passive* uses might still be created, by limiting a use upon a use, as the statute only executed the use in the first *cestui que use*, who was allowed to hold the estate for the benefit of the second.

Neither the letter, nor policy of the statute, it was also held, prevented the creation of *active* trusts; that is legal estates, impressed with some active duty in their control, management, or disposition for the benefit of some person or class of persons other than the trustee.

Trusts of this kind gradually grew up and expanded to meet the wants and wishes of the community, according to the discretion of the author of the trust, and undefined by any statute or rule. Where the instrument did not, in terms, vest the legal title in the trustee, there was always a question whether the nature of the trust or duty declared, was such as to render the presence also of the legal estate necessary or convenient. If so, the title was deemed to vest in the trustee accordingly. If not, then the estate remained in the donor and his heirs, subject to the trust as a *power*. Powers were equally undefined as trusts. The intention, as to the legal estate, being unexpressed, powers began where trusts terminated; but to ascertain the dividing line between them was often attended with difficulty, and perplexing questions arose on the subject, and are still of frequent occurrence before the courts of this State. The distinction between trusts and powers, although sought to be defined by our statutes, and the limits of each expressed, is still a matter of considerable obscurity in the interpretation of instruments creating them.

A trust to pay the rents and profits to J. during life, and after her death to convey to such of her children as should survive her, contained in a deed of bargain and sale made before the revised statutes, was not executed as a legal estate in the *cestui que trust*, by the law of uses then in force.

By such a trust, the children of J., during her life, took vested equitable estates in remainder, subject to be defeated, wholly by their dying before her; or, in part, by the coming *in esse* of after born children of J. The revised statutes, subsequently enacted, did not turn these equitable estates into legal ones during the life of J. Wood v. Mather, 38 Barb. 473.

TITLE II. CHANGES BY STATUTE IN THIS STATE.

The condition of the law in this State at the time of the revision of 1830 as to *uses and trusts* was as above set forth.

The English statute of uses had been enacted in 1787 here; but no other change in our jurisprudence had been made on the subject.

That act passed on Feb. 20, 1787 (1 Web. 66; 1 R. L. p. 72), provides that the possession of lands shall follow the use, and transfers the possession, estate and seizin to the extent of the use, and *cestuis que use* are to have all the rights and remedies of owners. It also provided that all grants and conveyances, &c. made to the extent of the use of a person, should be valid against him to that extent.

This act was repealed by the general repealing act of 1828, and the provisions of the revised statutes substituted.

By chap. i, Art. II, Part II, §§ 45, 46, the revised statutes of 1830 have declared that *uses and trusts, except as authorized and modified in the "Article," are abolished;* and every estate and interest in lands is declared to be a *legal* right, cognizable as such in the courts of law, except when otherwise provided in the chapter; and every estate held as a use executed under any former statute of this State is confirmed as a *legal* estate.

Section 47 provides as follows: "Every person who, by virtue of any grant, assignment or devise, now is or hereafter shall be entitled to the actual possession of lands and the receipts of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration and subject to the same conditions as his beneficial interest."

1 R. L. 72; 1 R. S. 1st ed. p. 727.

This provision would apply as well to trusts created before the revised statutes as to those created thereafter. Bellinger v. Shafer, 2 S. Ch. 293.

It will be observed that the word "assignment" is used that there may be no doubt of the intention of the legislature to include the transfer of chattel interests; it having been theretofore decided that the assignment of a term of years was not reached by the statute of uses.

Section 48 is as follows: "The last preceding section shall not divest the estate of any trustees in any existing trust, where the title of such trustees is not *merely nominal*, but is connected with some *power of actual disposi-*

tion or management, in relation to the lands which are the subject of the trust."

1 R. S. p. 728, 1st ed.

The revised statutes further provide as follows: § 49. "Every disposition of lands, whether by deed or devise, hereafter made, *shall be directly to the person in whom the right to the possession and profits shall be intended to be invested*, and not to any other to the use of or in trust for such person, and if made to one or more persons to the use of or in trust for another, *no estate or interest, legal or equitable, shall vest in the trustee.*"

1 R. L. 72.

§ 50. The above sections are not to apply to trusts *resulting* by implication of law, nor to trusts thereafter allowed, in the above chapter.

A trust in a deed to convey the premises to such person as the wife of grantor shall appoint, is held void; and where the trustee is not vested with the right to the possession, rents or profits of the lands conveyed, for any purpose, either for himself or any other person, the deed or trust will be regarded as void. Hotchkiss v. Elting, 36 Barb. 38.

By the revised statutes, also, every *express trust*, valid as such in its creation, *except as is therein otherwise provided*, shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust. The person for whose benefit the trust is created shall take *no estate or interest* in the lands, but may enforce the performance of the trust in equity. (1 Rev. Stat. 1st ed. p. 729, § 60.) The person creating the trust, however, may dispose of them subject to the execution of the trust, and the grantee or devisee takes them subject to the execution of the trust. (*Ib.* § 61.)

§ 62. "Where an express trust is created, every estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in, or revert to, the person creating the trust, or his heirs, as a legal estate."

For the trusts allowed by the revised statutes, *vide post*, Title IV.

Where there is a valid trust for the sale of land, the party creating the trust and those holding derivative titles under him, have no rights, legal

or equitable, until the purposes of the trust are satisfied. Their interests are subject to the execution of the trust absolutely; so that a subsequent grantee, from the creator of a trust to sell for the payment of debts, acquires no right of redemption. Briggs v. Davis, 21 N. Y. 574.

§ 67. "Where the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease."

This provision applies to cases arising before the revised statutes, as well as to those arising subsequently. Bellinger v. Shafer, 2 S. Ch. R. 293.

In all cases of mere *passive* or naked trusts the revised statutes have, therefore, by the above provisions vested the legal estate in the person or persons entitled to the actual possession, and to the whole beneficial interest in the lands under the trust. They have turned the beneficial estate into a fee, where the trust is merely nominal, that is where the trustee has a mere formal or naked title; and the operation of the 47th section, *supra*, accomplished all that could have been effected by the most liberal interpretation of the statute of uses.

Cushney v. Henry, 4 Paige, 345; Johnson v. Fleet, 14 Wend. 176; Frazer v. Western, 1 Barb. Ch. 220; affirmed, 3 Den. 611; Lang v. Ropke, 5 Sand. S. C. 363.

A devise or conveyance of land, therefore, to trustees for another, but without limitation, or directing them to execute and deliver to another a conveyance for the uses and purposes, and with the restrictions set forth in a will, creates no valid trust in such trustees, and gives them no title or estate, but vests immediately and absolutely in the third person the land transferred. So, also, a devise to trustees to convey the legal estate to those who should be entitled in remainder, is a void direction; and if that alone remains for them to do under a trust, their office, as trustees, ceases. Knight v. Weatherwax, 7 Paige, 182; Bogert v. Perry, 17 John. 351; Fellows v. Emperor, 13 Barb. 92; Adams v. Perry, 43 N. Y. 487; in re Livingston, 34 N. Y. 555; in re Craig, 1 Barb. 33; Rawson v. Lampman, 5 N. Y. 1 Seld. 456; La Grange v. L'Amoureux, 1 Barb. Ch. 18.

A direction to hold and control property, and then to pay over creates no estate in the trustee. Burke v. Valentine, 52 Barb. 412.

In the case of Adams v. Perry, 43 N. Y. 487, a devise of land to trustees to execute and deliver a deed to a corporation, for the uses and purposes in the will, was held to create no valid estate in such trustees, and to give them no title; but vested immediately in the corporation the land devised.

This case also holds, that a bequest to trustees, of personal estate, to vest and reinvest, and pay the income to an incorporated academy forever, is void, under the statute of perpetuities (supra p.).

The statute, § 47, however, is held to have applied not to implied or constructive trusts, but to formal trusts; and would vest the legal title in the *cestui que trust* last named.

If a valid trust were devised to the trustee for a particular purpose, the legal estate would be vested in him so long as the execution of the trust required it. It would thereafter, under the above provisions, vest in the person beneficially entitled to it.

Nicoll v. Walworth, 4 Den. 385; McCosker v. Brady, 1 Barb. Ch. 329. See further as to the estate of the trustees, pp. 266 to 269.

Trusts executory or executed.—A trust is considered *executory* when it is to be perfected at a future period by a conveyance or settlement, as in the case of a conveyance to B., in trust to convey to C.

It is *executed*, either when the legal estate passes, as in a conveyance to B. in trust, or for the use of C., or where only the equitable title passes, as in the case of a conveyance to B. to the use of C., in trust for D. (Kent, Vol. IV, p. 304.)

Active trusts.—Active or express trusts are those where the trustee is clothed with some actual power of disposition or management which cannot be properly exercised without his having the legal estate and actual possession. If the trusts are not passive but active, and not, in the language of § 48, *supra*, "*merely nominal*," but are connected with a power of management, they do not fall within the provisions of § 47, and are not consequently prohibited by it. In such cases the estate, either by express words or by implication of law, vests in the trustee, and the *cestuis que trust* have merely the beneficial estate and interest therein. If the trust, however, by its provisions, ceases to be active, it becomes executed by virtue of the statute, and the legal estate vests in the beneficiary.

McCosker v. Brady, supra; Johnson v. Fleet, 14 Wend. 176; Nicoll v. Walworth, *supra;* Welch v. Allen, 21 Wend. 147; 2 Hill, 491; Brewster v. Striker, 2 Com. 19; Wood v. Burnham, 6 Paige, 513; Wagstaff v. Lowerre, 23 Barb. 209.

Title III. Creation of Trusts.

Three things are said to be necessary to the creation of a valid trust; first, sufficient words to raise it; secondly, a definite subject; and thirdly, a certain or ascertained object. The trust must appear in writing, with absolute certainty as to its nature, and the terms and conditions of it; and the instrument creating the trust must be certain in itself, or capable of being made so by reference to something else, whereby the terms can be ascertained with reasonable precision. No special instrument or technical form of words is requisite to create or declare a trust, if the intention be clear; and it may be gathered from different instruments.

Fisher v. Fields, 10 Johns. 495; Story's Eq. § 964; The Farmers', &c. Co. v. Carrol, 5 Barb. 613; Gomez v. Tradesman Bank, 5. Sand. 102.

The English statute of frauds (29 Car. 2) required a trust to be manifested in writing, and it could only be so created or transferred under the signature of the party creating or transferring it.

A trust, before the revised statutes, need not have been created by writing, but it had to be manifested and proved by writing; and the nature of the trust, and its terms and conditions, had to sufficiently appear under the hand of the party creating it.

Steere v. Steere, 5 John. Ch. 1; Wheelan v. Wheelan, 3 Cow. 538; Throop v. Hatch, 3 Abb. 23.

The revised statutes declare that no "estate or interest in lands, other than leases for a term not exceeding one year, nor any *trust or power* over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." The section is not to apply to wills or implied or resulting trusts, nor to declarations of trusts proved by any writing subscribed by any party declaring the same; nor to

prevent, after a fine is levied, the execution of a deed or other instrument, declaring the uses of such fine.

3 Rev. Stat. p. 220, §§ 6 and 7, as amended by Laws of 1860, p. 547, ch. 321. The amendment was with reference to the declaration of trusts.

In this State, although the trust must be created by writing subscribed by the party creating it, the trust itself may be gathered from the instrument, even if it be a mere recital therein. If, therefore, a conveyance be received to the use of another, so that it appears that the *cestui que trust* is entitled to the actual possession of the lands, and the receipt of the rents and profits, its effect, under our statute, would be to vest the estate at law in the *cestui;* and it is not necessary that the trust clause should be expressed on the face of the conveyance, to bring the case within the statute.

Neither is it necessary that specific directions in regard to the execution of the trust and the disposition of the trust property be given in the instrument creating the trust; and if an intention to create a definite trust can be fairly collected upon the face of the instrument it will be enforced.

Story Eq. Jur. 980; Bellasis v. Crampton, 2 Vern. 294; Throop v. Hatch, 3 Abb. 23; Wright v. Douglass, 3 Seld. (7 N. Y.) 564; rev'g, 10 Barb. 97; Corse v. Legget, 25 Barb. 389.

It is also necessary to the lawful creation of a trust, or a power in trust, that the authority to perform the required act should be rightfully delegated to the trustee by the person having authority to dispose of the estate, or some interest therein, in the manner directed by the trust or power. The object or purpose of the trust also must be declared, in some manner, to some person that can legally execute it.

Selden v. Vermilyea, 3 Com. 425; Moore v. Moore, 47 Barb. 257.

To raise a trust, at common law, there must also be a definite grantee, devisee or donee, capable of coming into court and claiming the benefit of the grant, devise or bequest.

At common law, where the trust is for an uncertain object, the property which is the subject of the trust is deemed to be undisposed of, and goes to those to whom the law gives the ownership, in default of disposition by the former owner.

Where the instrument creating the trust does not disclose the beneficiary, or give the means of definitely ascertaining him, it does not necessarily result that the creator of the trust is such beneficiary; and if the instrument is silent as to the persons to be beneficially interested in the trust, no trust whatever is created that the courts could execute.

Delaye v. Greenough, 45 N. Y. 438; Williams v. Williams, 4 Sel. 8 N. Y. 525; Levy v. Levy, 33 N. Y. 97.

See, also, *infra*, "Charitable Trusts," Title VII, as to unknown beneficiaries and indefinite dispositions.

A trustee is not absolutely necessary to the validity of a trust, for a use being well declared, the law will find a trustee wherever it finds the legal estate.

Levy v. Levy, 33 N. Y. 97, and cases cited, and see *post*, Title VII.

Precatory Words.—It is frequently a matter of discussion whether precatory words in a devise create a trust, or are mere requests; and, as such, the performance of them optional with the donee.

The words, "desire," "request," "entreat," "confidence," "hoping," "recommending," are sometimes to be construed as imperative words, and at other times not.

The following principles have been laid down as to the construction of precatory words. They are held to create a trust:

1. When they exclude all option in the party who is to act.

2. When the subject is certain.

3. When the objects are not too vague and indefinite.

The words, "in the fullest confidence," are held imperative, and to create a trust.

Vide Briggs v. Penny, 8 Eng. L. & Eq. 231; Lawless v. Shaw, Lloyd

& Goold, 154; Coate's Appeal, 2 Barr. (Penn. 129); Wright v. Atkyns, 1 Turner & Russ. 143; and cases cited in Taylor on Wills, p. 296; Story's Eq. § 1068; Tiffany & Bullard on Trusts, ch. iv.

Parol Evidence.—Where there has been mistake or fraud, parol evidence may be given to establish a trust, although a conveyance may be absolute; but it must be clear and positive and define the trusts.

Harrison v. McMennomy, 2 Edw. 251; St. John v. Benedict, 6 Johns. Ch. 111; Rathbun v. Rathbun, 6 Barb. 98.

The law under this head comes under the special cognizance of courts of equity.

But a trust cannot be engrafted on a deed absolute on its face, by parol evidence, through a direction given *after* its execution. Any trust, to be established by parol, must be with reference to facts or acts simultaneous with the deed, and a part of the same transaction.

The acts constituting part performance, which will estop a party from insisting on the statute of frauds, which require all trusts to be in writing, must be so clear, certain and definite in their object and design, as to refer exclusively to a complete and perfect agreement of which they are a part execution.

The grantor of a deed containing covenants of warranty would be estopped from claiming a resulting trust in the premises conveyed, for his own benefit. So, also, where there is express declaration that a deed was made for the use of the grantee, for good and valuable consideration, there can be no resulting trust to the grantor.

Rathbun v. Rathbun, 6 Barb. 98.

See further, as to parol evidence to create a trust, Title V, *infra*, Implied and Resulting Trusts.

The revised statutes also provide (§ 64), "When an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute as against the subsequent creditors of the trustees, not having notice of the trust; and as against purchasers from such trustees, without notice and for a valuable consideration."

Duration of the Trust Estate.—A trustee, or *cestui que*

trust, would, before the revised statutes, take a fee without the word "heirs," when a less estate would not satisfy the object of the trust.

The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust; and notwithstanding a devise to trustees and their heirs, they would take only a chattel interest, where the trust does not require an estate of higher quality; and the language used in creating the estate will be limited to the purposes of its creation.

Selden v. Vermilyea, 3 Com. 525; 4 Kent, 233; Doe v. Considine, 6 Wall. 458; Fisher v. Fisher, 10 Johns. 505; Wright v. Miller, 4 Seld. 9. See, also, p. 258, and pp. 266 to 269.

By the revised statutes, as seen above, p. 258, it is provided, that where the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease.

As a general rule, where trustees are given power to take charge of and manage lands and pay over rents, a fee will be held conferred by implication; also, generally, where it is necessary to carry out the intent of the creator of the trust, but only when so necessary. And by the revised statutes (§ 60, *infra*, Title IV), in the case of express trusts, the whole estate is vested in the trustees, subject to the trust; the beneficiaries are to have no other estate than the right to enforce the trust.

Leggett v. Perkins, 2 Com. 297; Manice v. Manice, 43 N. Y. 303; Vail v. Vail, 7 Barb. 226; *Ib.* 10 Barb. 69; Burke v. Valentine, 53 Barb. 412. And see, *post*, as to the nature of the estate given, Title IV.

Trust Created without Knowledge of the Party.—A trust created for a person without his knowledge may be enforced by him; the acceptance of the trust by the trustee creating a privity in law, provided, by the agreement, the party creating the trust transfer his entire interest in the fund, and transfer it for the entire benefit of the other.

Weston v. Barker, 12 Johns. 276; Hosford v. Merwin, 5 Barb. 51; Seaman v. Whitney, 24 Wend. 260.

Vide, *post*, Title V, Resulting and Implied Trusts. Murdock v. Aikin, 29 Barb. 59.

Trust as to Realty in Another State.—Whether a trust

created by a will, as to realty situated in another State, is valid or not, can only be determined by the courts of that State.

As to the effect of the *lex loci* upon realty, see fully, *ante*, p. 102; and particularly, as to trusts. Knox v. Jones, 47 N. Y. 389. This case also holds that, although real and personal property be given by the same clause in a will, and upon the same trust, they are severable; and the validity of one will not depend upon that of the other. Therefore, if the testator were domiciled in this State at the time of his decease, the validity of the *bequests* would be determined by the laws of this State, while the *devises* might be determined by those of another.

TITLE IV. TRUSTS ALLOWED BY THE REVISED STATUTES.

The revision of the statutes of this State in 1830 made important changes in the law of trusts, and has enunciated the law applicable to them in a precise and definite code.

Reference is made below to the sections of the statutes by their original numbers, as contained in Part II, ch. i, Title II, art. ii, of the said statutes.

It has been seen above (*ante* Title I) how, under the provisions of those statutes, beneficial interests through passive trusts in land, have been converted into legal estates, and passive or nominal trusts abolished. It now remains to be seen what other trusts are recognized by the statutes as valid.

By the revised statutes, in the above article, it is provided as follows:—

"Uses and trusts, except as authorized and modified in this article, are abolished, and every estate and interest in lands shall be deemed a *legal* right, cognizable as such in the courts of law, except when otherwise provided in this chapter."

Section 55. "Express trusts may be created for any or either of the following purposes:

1st. To sell lands for the benefit of creditors.

2d. To sell, mortgage, or lease lands *for the benefit of legatees*, or for the purpose of satisfying any charge thereon."

The other two subdivisions of this section are considered *infra.*

A trust to sell lands to pay debts, ceases when the debts are, in any mode, paid or discharged; and the whole legal and equitable title becomes vested in the person entitled to the reversion or his assignees. Selden v. Vermilyea, 3 Com. 525.

Where the trustees are not also empowered to receive the rents and profits, no estate vests in them. Boynton v. Hoyt, 1 Den. 53.

If a trust is created for the payment of debts, and the assignees reconvey the real estate to the assignor before the debts are paid, such reconveyance is void as to all creditors whose debts are not paid; and a recital that all debts are paid in the conveyance will not avail, even as to mortgagees without notice. Briggs v. Palmer, 20 Barb. 392.

A trust to receive rents, &c., and apply them to the payment of debts, may be satisfied by a sale of the lands for a term of years, taking the whole rent in advance, and discharging the debts, and such a sale is not contrary to the statute. Rogers v. Tilley, 20 Barb. 639.

A power to sell lands, and distribute the proceeds among those to whom the lands are *devised*, is not one of the purposes for which an express trust may be created. The sale, in that event, is for the benefit of *devisees*, not *legatees*. Lang v. Ropke, 5 Sand. S. C. 303.

See further, as to the construction of the above, subdivision 1, ch. 31, *post*, "Insolvent Assignments."

3d. To receive the rents and profits of land, and apply them to *the use of any person* during the life of such person, or for any shorter term (subject to the rules prescribed in the article relative to the creation and division of estates).

Instead of the word "use" in the above sub. 3, the subdivision originally read, until changed by law of April 20, 1830, ch. 320, p. 384, "*to the education and support or either.*"

A trust to apply rents to the use of a man's "family" would be valid. Rogers v. Tilley, 20 Barb. 639.

A trust not authorizing the trustee to take possession or receive the profits, and not imposing any active duty on him, is void. Jarvis v. Babcock, 5 Barb. 139.

Under this head an express trust may be created to receive rents and pay annuities. Mason v. Jones, 2 Barb. 229; Kane v. Gott, 24 Wend. 641.

A trust to receive rents, and pay certain annuities for a prescribed term to two annuitants, if they should so long live, is a valid trust. McCosker v. Brady, 1 Barb. Ch. 329.

A trust to manage and dispose of land and pay over the income thereof to a person for his support and maintenance, would be valid, within the above provision. Campbell v. Low, 9 Barb. 585.

A direction to hold and control property, and then to pay over creates no estate in the Trustees. Burke v. Valentine, 52 Barb. 412.

A trust to apply rents during the lives of two persons, not the beneficiaries in the trust held invalid. Downing v. Marshall, 23 N. Y. 366.

Under the above section executors might continue to operate and receive the income from a manufacturing establishment and apply it; it is not necessary they should lease the lands. *Ib.*

A devise to apply rents and profits to beneficiaries for a term of years; the lands then to be sold, would be void, as unduly suspending alienation. Beekman v. Bonsor, 23 N. Y. 298.

A devise to executors to apply moneys of an estate to the support of a family, until the widow's decease or to a certain day; and thereafter that the executors should apply them to the support of testator's family, would be a valid trust until the appointed day, if the widow live so long. The further provision over would be void as tying up the estate beyond two lives in being. DeKay v. Irving, 5 Den. 646.

And see fully to trusts under the above subdivision unduly suspending alienation, *ante*, p. 226.

A trust to purchase a farm "for the benefit" of nephews and nieces held good. Beekman v. Bonsor, 23 N. Y. 298.

The rents &c. may be directed to be "paid over" instead of "applied." Such a trust is held an active trust. Kane v. Gott, 7 Paige, 521; affirmed, 24 Wend. 641; Leggett v. Perkins, 2 Com. 296.

Where trustees are given power to take charge of, manage and improve lands, and pay over the rents, a fee will be held conferred by implication; also generally, where it is necessary to carry out the intent of a testator, but not further than is necessary to carry out that intent. Leggett v. Perkins, 2 Com. 297; Manice v. Manice, 43 N. Y. 303; Vail v. Vail, 7 Barb. 226; 10 Barb. 69. See also Burke v. Valentine, 53 Barb. 412, and section 60 of the revised statutes, *infra*.

A trust created by a husband for the support and maintenance of his wife is a valid trust. Calkins v. Long, 22 Barb. 97.

The case of Coster v. Lorillard, in the court of errors (14 Wend. 265), holds that a devise to A. and twelve nephews in trust, to pay over and divide profits among the twelve nephews during their natural lives and to the survivors is a void trust.

This case was decided on the principle that as the estate was inalienable either by the trustees or the *cestuis* during the twelve lives the trust was void. That the trust was also invalid as a power in trust, as it was to be executed by the grantee of the trust for his own benefit *vide* title "Powers." Some of the court were of opinion that the trust was void as it directed a "paying over" instead of an "application" of the proceeds according to the strict words of the Statute.

By the revised statutes a devise to executors to sell or mortgage without power to collect the rents and profits is not a trust estate, but a power only, *vide post*.

In considering the above subdivision, the provisions of the revised statutes against perpetuities will have to be applied *ante*, ch. ix, Title IV. And see, as to the estate of the trustees, *post*, p. 268, and *ante*, p. 260.

Another class of trusts allowed by the revised statutes is as follows:

4th. "To receive the rents and profits of lands, and to accumulate the same for the purposes and within the limits prescribed in the first article of this title."

As to the validity of accumulations under this subdivision *vide ante*. p. 236.

In all the above cases, the whole estate in law and equity is vested in the trustee, but no longer than the

purposes of the trust require ; then it reverts or vests as provided.

1st. Rev. Stat. p. 679, 1st. ed. §§ 60, 62.

To render a trust as to the rents and profits of real estate valid, under the above subdivisions, it is not only necessary that the trustee should be authorized to receive the rents and profits, but that he should be also empowered to apply the same.

Trusts also in a deed, permitting the grantors or others to remain in possession, and receive rents, &c. of real estate, are void, if the trustees are not authorized to receive the rents and profits, notwithstanding they might be required to take care that the rents and profits are properly applied.

These rules are based upon the principle that as the trust imposes no active duty on the trustee, it is a mere formal trust, and no estate legal or equitable is vested in him. So, also, a devise of the rents and profits of lands. if there is nothing more in the will to show that the testator meant to create a valid trust, would be but another mode of making a devise of the land itself, during the prescribed period ; and the legatee would take the legal estate, inasmuch as has been seen above mere passive trusts are no longer allowed ; but beneficial interests in lands are converted into fees, where the trusts are merely nominal.

Vide Craig v. Craig, 3 Barb. Ch. 76; Wood v. Wood, 5 Pai. 596; Jarvis v. Babcock, 5 Barb. 139; and see *ante*, p. 236.

The estate of the trustees.—The revised statutes also provide as follows :—

§ 60. "Every express trust valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, in law and in equity subject only to the execution of the trust. The persons for whose benefit the trust is created, shall take no estate or interest in the land, but may enforce the performance of the trust in equity."

The trustees are seized of such an estate as will authorize them to bring ejectment; McLean v. McDonald, 2 Barb. 534.

Where the trustee has authority to receive the rents and profits, the *cestui* has no estate or interest in the lands, or in their future income upon which he can create a lien or charge, for the purpose of protecting the estate or for any purpose. The trustee may have a lien upon it for charges incurred for its protection. Noyes v. Blakeman, 2 Seld. (6 N. Y.) 567; see also Leggett v. Perkins, 2 Com. 297; Vail v. Vail, 7 Barb. 226; Burke v. Valentine, 53 Barb. 412.

A general devise to executors in trust vests no estate in them, except for such of the declared purposes as require that the title be vested in them. Manice v. Manice, 43 N. Y. 303. And see *ante*, pp. 261, 266, 267.

§ 61. "The preceding section shall not prevent any person creating a trust, from declaring to whom the lands to which the trust relates, shall belong in the event of the failure, or termination of the trust; nor shall it prevent him from granting or devising such lands subject to the execution of the trust. Every such grantee or devisee shall have a legal estate in the lands, as against all persons, except the trustees and those lawfully claiming under them."

§ 62. Where an express trust is created, every estate and interest, not embraced in the trust, and not otherwise disposed of, shall remain in or revert to the person creating the trust, or his heirs as a legal estate.

Certain devises in trust declared powers.—By revised statutes, "a devise of lands to executors or other trustees to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, shall vest no *estate* in the trustees; but the trust shall be valid as a *power*, and the lands shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power." § 56.

See more fully as to "powers," *post*, ch. xii.

Trusts may take effect as powers.—§ 58. "Where an express trust shall be created for any purpose not enumerated in the preceding sections (of the article), no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be law-

fully performed under a power, shall be valid as a power in trust, subject to the provisions in relation to such powers contained in the third article of this title."

As to what are Powers in Trust, *vide*, *post*, ch. xii.

§ 59. "In every case where the trust shall be valid as a power, the lands to which the trust relates, shall remain or descend to the person otherwise entitled, subject to the execution of the trust as a power."

An executor does not take, by implication, an estate in the lands of the testator, when all the duties enjoined upon him by the will in regard to the lands can be discharged under a power. Especially where by construing the will to give the executor an estate, the devise will be void, on account of its suspending for too long a period the power of alienation.

Vide Tucker v. Tucker, 1 Seld. (5 N. Y.) 408.

A power in trust is defined as a mere authority or right to limit a use, while a trust estate is an estate or interest in the subject matter of the trust. A trustee is invested with the legal estate, but this is not necessary with respect to the donee of the power. The definition by the revised statutes of a power in trust, and the characteristics of such powers are fully given in a subsequent chapter treating of them.

In the case of The Farmers' Loan & T. Co. v. Carroll, 5 Barb. 613, it is held that there can be no valid power in trust without an appointee or beneficiary designated other than the donee of the power.

The Superior Court of the city of New York, in 1852, when investigating the law of trusts in connection with statutory changes, in the case of Lang v. Ropke (5 Sand. S. C. 363), holds that the revised statutes have imposed no limitation whatever upon the creation of trusts, and that a valid trust may be now created for any and every purpose for which it might have been created before the revised statutes were adopted. That the only changes operated by the revised statutes are the abolition of *passive* trusts, and the limitation of express trusts, *i. e.*, of trusts which pass an estate as well as grant an author-

ity, but that these changes have neither abridged the real power of the owner of lands in the creation of trusts nor the jurisdiction of equity in compelling their execution.

Therefore, the court determines, that where there is no illegal suspense of the power of alienation, the real intention of the party creating the trust will, in all cases, be carried into effect, and consequently, where the trust is active, the courts would construe it as a power in trust, if it could not take effect as an express trust. Where the trust is passive, however, the statute executes the intention of the party by giving to the *cestui que trust* a legal estate.

The principles of this decision are based upon a view of the provisions of the revised statutes with relation to "powers," in connection with those relative to trusts. It will be observed, from a perusal of a succeeding chapter, that no restriction whatever is imposed on the creation of powers in trust, and that a trustee may be authorized to perform any act in relation to lands or the creation of estates therein which the owner granting the power might himself lawfully perform. Therefore, although the attempted transfer of an estate in trust might not, under statutory provisions, be effectual, and the grant or devise, *as passing an estate*, might be void, the trust, in its substance and reality, may be preserved and its execution enforced by the same means, and with the same certainty as if the title to the lands had been vested in the trustee, as well as a power of disposition. The intention of the testator or grantor is thereby carried out, by the court considering the trust to be valid as a power in trust.

According to this principle of construction, the powers and duties of the trustee, and the rights and remedies of the *cestui que trust* (except the vesting of the estate), are considered the same as if the revised statutes relative to trusts had not been passed, and courts of equity have the same powers in compelling the execution of trusts,

when not against express statutory provisions, as before the passage of the above statutes.

The views, in the case of Lang v. Ropke, were sustained in the subsequent case of Lang v. Wilbraham 2 Duer, 171.

In the subsequent case of Selden v. Vermilyea, also, the Court of Appeals, holds that if an express trust is created for a purpose not enumerated in the statute, no estate vests in the trustees, but the power continues, and may be exercised in the performance of any act directed or authorized by the trust which may lawfully be performed under a power.

3 Com. 525. See, also, N. Y. Dry Dock Co. v. Stillman, 30 N. Y. 174.

It has been observed by Judge Comstock, on the subject of the virtual continuance of trusts under the name of powers beyond the restrictive classes of trusts enumerated by statute, that it would seem that the principal result of the statute restricting trusts is to withdraw from the trustee the legal estate, although expressly granted to him, in all cases except the specially permitted trusts, but leaving the limitation in full force as a *power*, if the purpose is lawful, and the laws of perpetuity are not transcended. The intended trustee may do under the power whatever he might have done if the statute had suffered the legal estate to vest in him, subject, in many cases, however, to the inconvenience of having an estate to manage or protect without the title, which remains in the author of the limitation, or descends to his heirs.

In the case of Downing v. Marshall (23 N. Y. 366), the court also holds that while the provisions of the revised statutes wholly abrogated trust estates of a character purely passive, which might exist in various forms notwithstanding the statute of uses, and abolished all express trusts, *i. e.*, legal estates impressed with trust duties and powers (except those enumerated), there was no attempt to limit or define the acts which might be done under a trust power, and, in that respect, that the

law, as it stood before the revised statutes, was unchanged.

Under the views expressed as above, therefore, trust limitations, if active, although not belonging to the class of permitted trust estates, if not otherwise unlawful, may be effectual and take effect as powers in trust, leaving the title in the donor or his heirs subject to the power. If of a passive character the use becomes executed by the title vesting in the beneficiary.

Thus the revision of the statutes in abrogating all active trusts except the few particularly specified has reanimated them, under the name of powers, which are left without restriction, provided the purpose of the limitation or power be in itself a lawful one. The statutes also enunciate a code on the subject of powers, but make no attempt to enumerate or define the lawful occasion for creating a power.

To illustrate the above distinctions the following case may be cited: A trust for the use of infant children and their heirs and assigns forever, to be held for the *benefit, and used* and expended for the support, maintenance and education of such children, and every of them, was held void as an express trust, as not being within any of the permitted classes; but valid as a power in trust. It was determined that the legal title vested in the trustee only during the minority of the infants, and that the estate of trustee ceased as to each *cestui que trust* upon their arriving at age. Stenicker v. Dickinson, 9 Barb. 516.

A trust also to sell lands and divide the proceeds among the *cestuis que trust*, as beneficiary owners, and not as creditors, is void as a trust but valid as a power might be. Selden v. Vermilyea, 1 Barb. 58; 3 Com. 525.

In the case of Lang v. Ropke, *supra* (5 Sand. S. C. 363), it was held that it was no objection to a power in trust that it is granted for the same purpose for which an express trust is authorized.

In the case of Hawley v. James (16 Wend. 61), Judge Bronson, on the contrary, states that an express trust can be valid as a power in trust only when it is created for a purpose not enumerated as the proper subject of an express trust. See, also, Selden v. Vermilyea, *supra*.

Where a trust to executors to lease real estate of the testator, until it can be sold, would have the effect to suspend the power of alienation in such real estate beyond the time allowed by law, it is void. But the power in trust, in such a case, might still be valid. Haxtun v. Corse, 2 Barb. Ch. 506.

Powers in Trust Assignable.—Where an express trust is attempted to be created for purposes other than those above enumerated (viz.: § 55 *supra*), the conveyance if valid at all is valid as a power in trust only. It gives the

cestui que trust no estate or interest in the land, but the land will be held and continued in whosever hands, otherwise entitled, it may come, subject to the execution of the trust as a power. His right is considered a vested right to enforce the execution of the trust in his favor in a court of equity, and it is an assignable interest, and the assignee can enforce the execution of the trust power in equity as could the person for whose benefit the power was created.

See Clark v. Crego, 47 Barb. 599.

Law of Domicil as to Trusts.—The law of a testator's domicil governs the disposition of his personal property, and his real estate which is situate where he is domiciled. If, therefore, a testator were a resident of the State of New York at the time of his decease, and by his will directs his personal property and the proceeds of his real estate situate there, to be invested in real estate in the State of Ohio upon trusts which are invalid by the laws of New York, these devises in trust would be invalid, as inconsistent with the law of domicil. As to estates in realty, instruments creating or transferring them are to be construed according to the "lex loci," as has been fully considered in a preceding chapter.

Vide ante, ch. iv, Title I, as to the regulation of the disposition of realty according to the *lex loci*.

Future or Contingent Interests in Trust.—Future and contingent or shifting limitations of real estate, even in favor of unascertained persons, may still be created under the revised statutes in certain cases.

If the person primarily designated die during a trust term lawfully constituted, in respect to its duration, the use permits the trust to be shifted to some other beneficiary, and it is not necessary that such person should be in existence or known at the time of creating the trust. The law, for example, will allow a succession to an interest in rents and profits to be made

in favor of the unborn issue of a child who may die before the time which the author of such a trust has lawfully prescribed for its termination.

Gilman v. Reddington, 24 N. Y. 9; Harrison v. Harrison, 36 N. Y. 543.

Trusts as Affecting Mortgages.—The revised statutes regulating trusts in real property have no application to a security by mortgage. A mortgage in fee of lands, therefore, made to a person in trust for the payment of several bonds of the mortgagor, held by different individuals is not affected by these statutes, and is therefore valid. This view is based upon the fact that a mortgage is a lien upon, and not a title in or to lands, and the interest of the mortgagee is a mere chattel interest.

King v. The Merchts. Ex. Ins. Co. 1 Seld. 5 N. Y. 547.

Trusts Upheld in Part.—Although void limitations are embraced in a trust it may be upheld as to others. The principle is now well settled that courts lean in favor of the preservation of all such valid parts of a trust, especially one created by will, as can be separated from those that are invalid, without defeating the general intent of the testator. By the more enlarged view recently taken of trusts also by the courts of this State and their desire to carry out the legal doctrine that instruments and contracts are to be so construed, *ut res magis valeat quam pereat*, the above principle of upholding valid provisions of a trust is carried out, even if those which are valid and invalid are embraced in a single trust; and a single trust created for two purposes, one lawful and the other unlawful, will be held good for the lawful purpose, although void for the other.

In the case of Darling v. Rogers, (22 Wend. 482) the trust was single, *i. e.*, to sell or mortgage the assigned estate for the benefit of creditors, and it was held to be a good and valid trust to sell but void as a trust to mortgage. The trust, in Haxton v. Corse, was the case of a single trust for two purposes, viz.: to lease and sell, one lawful and the other unlawful, and the trust to sell was

declared to be valid while the other was held to be void. In Savage v. Burnham, the trust was a single trust embracing both lawful and unlawful purposes, and it was sustained as to the lawful purpose, while, for the unlawful purpose, it was adjudged void. And the same rule was recognized and applied in Gilman v. Redington, Post v. Hover, and Everitt v. Everitt, *infra.*

If, however, the valid trusts are so involved with and dependent upon the illegal and void ones, that it is impossible to sustain the one without giving effect to the other; in short, if the whole scheme of the creator of the trust is indivisible, so that it must wholly stand or wholly fail, then the whole trust will fall.

Savage v. Burnham, 17 N. Y. 561; Buckley v. Depeyster, 26 Wend. 1; Gilman v. Reddington, 24 N. Y. 9; Post v. Hover, 33 N. Y. 593; 30 Barb. 313; Gott v. Cook, 7 Paige, 521; 24 Wend. 641; DePeyster v. Clendening, 8 Paige, 295; VanVechten v. VanVechten, 8 Paige, 120; Everett v. Everett, 29 N. Y. 99; Amory v. Lord, 5 Seld. 403; Harrison v. Harrison, 36 N. Y. 543; Tucker v. Tucker, 5 Barb. 99; affi'd. 5 N. Y. 408; Harris v. Clark, 3 Sel. 7 N. Y. 242; Coster v. Lorillard, 14 Wend. 26; Manice v. Manice, 43 N. Y. 203; Levy v. Levy, 33 N. Y. 97; Adams v. Perry, 43 N. Y. 587.

In certain cases bequests have been upheld where there is an illegal direction connected with them, the direction only being held void. Williams v. Williams, 4 Seld. 525; Darling v. Rogers, 22 Wend. 483; overruling, 7 Paige, 272; Goodhue v. Berrien, 2 Sand. Ch. 630.

In a deed if any of the trusts therein are valid, the deed is not void; a single good trust is sufficient to sustain it, and an estate is vested in the trustees to the extent of the valid trusts, leaving the residue of the estate in the grantor. Rogers v. Tilley, 20 Barb. 639; Woodgate v. Fleet, 44 N. Y. 1.

Where the trusts can be separated, a conveyance of real estate upon trusts, some of which are valid while others are inoperative, vests an interest in the trustees, to the extent of the valid trusts, leaving the residue of the estate in the grantor. Woodgate v. Fleet, 44 N. Y. 1.

In the case of Knox v. Jones, 47 N. Y. 389, it is held that a void trust which is separable from other valid trusts, and is not an essential part of the general scheme, may be cut off, but where the trust is an entirety, it cannot be sustained in part and avoided in part. Knox v. Jones, 47 N. Y. 389; Clemens v. Clemens, 60 Barb. 366.

The case of Manice v. Manice, 43 N. Y. 305, holds that a void trust which is separable from other valid trusts, may be cut off, where the trust thus defeated is independent, and not an essential part of the general scheme. See also Adams v. Perry, 43 N. Y. 487; See also *ante*, p. 234.

Suspension of the Power of Alienation through Trusts.—The subject of Trusts is so intimately connected with that of expectant estates that the provisions of statute

relative to the latter will have to be continually referred to and applied in connection with Trusts. See fully as to expectant estates and suspension of alienation, *ante*, ch. ix.

Title V. Implied and Resulting Trusts.

Apart from the trusts as above authorized, courts of equity will regard and enforce trusts arising and implied in law, in a variety of other cases, when substantial justice cannot be otherwise obtained, and the rights of third persons would be prejudiced or frauds would be perpetrated in cases where no suitable redress could be obtained without equitable interposition. Such trusts are presumed and implied from the manifest intentions of the parties or the nature and justice of the case.

These trusts arise, not by deed, but by construction of law; and are, as it were, creatures of equity, and are raised without the statute requiring trusts to be in writing.

The establishment and enforcement of trusts of this description is one of the original and inherent powers of courts of equity. The number and character of such trusts are as varied and extensive as the phases of human dealing. Their consideration falls under the peculiar province of works treating of Equity Jurisprudence; and only those of a certain character, which are made the subject of Statutory enactment, can be here reviewed.

Previous to the revision of our statutes, when land was purchased in the name of one, with the money of another, save in a few exceptional cases, the law declared a trust in favor of the party paying the consideration, which was termed a resulting trust. The revised statutes, however, provide (§ 51 of the Chapter on Trusts) that, on a grant to one, for valuable consideration, paid by another, no use or trust results in favor of the latter.

§ 52. "Every such conveyance shall be presumed fraudulent as against the creditors at that time of the

person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that shall be necessary to satisfy their just demands."

§ 53. "The provisions of the preceding 51st section shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration; or where such alienee in violation of some trust shall have purchased the lands so conveyed with moneys belonging to another person."

§ 54. "No implied or resulting trust shall be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration and without notice of such trust."

Although the purchase and conveyance were made with an actual intent to defraud, by the person paying the money, the trust in favor of his then creditors prevails over the title of one who takes a conveyance from the grantee unless he obtain it for a valuable consideration, and without notice; and would prevail over a subsequent creditor who had obtained a mortgage on the land. Lounsbury v. Purdy, 16 Barb. 376; 18 N. Y. 515; Wood v. Robinson, 22 N. Y. 564.

Under the above provisions of the revised statutes all trusts in land paid for by one person, where the conveyance is given to another, whether for the benefit of the party paying the money or for another, are abolished; and the title is vested in the alienee absolutely, excepting where the conveyance is so taken without the knowledge or consent of the party whose money is used, and excepting also the trust in favor of creditors, which can only be enforced in equity.

Gilbert v. Gilbert, 34 How. P. 142 (Court of App'ls); Garfield v. Hatmaker, 15 N. Y. 475; overruling, 4 Den. 475; Wood v. Robinson, 22 N. Y. 564; Norton v. Stone, 8 Paige, 222; Moore v. Livingston, 14 How. P. 1.

The resulting trusts sought to be prohibited by the statute, it is held, have reference to trusts created by acts of parties *claiming to establish the trust*, and the statute is applicable when the conveyance, with the con-

sent or knowledge of the person paying the consideration, is taken in the name of another person.

The object of the legislature was to prevent the creation of passive or formal trusts, and hence, under the 53d section, the provisions of the 51st section are not to apply to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration.

Such trusts arising or resulting by implication of law, have been left untouched by the legislature. They arise from the obvious intention of the parties though not expressed in the instrument, with which they are connected, or they are forced upon the conscience of the courts by the manifest justice of the case.

Where the justice of the case demands it also, in equity, parol evidence may be given to show the intention of parties to a deed; and then effect may be given to such intention as an implied trust. And when the plaintiff's case rests upon fraud, such fraud may always be proved by parol; even to avoid the statute of frauds.

Hosford v. Merwin, 5 Barb. 51; Reid v. Fitch, 11 Barb. 399; Botsford v. Burr, 2 Johns. Ch. 405; Voorhees v. Presbyterian Church, 8 Barb. 135; Willink v. Vanderveer, 1 Barb. 399; Buffalo, N. Y. & E. R. Co. v. Lansing, 47 Barb. 534; Safford v. Hynds, 39 Barb. 625; Jackson v. Mills, 13 Johns. 463; Lounsbury v. Purdy, 18 N. Y. 515; Boyd v. McLean, 1 Johns. Ch. 582; Foote v. Colvin, 3 John. 216.

These cases also maintain the principles relative to resulting trusts, above set forth.

Where a deed, however, has been executed pursuant to a written agreement between the parties, parol evidence is inadmissible to show a resulting trust. St. John v. Benedict, 6 Johns. Ch. 111.

And see *supra*, p. 263, as to parol evidence.

When there is a resulting trust under a conveyance it must arise if at all, at the time of the execution of the deed. Bottsford v. Burr, 2 Johns. Ch. 405; Jackson v. Seelye, 16 Johns. 197; Rogers v. Murray, 16 Johns. 390.

It is also held by our courts that the above statutory regulations do not, even in cases not expressly excepted by them, entirely govern; but that, in many instances, based upon equitable and moral considerations, the common law rules as to resulting trusts in favor of him who

pays the purchase money on a conveyance being made to another, will regulate the rights of the parties.

The language of the statute, accordingly, declaring that, where a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, is not necessarily prohibitory of a resulting trust for the benefit of a third person in whose favor, for family or other lawful and sufficient reasons, it is deemed proper to make some provision; nor where, for the benefit of a corporation, land has been taken in the name of a director thereof, without the direction or knowledge of the corporation.

Wait v. Day, 4 Denio, 439; Siemon v. Austin, 29 N. Y. 598; affirming, 33 Barb. 9; The Buffalo, N. Y. & E. R. Co. v. Lampson, 47 Barb. 533.

If a parent buy and pay for land, and has the deed thereof made to a child, the inference of law is that it is an advancement to the child, and not a resulting trust in favor of the father. It is always competent, however, to meet and repel such inference by proof that the parent did not intend such advancement.

Such a conveyance, if so intended, would be effectual and absolute as between the parties, and could not be revoked by the grantor. If intended as a cover, in fraud of creditors, the conveyance would likewise be absolute as between the child and the father, and those claiming under him.

Welton v. Divine, 20 Barb. 9; Proseus v. McIntyre, 5 Barb. 424. The above decisions are contrary to McGregor v. Buel, 1 Keyes, 159.

The presumption, therefore, that he who supplies the money to make a purchase, intends it for his own benefit, rather than for that of another, does not apply in cases like that of parent and child or husband and wife; where the purchase may fairly be deemed to have been made for another from motives of natural love and affection. The presumption in such cases is that the purchase is intended as an advancement, unless the contrary is established by proof.

Nor do the statutory regulations apply to a case where the deed is taken in the name of one acting merely as agent, without the consent of the person paying the consideration.

Anstice v. Brown, 6 Paige, 448; Safford v. Hynds, 39 Barb. 625; Lounsbury v. Purdy, 16 Barb. 376; 18 N. Y. 515; see also the cases above cited.

There is no resulting trust in favor of the husband, where he purchases lands and takes the deed in the name of his wife, but there will be a resulting trust in favor of creditors as above, unless the deed is taken under the circumstances above stated. Jencks v. Alexander, 11 Paige, 619; Garfield v. Hatmaker 15 N. Y. 475; Tappan v. Butler, 7 Bos. 480.

A purchase of land before the revised statutes made with the money of three persons in the name of one of them, creates a resulting trust in the latter, in favor of the others, *pro tanto*. The Trustees, &c. v. Wheeler, 5 Lans. 160.

Ejectment cannot be maintained by the beneficiary of a resulting trust; nor can the *cestui que trust* defend in an action brought by the trustee. Moore v. Spellman, 5 Den. 225.

The Trust as Affecting Creditors and Purchasers.—The trust in favor of existing creditors, created by the statute, would prevail over *subsequent* creditors, even if the latter had obtained a special transfer to them of the property; and would prevail over the title of any one taking a title from the grantee, unless he obtained it for a valuable consideration, and without notice of the fraud.

Wood v. Robinson, 22 N. Y. 564; Arnold v. Patrick, 6 Paige, 310; Brewster v. Power, 10 Paige, 562.

The trusts result in favor of those who were creditors of the person paying the consideration, at the time the conveyance was executed and consideration paid; and there is no resulting trust in favor of creditors whose debts were subsequently contracted. A judgment recovered by a creditor existing at the time would be a lien in equity, but could not be enforced by execution. To be an actual lien, the commencement of an action and filing of notice of *lis pendens* is necessary.

Brewster v. Power, 10 Paige, 562; The Ocean Nat. Bank v. Olcott, 46 N. Y. 12; Watson v. Le Row, 6 Barb. 481; McCartney v. Bostwick, 31 Barb. 390; 32 N. Y. 53.

Where a grant is made to one on a consideration paid by another, it is held that the legal title is in the grantee,

notwithstanding the conveyance is made for the purpose of defrauding the creditors of the grantor, and upon a parol trust in his favor. And so long as the grantee holds such title, the property is subject to the claims of his creditors, to the same extent as any other property to which he has title. But until such creditors have acquired liens on it, they have no rights superior to those of the grantor; and if a reconveyance is made to him, such creditors cannot have the conveyance set aside as fraudulent.

Davis v. Graves, 29 Barb. 480; Moore v. Livingston, 14 How. P. 1.

If part only of the consideration is paid, the land will only be charged with the money advanced, *pro tanto*.

Any payment or advance of money *after* the purchase has been completed will not raise a resulting trust. Botsford v. Burr, 2 Johns. Ch. 405.

The above provisions of statute do not make the conveyance void *in toto* (as the statute of frauds does), but only *pro tanto*, to the extent that may be necessary to satisfy the just demands of creditors. Accordingly, a creditor of the person paying the consideration cannot obtain a judgment at law for an indebtedness, a part of which arose *after* the conveyance; and by a sale for the satisfaction of the whole judgment transfer the title of the whole of the premises embraced in the conveyance. On the contrary, the parties must seek their remedies in equity, where alone the rights of all parties can be properly adjusted.

Wright v. Douglas, 3 Barb. 555.

The above two sections (51, 52, p. 277), are held not to limit or restrict the right of creditors either precedent or subsequent to the conveyance, to impeach it for fraud in fact, and to show it fraudulent by any proper evidence. Mead v. Gregg, 12 Barb. 653.

Title VI. Assignment and Transfer of Trusts.

By the revised statutes, no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for

whose benefit a trust for the payment of a sum in gross is created, are assignable.

§ 63; 1 R. S. 1st ed. p. 729.

Where the *cestui que trust's* interest, however, is in the fund, and not in the income, his interest is assignable by him, and would pass to assignees under bankrupt and insolvent acts, and may be reached under proceedings similar to creditors' bills. Havens v. Healy, 15 Barb. 296.

By section 61 (*supra*, p. 257), it has been seen that the lands may be devised or granted by the creator of the trust, subject to the execution of the trust.

§ 57. "Where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity to the claims of the creditors of such person, in the same manner as other personal property which cannot be reached by an execution at law."

1 R. S. 1st ed. p. 729.

Pursuant to the above statutory provisions, where rents and profits are held to be applied for the use of designated persons under a valid trust, neither the estate of the trustees nor the interest of the beneficiaries can be assigned or disposed of, except that the surplus, beyond what is necessary for the education and maintenance of the *cestuis que trust*, would be liable, in equity, to the claims of creditors, in the same manner as other personal property which cannot be reached by an execution at law.

Le Roy v. Rogers, 3 Paige, 234; De Graw v. Clason, 11 Paige, 136; Craig v. Hone, 2 Edw. Ch. 554.

An interest in an annuity, also, held in trust for a party's maintenance, &c., cannot be assigned or reached by creditors, except that his interest, beyond what is necessary for the support of himself and his family, may be reached by a creditor's bill or similar proceedings, and be applied to the payment of his debts. And what is necessary for the maintenance of the *cestui que trust* can-

not be reached, although such *cestui* is able to and might support himself by his own labor and exertions.

L'Amoureux v. Van Rensselaer, 1 B. Ch. 34; Cruger v. Jones, 18 Barb. 467; Clute v. Bool, 8 Paige, 83; Sillick v. Mason, 2 Barb. Ch. 79; Stewart v. McMartin, 5 Barb. 438; Graff v. Bonnet, 31 N. Y. 9; explained, 2 Keyes, 457; Rider v. Mason, 5 Sand. Ch. 351; Craig v. Hone, 2 Ed. Ch. 554.

Such interest and any income in the trustees hands cannot be reached under proceedings supplementary to execution, but only through an action in which the judgment debtor and the trustees are parties. Genet v. Foster, 18 How. P. 50; Campbell v. Foster, 35 N. Y. 361.

An annuity for life, however, given directly to a legatee, and charged on real or personal estate, is not property held in trust for the legatee, but is an absolute legacy, the payment of which may be enforced by creditors. Degraw v. Clason, 11 Paige, 136.

The same has been held, also, with reference to a fund, the income of which was to be paid to the annuitant, with power of disposition in him by will; and in default, to his heirs, the executors to have the management of it. Hallet v. Thompson, 5 Paige, 583.

In the case of Lang v. Ropke, 5 Sand. 313, it was held that a trust for the payment of an annuity, even when payable out of rent and profits, does not fall within subdiv. 3, in § 55, *supra*, p. 266. That subdivision applies to cases where the whole rents and profits are to be paid; but an annuity is a pecuniary legacy, and the trust for its payment must be referred to subdiv. 2, in § 55, p. 265, *supra*.

It is held, also, not subject to § 63, p. 282; and imposes no restraint on alienation (*supra*, p. 226), as the annuitant may release to the person entitled in remainder, or may unite with them in the conveyance of an absolute fee. Lang v. Ropke, 5 Sand. S. C. 503.

See, also, the case of Cruger v. Douglas, 4 Edw. 433, where it is held that a wife can assign to her husband, under certain circumstances, a portion of her income for his life, held under a trust.

In the case of Graff v. Bonnet, 31 N. Y. 13, it is held that the law with reference to the inalienability of uses and trusts in lands, applies constructively, also, to trusts of personal property; overruling, Kane v. Gott, 24 Wend. 641, and Grant v. Van Schoonhoven, 1 Sand. Ch. 336, in that particular.

This case also holds that courts of equity may reach, for the benefit of creditors, any surplus beyond what is necessary for the support of the beneficiary in a trust created for his benefit by a third person.

This case must also be considered as overruling, Titus v. Weeks, 37 Barb. 136, where it is held that the provisions of statute forbidding the alienation, by a *cestui que trust*, of his interest in an express trust, are not applicable to trusts or estates in personal property.

Assignments and transfers to be in writing.—The revised statutes also provide that every *grant or assignment* of any existing trust in lands, goods, or things in action, unless the same shall be *in writing, subscribed by the party making the same,* or by his agent lawfully authorized, shall be void.

2 R. S. 1st ed. 137.

"Lands" is to be construed as meaning "lands, tenements and hereditaments." *Ib.*

Acts in contravention of the Trust.—It is also provided, that where the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void.

§ 65, 1 R. S. 1st ed. p. 729.

This section 65 has been held to apply merely to acts of the trustees, and it does not divest courts of equity of their power over the legal title, when vested in infant trustees.

And where a fund is directed to be invested in a particular place or manner, the court, with the assent of all parties in interest, may allow a change to be made upon the same trusts; and the supreme court, as the general guardian of infants, may assent to such change in their behalf.

Wood v. Wood, 5 Paige, 596; *Ib.* 38 Barb. 473.

A court, however, has no power to order a sale of trust property if it be contrary to the provisions of the instrument creating the trust, and if the remaindermen are uncertain and cannot be ascertained.

In re Turner, 10 Barb. 552.

Under the above provision (§ 65), it has been held, that a mortgage executed by trustees, upon the trust estate, would be an act contravening a trust to hold real estate, to receive rents and profits and pay them over, and such a mortgage being absolutely void, would not be rendered valid by receiving the previous sanction of the court.

Cruger v. Jones, 18 Barb. 467; see also Briggs v. Davis, 20 N. Y. 15; as partially overruled, 21 *Ib.* 574.

Any reconveyance by a trustee to his grantor before the trusts are fully executed would be set aside.

And a purchaser is bound to ascertain, at his peril, the fact, although it were recited in the deed.

Where there is a valid trust, therefore, for the sale of land, the party creating the trust and those holding derivately under him, have no rights, legal or equitable, until the purposes of the trust are satisfied.

Their interests are subject to the execution of the trusts absolutely; so that a subsequent grantee, from the creator of a trust, acquires no right in contravention of or hostile to the trust.

Any disposition of a trust estate also, under a power to dispose of it, for the benefit of the trustee or others without any benefit to the *cestui que trust*, would be deemed fraudulent as to the beneficiaries; and the trust will follow the land, in the hands of any person who has taken it with notice of the trust.

As to the above principle *vide* cases last above cited, and Smith v. Bowen, 35 N. Y. 83.

A power to trustees to sell lands and reinvest the proceeds, and hold them reinvested on the same trusts, is not repugnant to a trust created by the deed to receive rents &c., and apply them; nor would a conveyance by the trustees be in violation of the statute prohibiting the alienation of trust estates—(*supra*, §§ 63, 65).

Belmont v. O'Brien, 2 Ker. 12 N. Y. 395.

Assignment of a power in trust. *Vide ante*, p. 273.

Acts of the Legislature.—As to the power of the legislature to pass private acts varying the trust, *vide post*, Title IX.

Title VII. The Trustee.

As regards making title under trust deeds, it is not only necessary to see that the trust is a valid one in law, and that the trust has not terminated by its terms, or by cessation of the purposes of the trust, but it is important to ascertain whether the trustees nominated have still the right to act as such, or whether changes or substitutions have been made.

In the absence of proof to the contrary, a devisee or grantee of property in trust is presumed to accept the trust estate, but he cannot be vested with such an estate against his will; and where he declines to accept it, his disclaimer need not be in such form as to pass an estate in the property devised.

Burritt v. Silliman, 3 Ker. (13 N. Y.) 93.

Whenever a trust exists, either by the declaration of a party, or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and direct the person in whom it is vested to execute the trust.

If the persons in whom the legal estates are vested are infants, the court will appoint some proper person to execute a conveyance, if necessary.

De Barante v. Gott, 6 Barb. 492; Burrill v. Shiel, 2 Barb. 457.

It is a principle, also, of courts of equity that the courts will never allow a trust to fail for want of a trustee, but will appoint a new trustee, or the court may execute the trust, and, by the provisions of the revised statutes, on the death of a surviving trustee of an express trust, the trust vests in the Supreme Court (formerly the Court of Chancery), who shall appoint some person to execute it. (1 R. S. 1st ed. p. 730, § 68). The court may also accept a resignation and appoint a new trustee of an express trust (§ 69), or remove one insolvent or unsuitable, on good cause shown, or one who has violated or threatened to violate his trust, (§ 70). These sections and § 71, *infra*, apply only to express trusts, § 72. (*Ib.*)

People v. Norton, 5 Seld. 176.

If one of several trustees die, and the others refuse to accept the trust, the trust devolves upon the court under the above provisions. McCosker v. Brady, 1 Barb. Ch. 329; Hawley v. Ross, 7 Pai. 103; Clark v. Crego, 47 Barb. 599.

Formerly, under the common law, the trust devolved upon the heir of the trustee on the death of the latter, and such was the rule as to trusts created before the re-

vised statutes of 1830; and the legal title of the trustee descended to his heirs, even if he died after the revised statutes. The revised statutes, as cutting off trusts from the statutes of descent, are held merely to operate prospectively. The heir would take the estate not absolutely, but chargeable with the trust.

Berrien v. McLane, Hoffman, A. V. C. 421; Jackson v. Delancey, 13 Johns. 537; Wood v. Mather, 38 Barb. 473.

An unsuitable or incapable trustee, or one who refuses to do his duty, may be removed by the court on petition: The People v. Norton, 9 N. Y. 176; and a new one appointed with all the other's powers: In re Mechanics' Bank, 2 Barb. 446; Leggett v. Hunter, 19 N. Y. 445.

The Court of Chancery had power by its general authority, independent of statute, to remove a trustee on good cause shown, and to substitute another. The People v. Norton, 9 N. Y. 176.

Where there are several trustees, and one refuses to execute the trust, resigns or is discharged from office, the remaining trustees are vested with the entire estate, and any order to the contrary would be illegal. In re Crossman, 20 How. Pr. 350; King v. Donnelly, 5 Paige, 46; Burrill v. Shiel, 2 Barb. 457. After entering on the trust, one cannot resign without the consent of the *cestui que trust*, or direction of the court. Shepperd v. McEvers, 4 Johns. Ch. 136; Wood v. Wood, 5 Paige, 596.

Trustees of a corporation or religious society cannot take in trust for other societies for any purposes foreign to its institution. Jackson v. Hartwell, 8 Johns. 422; Matter of Howe, 1 Paige, 114; Wilson v. Lynt, 30 Barb. 124, or see, also, *post*. ch. xvii, as to executors.

See, also, *post*, chs. xii and xvii, Powers of Executors, &c.

By the revised statutes *supra*, § 71, and under the general powers of the Courts of Equity, on the death of a sole or surviving trustee of an express trust, or in case of removal or resignation, the trust vests in the Supreme Court, where there is no acting trustee, and it is the duty of the court, in its discretion, to appoint another person, as trustee, to complete its execution; or the court may cause the trust to be executed by one of its officers, under its direction. The proper mode of application for this purpose is by petition, under the provisions of the statute, by a person interested in the execution of the trust; and although it is usual and proper to have all persons interested in the trust fund notified of the proceeding, yet it is in the *discretion* of the court, and relates merely to the orderly and methodical progress of the petition or other proceeding.

Consequently the appointment of a new trustee would

not be invalid, if it were made without formal notice to, and summons of, those interested, or to the person in possession of lands held in trust.

The new appointment may also be made by a decretal order, made in a cause where such new trustee is a proper party to carry into effect the decree of the court. It is held that the statutes, authorizing the court to remove a trustee, do not apply to implied or constructive trusts.

Milbank v. Crane, 25 How. Pr. 193; King v. Donnelly, 5 Paige, 46; Leggett v. Hunter, 19 N. Y. 445; in re Livingston, 34 N. Y. 555; Clark v. Crego, 47 Barb. 599. See *infra*, Title IX, as to the change of trustees made by legislative enactment. As to who may apply for the removal, *vide* in re Livingston, 34 N. Y. 555. See, also, Roome v. Philips, 27 N. Y. 357.

Where a deed provides that in case of the decease of one trustee, the survivors might, with the consent of the *cestui que trust*, appoint a substitute, with the like powers and estate as the others, it is held that, on the decease of one, the survivors might act without appointing a successor. Belmont v. O'Brien, 12 N. Y. 2 Ker. 395; Railroad Mortgages, *vide* Beadleson v. Knapp, 13 Abb. N. S. 335.

Executors as Trustees.—Although a court of equity cannot substitute new executors as such, for those named by the testator, yet when the duties of executors as such have ended, and they have become simply trustees, the power conferred by the revised statutes upon courts of equity, to compel the resignation of a trustee and to appoint another in his place, is applicable and may be executed.

The Supreme Court has no power to appoint or to discharge an executor as such, so far as relates to his power to sue for and collect debts, or so far as his liability to creditors, next of kin, etc., but only so far as he is a trustee of an active trust under the will. In re Van Wyck, 1 Barb. Ch. 565.

Where executors renounce or resign, the others who take out letters have capacity to act, and if all renounce or resign, and others are appointed by the court, the substituted persons or person are clothed with all the trusts, powers, and interests given to the executors under the will as well as trustees as executors.

The court may make substitution as well by action as petition, making all persons in interest parties as by petition.

Vide infra, ch. xvii, as to the appointment of executors; *in re* Bull, 31 How. 69; 45 Barb. 334; Leggett v. Hunter, 25 Barb. 82; 19 N. Y. 445.

Renunciation and resignation by trustees.—Where an executor renounces his office, the renunciation being followed by many years of total non-interference with the estate, he is deemed also to have renounced the trusts conferred by the will, which are personal and discretionary; and it is not necessary that he be discharged by the court. The whole trust estate becomes vested in the executors who assume the execution of the trust.

In re Stevenson, 3 Pai. 420; Beekman v. Bonsor, 23 N. Y. 298.

But a trustee cannot resign without the consent of the *cestuis que trust*, or the order of the court after he has accepted the trust.

Defendorf v. Spraker, 6 Seld. 246.

A trustee may resign as to certain particular trusts in a will, and another may be appointed therefor, and the original trustee remain as to the general trusts, if they are separable, and a trustee may be removed as to some trusts and retained as to others.

Craig v. Craig, 3 Barb. Ch. 76; Wood v. Brown, 34 N. Y. 337; see 41 N. Y. 46.

Where there are infants or persons not *in esse*, a trustee can only be discharged by order or decree.

Cruger v. Halliday, 11 Pai. 314.

Where a trustee renounces, he cannot afterwards accept and execute the trust, except it be under a new appointment as trustee. The revised statutes are held only to authorize the supreme court to appoint a new trustee in place of one who is removed by the court, or whose resignation is accepted after he has assumed the trust; or in case of the death of a sole surviving trustee, so that there is no one left to execute the trust.

In re Schoonhoven, 5 Paige, 559.
As to Renunciation by Executors, *vide* fully, *post.*

Disclaimer by Trustee.—Where one of two trustees disclaimed acting as trustee, by an answer in chancery in another State; it was held that his subsequent death

without ever assuming the trust, or claiming a right to act, made valid that disclaimer, and vested all the estate in the surviving trustee.

Clemens v. Clemens, 60 Barb. 366.

Trustees as Joint Tenants.—The revised statutes provide (Vol. III, p. 14, § 44) that every estate vested in executors or trustees; as such, shall be held by them in *joint tenancy.*

The power and interest of co-trustees being equal and undivided, and their duties being more or less those of confidence and discretion, they must act jointly, unless in acts of a mere ministerial nature.

2 Leading Cases in Equity, pp. 11-306; Hill on Trustees, 2d Am. ed. 436; Lorillard v. Coster, 5 Paige, 172; 14 Wend. 267; Sinclair v. Jackson, 8 Cow. 543.

Their Joint Action.—They must join in receipts and conveyances, and releases, (Ridgeley v. Johnson, 11 Barb. 527); and in releases or transfers of realty, (Van Rensselaer v. Akin, 22 Wend. 549; Hertell v. Bogert, 3 Edw. 20, 9 Paige, 52); reversed on the ground that the executors acted as executors and not as trustees, 4 Hill, 492.

One may confirm and recognize the acts of the other, however. Van Rensselaer v. Akin, 22 Wend. 549.

See also the Trustees &c. v. Stewart, 27 Barb. 553; see also Satisfaction of Mortgages *post*, ch. xxiii; also "Powers" ch. xii; "Powers of Executors," &c. ch. xvii.

Delegation of Powers and Transfer of Trust.—A trustee cannot delegate his powers or transfer his trust; and the vested interest of a *cestui que trust* cannot be impaired or destroyed by the voluntary act of the trustee, but the trust will follow the land in the hands of the person to whom it has been conveyed in the knowledge of the trust.

Shepherd v. McEvers, 4 Johns. Ch. 136.

Dealings with Trust Property.—The trustee cannot purchase or deal in the trust property, in his own behalf, or for his own benefit directly or indirectly, even under a judicial sale under a title superior to that of the trust.

Sternicker v. Dickinson, 9 Barb. 516; Abbott v. American H. R. Co. 33 Barb. 579; Conger v. Ring, 11 *Id.* 356; Ackerman v. Emott, 4 Barb. 626; Jewitt v. Miller, 6 Seld. 402.

The purchase would not be absolutely void, *ab origine*, but would become so, by action in equity, and the *cestui que trust*, if of age, might sanction the sale, and make it effectual.

Bostwick v. Atkins, 3 Com. 52; Boerum v. Schenck, 41 N. Y. 183.

Equity would set it aside even against a purchaser unless he could show he had no notice.

Woodruff v. Cook, 2 Edw. 259.

Neither can agents or trustees of a corporation nor its officers sell the property of the corporation to themselves.

Abbott v. Am. Hard. Co., 33 Barb. 578.

Such a sale and conveyance to a trustee is capable of confirmation by the express act of the *cestui que trust*, by acquiescence, and by lapse of time; and a title acquired by a subsequent purchaser, in good faith and without notice, will be valid. Such sales are not void but voidable only at the instance of the *cestui que trust* alone.

Johnson v. Bennet, 39 Barb. 237.
A transfer of trust property without consideration would be void. The Wardens, &c. v. The Rector, &c. 45 Barb. 356.

Sale by.—Where the trustee is directed by the court to give a certain notice on selling, a sale without the notice would be valid as to the purchaser, but the trustee would be liable for any deficiency.

Minuse v. Cox, 5 Johns. Ch. 41.

A trustee's deed would be good although made by him as an individual.

Bradstreet v. Clark, 12 Wend. 602.

Outstanding Title.—A trustee will not be allowed to purchase an outstanding title for his own benefit.

Kellogg v. Wood, 4 Paige, 578.

Trustees of a Power.—As to trustees of a power, *vide post*, ch. xii.

Those sentenced to Imprisonment.—Forfeiture of trusts by, *vide ante*, p. 100.

Married Woman.—A married woman may act as trustee.

The People v. Webster, 10 Wend. 554.

Insane Trustees.—Their committee may be compelled to convey.

2 R. S. 55.

Infant Trustees.—*Vide post,* ch. xxv.

Infants holding lands as trustees or mortgagees may be compelled by the supreme court to convey them as directed, and the conveyance shall be valid.

1 R. L. 148; 2 R. S. 1st ed. 194; 44 N. Y. 279; 11 N. Y. 561; 6 Barb. 499; 2 Ed. 416; 4 John. 378; 38 Barb. 480.

Enforcement of the Performances of Trusts.—A general power in trust, the execution or non-performance of which does not depend on the mere volition of the trustees, is imperative in its nature, and imposes a duty the performance of which may be compelled in equity.

Arnold v. Gilbert, 5 Barb. 190; and *vide post,* ch. xii, "Powers."

Change of Trustees and Execution of Trusts through Legislative Acts.—As to these *vide* fully *post,* Title IX.

It is held that it is competent for the Legislature to dispose of the interests of infants, and of persons not *in esse,* and to declare that a deed executed by a portion of the trustees named in a will shall be sufficient to convey the entire estate.

In re Bull, 45 Barb. 334; *Ib.* 31 How. 69.

Title VIII. Trusts for Charitable Uses.

The law with reference to uses and trusts created for purposes of a religious or charitable nature has been the subject of extended discussion in the legal tribunals of this State.

The courts have endeavored to uphold such trusts, even when opposed to statutory enactments; and the

long range of cases on the subject exhibits a curious instance of varying opinion in the judicial mind, and finally of the entire reversal of the decisions of the highest court in the State on the subject, and the many cases that were sustained by or followed them, by subsequent decisions of the same tribunal.

It was for a long time considered, by the courts of this State, that the law relative to such trusts was of a special character, under a peculiar equitable cognizance and jurisdiction, and, as such, excepted from the general provisions of statute abolishing uses and trusts, except as specially provided.

It was also considered that, notwithstanding the statutory prohibition against devises of lands to corporations, a devise of a charity not directly to a corporation, but in trust for a charitable corporation, would be good.

According to the English law, based upon certain prerogatives of the crown and the statute of 43 Elizabeth, ch. 4, the court of chancery, in England, exercised a certain peculiar jurisdiction over charitable trusts, in determining and applying gifts to charity, where the donor had failed to define them, and in framing schemes of approximation near to or remote from the donor's true design. Where, therefore, there was a gift for a general and indefinite charitable purpose, either the king, under his sign manual, or the court representing him, disposed of the subject donated.

The statute of Elizabeth was repealed by the State legislature in 1788, and the prerogative of the crown had, of course, no effect in this State; but the powers and jurisdiction of the English court of chancery, as they existed in England at the time of the Revolution, were supposed to have followed and remained with courts of equity in this State, and the law of charities, it was claimed, independent of the statute of Elizabeth, was in force prior to that statute, and continued after its abolition.

In the consideration of this subject by the courts of

this country, it was, however, determined that the English doctrine with respect to charitable trusts, as it existed at the time of the Revolution, according to the common law, irrespective of statutory enactment, was only to be considered in force here so far as it was applicable to our circumstances and conformable to our institutions, and not repugnant to them.

Any abrogation or modification of the law relative to trusts growing out of our colonial jurisprudence or subsequent statutory enactment, would, of course, produce a corresponding change in the doctrine relative to charitable trusts, unless such trusts were either expressly or by legal implication excluded from the operation of such changes, which is now to be considered.

The principal earlier cases on the subject of charitable uses and trusts in this country, where the ancient abstruse learning on the subject will be found investigated and applied, are here noted for reference.

Coggeshal v. Pelton, 7 Johns. Ch. 292; McCarty v. The Orphan Asylum, 9 Cow. 437; Kniskern v. The Lutheran Churches, 1 Sand. C. 439; Shotwell v. Mott, 2 *Id.* 46; Bogardus v. Trinity Church, 4 Paige, 198; Canal Commissioners v. The People, 5 Wend. 445; Ayres v. The Methodist Church, 3 Sand. S. Ct. 368; Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. 99; The Baptist Assn. v. Hart's Ex'rs, 14 Wheat. 1; Vidal v. Girard's Ex'rs, 2 How. U. S. 127; Owens v. The Missionary Society, 14 N. Y. (4 Kern. 480); Boehm v. Engle, 1 Dall. 15; Attorney-General v. Stewart, 2 Merivale, 162; Phila. Bap. Assn. v. Smith, 3 Peters, 484; Bap. Church v. Preb. Church, 18 B. Mon. 635; Fortaine v. Ravenel, 17 How. U. S. 369.

The above cases, as a general rule, sustain the doctrine above referred to, with relation to the peculiar jurisdiction and power inherent in courts of equity in this country, as successors of the English court of chancery, in acting upon trusts of the above character, by carrying out the intention of the creator of the trust as far as it was possible, or where the purpose was indefinite or impossible, in executing the trust as nearly as possible in accordance with his supposed intentions.

It was subsequently determined, in this State, under the views expressed in our highest courts, that charitable gifts, so far definite, both in their subject and purpose,

as to be capable of being executed by the authority of the court, and made to a definite trustee, who was to receive the fund and apply it in the manner specified, would be maintained, although they might be void by the general rules of law, because the particular objects of the gift or persons to be benefitted by it were not definitely designated.

In other respects than as above specified, the rules of law regulating charitable uses and trusts were considered within those which appertained to trusts in general. But, it was also held, that the provisions of the revised statutes relative to restrictions on alienation generally, and to accumulations of personal property and of expectant estates, did not affect property given in perpetuity to religious or charitable institutions. These views were entertained in the following leading cases on the subject.

Williams v. Williams, 4 Seld. 527; Owens v. The Missionary Society, 14 N. Y. 380; Beekman v. Bonsor, 23 N. Y. 298.

In the above case of Williams v. Williams, it was considered by the court of appeals that the law of charities was, at an early period in English judicial history, engrafted upon the common law, and that its general maxims were derived from the civil law, as modified by the ecclesiastical element introduced with christianity, and that it existed irrespective of the declaratory statute of Elizabeth, which was afterwards repealed. The proceedings under that statute were considered of an exceptional nature, applicable to existing gifts, and not to the exercise of the general jurisdiction of the courts over charitable gifts, which consequently remained unimpaired on its abolition.

It was also held by the court of appeals, in the above case of Beekman v. Bonsor (23 N. Y. 298), with respect to a gift of proceeds of residuary real and personal property, that, as a general rule, charitable trusts are subject to the rules which appertain to trusts in general; among others, that the trust must be capable of execution by a

judicial decree, in affirmance of the gift as the donor made it; and consequently, that a charitable gift of a sum which is left uncertain, or which is left to the discretion of executors who have renounced the trust, especially where the objects to be benefitted are not specially designated, is void.

The court further holds that, under the peculiar system of government in this country, with its precise distribution of the governmental powers, the English common law on the subject could only be considered as in force here so far as it is adapted to our political condition, and capable of administration in the exercise of strictly judicial power, inasmuch as our courts are only clothed with an expressed judicial authority, and do not act as exponents of or ministrants to the wishes or authority of the crown or any other governing power representing it.

Therefore, it was determined that, in this State, the courts cannot entertain a jurisdiction commensurate with that claimed for equitable tribunals in England, inasmuch as it would involve the exercise of functions rather political than judicial—functions which might well be exercised by the English court of chancery as being technically the keeper of the conscience of the king, and based upon the royal authority and prerogative, but not appurtenant to any tribunal in this State.

The exercise of such jurisdiction and authority, therefore, was considered as unsuited to, and inconsistent with, our institutions; and the "*cy pres*" power of the English court of chancery was definitely held as not to have any existence in the jurisprudence of this State.

The court, however, in the main, coincides with the views expressed in Williams v. Williams, in holding that trusts for charitable purposes formed an established exception to the law against perpetuities as it existed before the revised statutes; and that it was not the intention of the legislature, in revising the branch of the law relative to perpetuities, to abolish that feature

of the law of charities which allowed the income of property to be perpetually devoted to charitable purposes.

To the same effect were Kniskern v. The Lutheran Church, 1 Sand. Ch. 439; Shotwell v. Mott, 2 Sand. R. 46; The Trustees, &c. v. Kellogg, 16 N. Y. 83; Voorhees v. The Presbyterian Church, 8 Barb. 135; Leonard v. Burr, 18 N. Y. 96; Tucker v. St. Clement's Church, 4 Seld. 558; Boyce v. City of St. Louis, 29 Barb. 650; and others above referred to.

We shall now briefly review the series of decisions which are in opposition to the above cases sustaining the doctrine that trusts for charitable uses might be upheld, although contrary to the provisions of the revision of 1830, and although indefinite in their character; which decisions, persistently attacking the above doctrine, in time culminated in the important cases of Levy v. Levy and Bascom v. Albertson, below referred to, which have finally determined all controversy in the matter, and set the doctrine at complete rest.

In the case of Ayres v. The Methodist E. Church (3 Sand. S. C. 357, 371), it was held that the restrictions of the revised statutes as to trusts applied as well to those for pious and charitable purposes as to others.

The case of Yates v. Yates (9 Barb. 324), was to the same effect.

To the same general effect also were The Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1; and Fontaine v. Ravenel, 17 How. U. S. 369.

The above views were also maintained in the Supreme Court, in King v. Rundle (15 Barb. 139), where directions for the accumulation of moneys contrary to the revised statutes, and trusts of real estate suspending the absolute power of alienation, and for purposes not authorized by the revised statutes, although for charitable designs, were held void.

The case of Voorhees v. The Presbyterian Church (17 Barb. 103), is to the effect that the statute abolishing uses and trusts extends to every use and trust not therein excepted, and that there is no qualification or exception, express or implied, in favor of public trusts and charitable uses.

This case also holds that no trust can arise in favor of a religious society, except in those cases where it could arise, be created or declared in favor of a private person; and, except when otherwise provided, the same rule as regards uses and trusts, the statute of frauds, and the modes of acquiring real property applies to them as to others.

The same views were expressed in the case of McCaughal v. Ryan, 27 Barb. 376. This latter case, while yielding assent to former decisions of the Court of Appeals, so far as they went, dissents from the *general principle*, and questions the soundness of authorities holding that donations to pious uses are not subject to the same restrictions as other trusts in the State, and claims that it was the intention of our legislature, as well as within the general policy of our laws and institutions, that the provisions of our statutes preventive of perpetuities should be applicable to donations for pious and charitable uses.

It is to be observed that even in the above case of Williams v. Williams, the provisions of the revised statutes were held applicable to the bequest in question so far as rendering the directions for accumulation beyond the statutory limit void.

The court, in McCaughal v. Ryan, further comments on supposed inconsistencies in the opinion pronounced in Williams v. Williams, and holds that it will not extend the decision of the Court of Appeals in that case beyond the exemption of donations for pious and charitable uses, from the laws to prevent perpetuities; and that the devise under consideration being of real and personal estate, in trust for the Roman Catholic Church of the State, was null and void, as not being a trust within the classes allowed by the revised statutes.

Judge Emott, in expressing his views on the case, takes the ground that the decision in Williams v. Williams has relation merely to trusts of personal property, and that the courts of this State would not be justified

in assuming that the restrictions of the revised statutes upon trusts would not be held to apply to trusts of realty, in view of the explicit statutes regulating them.

He, therefore, does not accept the decision in the case of Williams v. Williams as an authority that effect may be given to a devise of lands to a pious or charitable use which is too vague and indefinite in its subject or its beneficiaries to vest any estate in the *cestui que trust*, and which is not within the exceptions to the express abolition of all uses and trusts contained in the revised statutes.

The case of Owens v. The Missionary Society of the Methodist Epis. Church, 14 N. Y. (4 Ker. 380) arose upon a bequest of proceeds of real and personal estate to a corporation, not entitled to take by law, for a pious purpose. It was held that the trust could not be sustained as a charitable or religious use, inasmuch as there was no trustee named competent to take by law; and that, therefore, the court had no power to uphold the bequest, and that the trust was in any case invalid, the object being too general and indefinite, *i. e.*, "to diffuse the blessings of Christianity, &c., through the United States." It was also held that a subsequent act authorizing the corporation to take as provided, would not validate the bequest.

The court, in reviewing prior cases on the subject, places its decision on the ground that the law of charitable uses, as it existed in England at the time of the American revolution, is not in force in this State; and that the courts of this State have only such jurisdiction over trusts for charitable and religious purposes as was exercised by the court of chancery in England, *independently* of the prerogatives of the crown, and of the Statute of Elizabeth.

The case was held to be distinguished from that of Williams v. Williams (4 Seld. *supra*), inasmuch as in that case the fund was bequeathed to trustees competent to take in the first instance. The court, in deciding the

case, intimates that its decision is not intended to deny the powers of the courts of equity in this State, to enforce the execution of trusts for public and charitable purposes where the fund is given to a trustee competent to take, and when the charitable use is so far defined as to be capable of being specifically executed by the authority of the court, although no certain beneficiary, other than the public at large, be designated.

The case of Sherwood v. The American Bible Society (1 Keyes, 561), also holds that, while there is no statute in this State prohibiting corporations from acquiring personal property by bequest, there must be a body or trustee competent to take a fund given for charitable purposes, so as to secure the appropriation to the purpose intended, and that there can be no valid trust unless the title can vest in some person, natural or artificial, by favor of the gift.

See also Downing *v.* Marshall, 23 N. Y. 366.

In the case of Phelps v. Phelps (28 Barb. 121), a bequest to found a college in Liberia, in such manner as the executors might select, was held void, on the ground that the object of the charity, the mode of applying it, and the time when it should take effect, were so uncertain and indefinite that the trust could not be enforced by the court.

In the case of Wilson v. Lynt (30 Barb. 124), the court determined that a trust to accumulate proceeds of real and personal property until a certain sum should be raised to erect a church, was void; and that such trusts of personal property were void in the case of religious societies as in that of other trusts. In view of the decision, however, in the case of Williams v. Williams, *supra*, the court held that it was obliged to follow that case and sustain the trust, although it differed from the views expressed in that case, *toto cælo*.

In the case of Goddard v. Pomeroy (36 Barb. 547, a devise in trust to provide for the payment of the salary

of a missionary to be employed in preaching the gospel in the West, was held void, as too vague and uncertain. Such a trust, however, would be upheld, it was considered, as a charitable use, although there were no ascertained or ascertainable beneficiary, provided the charitable use were so clearly and certainly defined as to be capable of being specifically executed, as intended by the donor, through a judicial decree.

The case of Levy v. Levy (33 N. Y. 97, reversing, 40 Barb. 585), has finally determined the law upon these trusts in this State, and has been adhered to in succeeding cases in the Court of Appeals. This case arose upon the question of the validity of trusts with reference to lands in another State, the trusts being void by the laws of that State.

The trust in question was to the "People of the United States, or such persons as Congress shall appoint," to receive the fund for the purpose of the education of a certain class of the children of naval officers. The trust was given, in the case of Congress not accepting, to the State of Virginia, as trustee, and in case of its non-acceptance, to certain Jewish synagogues to procure societies to be incorporated to hold the land for schools of certain children. The fund was to be accumulated by the executors, until the trustees or the synagogues, in default of the trustees procuring the laws to be passed, *were* prepared to take.

The court, in its decision, extensively reviewed preceding cases, and held that, at common law, the trust would be void for want of a certain donee or beneficiary of the use or trust whom the law could recognize. That it was uncertain which class of beneficiaries would be the parties in interest, and if the class were ascertainable, that the individuals thereof were indeterminate, and unascertainable, and there was no ascertained beneficiary in whose favor performance might be enforced. If the trusts were viewed as for a charitable use, neither, it was held, could they be sustained; although such

trusts had been upheld when of an uncertain and indefinite character, and without a definite beneficiary; a distinction having been created between such trusts and others known to the common law.

The court determined, that the law of charitable trusts as existing and enforced in England, being based upon the statute of Elizabeth, was abrogated and annulled, in this State, by the act of 1788, which, by a general enactment, repealed the Statute of Elizabeth (2 Green. 136, § 37); and that the legislature, *by that act, intended to abrogate the entire system of indefinite trusts, which were understood at the time, to be supported by that statute alone*, as being opposed to the general policy of our government and to the spirit of our institutions.

The cases of Williams v. Williams, and Beekman v. Bonsor, above given, were fully reviewed by the court and virtually overruled. The court also determines that the trustees named, *i. e.*, The People of the United States, or of the State of Virginia, were incompetent to take as trustees, they being created for certain determinate political purposes, and having no other functions or existence. Nor could the Hebrew congregations, it was held, so act, as the trust was not within the acts or province of their incorporation; the one in New York being incorporated under the Act of 1813, could only take property for its own use, and the foreign corporations could not take and act as trustees of lands in this State.

The court was *further* of the opinion *that the whole of the peculiar system of English jurisprudence for supporting, regulating and enforcing public or charitable uses*, is not the law of this State, when in conflict with our statutory prohibitions relative to uses and trusts.

It was further determined that the dispositions in question were void *as in contravention of the revised statutes against perpetuities* (*vide ante*, p. 226), the executors being directed to hold the fund for an indefinite time, not determinable by lives in being. In this particular

also, does the court overrule the decision in Williams v. Williams, and lays down the rule that trusts for charitable and the like uses came within the prohibition of the revised statutes restricting alienation.

Neither, it was held, could the dispositions be upheld as *powers* in trust, because they did not authorize any act which might lawfully be performed under a power, and they were neither general or special powers under our statutes, as they did not contemplate the alienation or disposition of land.

It is to be remarked that the elaborate opinion of Judge Wright in pronouncing the decision of the court, was acquiesced in, with respect to its conclusions as to the law of charities in the State of New York, by two of his associates only. Three others of the justices put their decision on other grounds, and three others dissented entirely.

Following the case of Levy v. Levy, the subsequent case of Bascom v. Albertson (34 N. Y. 584), also holds that the English system of indefinite charitable uses has no existence in this State, and no place in our system of jurisprudence. The court, in this case also, determines that the law of English charities was codified by the Statute of Elizabeth, and that those common law principles, not thus codified and sanctioned, fell.

That the repeal of the Statute of 43 Elizabeth, and the Mortmain Act of Geo. II, ch. 36, by the legislature of this State in 1788, in fact, abrogated, in this State, the law of indefinite charitable uses, *which must be administered according to the statutes of the State; and that all gifts for such uses are subject to the provisions of the revised statutes in relation to uses and trusts, perpetuities and the limitation of future estates.*

The case of Burrill v. Boardman (43 N. Y. 254) is the succeeding case in our higher courts on the subject. That case decided that an executory *bequest* limited to the use of a corporation, *to be created within the period allowed for the vesting of future estates and interests, is valid.*

The trusts under review, in that case, were as follows:

A testator bequeathed the residue of his estate to nine trustees, for the establishment of an hospital for the reception and relief of sick and diseased persons; and directed them to apply to the legislature for a charter to incorporate the same; and in case the legislature should refuse to grant this, within two years after his death, provided two lives named in his will should continue so long, then the trustees were to pay over the same to the United States. It was held that these provisions did not violate the statute against perpetuities, but that the corporation could take only in case the charter was granted within the two lives named.

It was held further that the bequest was not void on account of the uncertainty of the beneficiary.

The case of Adams v. Perry (43 N. Y. 487), also holds that the only power in charitable and educational corporations to hold property in perpetuity in trust, is in virtue of their charters, and the acts of 1840 and 1841, as to which, *vide post*, Title IX, p. 313.

In the case of Inglis v. The Trustees, &c. (3 Pet. 99), it has been held that a subsequent act of the legislature would give validity and effect to a devise for charitable uses where trustees were not otherwise sufficient or competent to carry out the designated object.

See also Baptist Association v. Hart's Executors, 4 Wheat, 1; Same v. Smith, 3 Pet. 481.

In the case of White v. Howard (46 N. Y. 144), it is held, that a devise to an unincorporated charitable association is void, and is not made valid by the incorporation of such association after the death of the testator, and that a subsequent amendment of its charter would impart no vitality to a devise to a corporation not authorized to take at the time of the devise.

Religious Corporations under the Act of 1813.—The provisions in the revised statutes relative to trusts and per-

petuities have been supposed not to affect the powers of religious corporations incorporated under the general act of 1813 (Laws of 1813, ch. 60, 3 R. S. 1 ed. p. 292), nor to apply to transfers of lands made to such corporations, which are within the authority conferred upon them by that act.

The above act of 1813 was not repealed by the general repealing act of 1828; and the general provisions of the act of 1813, which allow corporations created under it to purchase and hold real estate for "*pious uses*," within certain limits were supposed to control subsequent statutes of a general nature. Nearly every conveyance to a "pious use," it was contended, contemplates or creates a perpetuity, and implies a trust of some character which cannot be referred to any class of those cases which alone are authorized by the revised statutes.

Tucker v. The Rector, &c. 3 Sand. 242; Williams v. Williams, 4 Seld. 525; McCaughal v. Ryan, 27 Barb. 376.

In Levy v. Levy, 33 N. Y, *supra*, there is a dictum that religious societies incorporated under the law of 1813, if they could take by devise, could take only for their own use.

The point, however, was not directly in question as to their exception from the provisions of the statutes relative to trusts. In the case of Wilson v. Lynt, (30 Barb. 124), it is held that trustees of religious societies have not the capacity to take property devised or bequeathed to them in trust for other societies.

The case of Goddard v. Pomeroy (36 Barb. 546), holds, further, that where a religious corporation has not the *specific* power to take *by devise*, for any purpose, a devise and trust founded upon it would be void.

In that case, also, the court determines, with respect to religious societies incorporated under the act of 1813, that they are not expressedly or impliedly authorized to take lands by devise for any purpose whatever; such societies being within the restrictions of the revised statutes (2 R. S. 57), declaring "that no devise to a cor-

poration shall be valid unless such corporation be *expressly* authorized by its charter or statute to take by devise. Such corporations under the law of 1813, it was therefore held, could only take by conveyance.

See, also, Theological Seminary v. Childs, 4 Paige, 419; Ayres v. The Methodist Episcopal Church, 3 Sand. 351; King v. Rundle, 15 Barb. 139.

Within the views taken by the courts in the cases of Levy v. Levy, and Adams v. Perry, referred to in the above pages, it is to be supposed that no trusts, even in favor of corporations created under the law of 1813, for "pious purposes," whether created by grant or will, would be now held valid, if in conflict with the express provisions of subsequent statutes restricting the creation of trusts or the suspension of alienation, or with any other general prohibitory or restrictive provisions of law.

Title IX. Miscellaneous Provisions as to Trusts.

The are many complex principles of law and equity arising out of the peculiar nature of trust estates, the relation of trustee to the *cestui que trust* and the obligations of those parties to third persons, which cannot be inquired into in a treatise of this general nature. The establishment and enforcement of trusts arising from or through fraud, the intent of parties, fiduciary relations, equitable liens, voluntary dispositions and other conditions and causes, offer a wide field for review.

They fall, as a general rule, under the peculiar cognizance of courts of equity, and few new conditions that arise will allow of the precise re-application of equitable principles as controlling antecedent cases. Such trusts only as have been the peculiar subjects of statutory provision have been considered in this chapter.

As regards others of a more recondite character that arise under principles of equity jurisprudence, and call for relief from purely equitable tribunals, they have been subjects of learned and extensive research in works treating particularly of trusts of such a nature.

The terms "Real Estate" and "Lands."—By the revised statutes, it is provided that the terms "real estate" and "lands," as applied in them to trusts, shall be construed as co-extensive in meaning with lands, tenements and hereditaments.

1 R. S. 750, 1st ed.

Descent of Trusts.—By the revised statutes, real estate held in trust for any other person, if not devised by the person for whose use it is held, shall descend to his heirs according to the provisions of the statute of descents.

1 R. L. 74; 1 R. S. 1st ed. 705.

Revocation and Extinguishment of Trusts.—The assent of trustees and *cestui que trust* may sometimes extinguish a trust.

Short v. Wilson, 13 Johns. 33; Brewster v. Brewster, 4 Sand. Ch. 32.

The creator of the trust, however, cannot extinguish it when it has arisen.

Smith v. Bowen, 35 N. Y. 83; Wright v. Miller, 4 Seld. 10; and see, *ante*, p. 285, as to acts in contravention of the trust. As to cessation of trusts in favor of married women under the laws of 1849, 1860, 1862, *vide ante*, p. 79.

Any reconveyance of the trust estate until the trust is executed or accomplished, is void, and any fraudulent disposition of it by collusion between the trustees and tenants, in possession, will be set aside. Wright v. Miller, 4 Seld. 10; Briggs v. Davis, 20 N. Y. 15.

Result of Failure of Object of the Trust.—In these cases a trust results to the original owner, if they are active trusts, but not if they are conveyances to uses, and a consideration has been paid.

Vender Volgen v. Yates, 5 Seld. 219.

Violation or Diversion of Trusts.—No violation or diversion of trusts upon which property was conveyed, works a forfeiture, and it cannot have the effect to revest either the legal or equitable title in the heirs of the original grantor.

R. D. Church v. Mott, 7 Paige, 77.

Trusts in Favor of Religious Corporations.

Vide ante, Title VIII, "Charitable Trusts," and ch. xv, "Devises to Corporations," *post*.

Law of 1860, *as to Devises in Trust, &c., to Corporations.*—By Law of Ap. 13, 1860, ch. 360, no person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association or incorporation, in trust or otherwise, more than one half part of his or her estate, after the payment of his or her debts; and such devise or bequest shall be valid to the extent of one half and no more.

All inconsistent acts, or parts of acts, are repealed.

See *post*, ch. xv, as to devises to such societies as above, under the Law of ch. 319, of the Laws 1848, as amended by Law of 1853, ch. 487. The latter laws allowed a devise of not more than a fourth of an estate, after payment of debts, by a wife, child or parent, provided the will were executed two months before decease of the testator.

Under this statute of 1860, the widow's dower and debts are to be first deducted before the half is estimated; and the testator cannot give to two or more corporations, in the aggregate, more than he can give to a single object. Chamberlain v. Chamberlain, 43 N. Y. 424.

Devises in Trust for Religious Purposes.—An act was passed April 9, 1855, relative to devises to religious corporations, in trust or otherwise, which was repealed by law of 1862, ch. 147.

Misapplication of Moneys, &c. by Trustees.—§ 61. No person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall be responsible for the proper application of such money according to the trust; nor shall any right or title derived by him from such trustee, in consideration of such payment, be impeached or called in question in consequence of any misapplication by the trustee of the moneys paid.

Champlain v. Haight, 10 Paige, 274; Field v. Schieffelin, 7 Johns. C. R. 150; see, also, Wilson v. Lynt, 30 Barb. 124.

Unless the purchaser knew that the trustee intended to misapply the money, or had sufficient information thereof; in such case he would be liable.

Knowledge of the Trust.—Where a party has knowl-

edge of facts sufficient to put him upon inquiry as to the existence of a trust, he purchases subject to all legal and equitable rights under it.

Voorhees v. The Presbyterian Church, 8 Barb. 135. See, also, *ante*, p. 285.

Legislative Acts Affecting Trust Estates.—It is held that the legislature (except in cases of necessity, arising from the infancy, insanity, or other incompetency of those in whose behalf it acts) has no power to authorize, by special act, the sale of private property held in trust, for other than public purposes, without the consent of all interested in the property.

Powers v. Bergen, 6 N. Y. (2 Seld.) 358.

In the subsequent case of Leggett v. Hunter, it was held that a public or private act of the legislature would be valid which authorized, upon the petition of the *cestuis que trust*, a sale of the trust estate, so as to operate for the benefit of infants and others under disability, who had either vested or contingent interests; and that the power might be exercised as well in respect to the rights of persons *in esse* as to the contingent interests of persons yet to be born.

19 N. Y. 445.

An act of the legislature by which the legal title of a mere naked trustee is declared to be transferred to and vested in the *cestui que trust*, who previously had the power to compel such transfer through the courts, is held constitutional and valid.

The Reformed P. Church v. Mott, 7 Paige, 77.

It is also held that the legislature may provide for the disposal of the interests of infants and persons not *in esse*, and declare that a deed executed by a portion of the trustees named in a will shall be sufficient to convey the entire estate.

Matter of Bull, 45 Barb. 334.

In relation to the power of the legislature of the State to pass acts relative to changes of trustees and the

disposition of trust estates under a will conferring a trust estate, with power over the realty, the history of the adjudications relative to the will of Mary Clarke, in the various courts of this State and in the federal courts, is of importance. A review of the various decisions relative thereto is here given.

The will was made in 1802, devising lands in New York City to trustees, in trust to receive the rents, to pay the same to testatrix's grandson, Thomas B. Clarke, during life, and upon his decease to convey the lands to his lawful issue then living, in fee; in default of which, remainder over. It appeared that the land was unproductive and comparatively useless for income.

In 1814, T. B. Clarke, then being living, with two children (one other being born subsequently), an act was passed by the legislature, on the request of the then trustees, providing that the court of chancery, on Clarke's application, might appoint one or more trustees to perform the acts specified in the will, in place of the testamentary trustees, who were by the act discharged from said trusts. The new trustees were directed to partition the lots into two portions, one moiety thereof to be held by them under the uses and trusts declared by the will, and the remaining moiety to be sold within a convenient time not exceeding six months, unless otherwise requested by Clarke, the proceeds to be invested, the interest to be paid, except a certain portion, to Clarke, and the principal to be reserved for the trusts of the will.

On March 24, 1815, a supplemental act was passed authorizing *Clarke* to execute and perform every act in relation to the real estate, with like effect that the trustees duly appointed under the will might have done, and to apply the *whole* of the interest and income of the said property to the maintenance and support of his family, &c. The act further provided that no sale of any part should be made by Clarke until he obtained assent of the chancellor as to the sale and as to the vesting of the principal of the proceeds in the trustees; the interest to be applied by Clarke for his use and the maintenance and education of his children.

On July 3, 1815, the chancellor made an order authorizing Clarke to sell the *eastern* moiety, to be divided by a line specified.

On March 29, 1816, a third act was passed, authorizing Clarke, under said order, or any subsequent order, either to sell or mortgage premises which the chancellor had permitted or might permit him to sell, and to apply the moneys as above.

On March 15, 1817, the chancellor authorized Clarke to sell the *southern* moiety, instead of the *eastern* moiety, or mortgage any parts thereof; also, to convey any portion of the *southern* moiety, in satisfaction of any debts due by him, on a valuation agreed upon by him and his creditors; each sale or mortgage to be approved by a master; and power was given him to invest the surplus in such manner as was proper to yield an income as above.

In 1818, lots in the south moiety, and also the west moiety, were conveyed to creditors of Clarke, in consideration of his indebtedness and of cash paid. Other sales, also, were made under the above acts and orders, and questions arose as to the validity of the titles passed.

Questions touching the validity of the before-mentioned acts of the legislature of the State were first considered judicially in the case of Sinclair v. Jackson, 8 Cow. 579; but the decision turned upon another point,

and the court avoided expressing any opinion as to their validity. The next case was Cochran v. Van Surlay, 15 Wend. 439, decided originally in the Supreme Court. Statement of the court in that case was that when the first act was passed all the parties interested in the trust estate, who were capable of acting for themselves, were before the legislature, and were applicants for the law. Besides Clarke, the tenant for life, in his own right, and the natural guardian of his children, to whom the remainder was limited, there was Clement C. Moore, the contingent remainder man in fee, and the trustees named in the will, who had the whole legal estate, and represented the minors as fully as they could be represented in any form. The decision of the court was that the Court of Chancery, without an act of the legislature, could have discharged the trustees named in the will and might have appointed others in their place, and that the act of the legislature was not an act beyond its constitutional power, as the mere substitution of a new trustee could neither defeat the trust nor divest the rights of those beneficially interested in the property. It was also determined that the several acts were valid and constitutional, although they did not extend to other cases of like character. Objections were also taken that the orders of the Chancellor were not made in pursuance of the acts of the legislature; but those objections were overruled as unsupported in fact, or as entirely unavailing, unless presented in some direct proceeding, as by appeal, or by application to the Chancellor for new orders and directions in the premises. The conclusions of the court were, first, that the acts of the legislature authorizing the sale of the property for the support and maintenance of the tenant for life, and of his family, and the education of his children, were fully warranted by the State constitution, and that they did not in any manner conflict with the constitution of the United States; second, that the orders of the Chancellor, in carrying those provisions into effect, were regular and proper, and that the deeds of conveyance were sufficient to convey the title to the estate to the grantees. The plaintiff sued out a writ of error, and removed the cause into the Court for the Correction of Errors, where the questions were again fully argued, but the judgment of the Supreme Court of the State was in all things affirmed. (Cochran v. Van Surlay, 20 Wend. 371.) Pending that litigation, certain suits were commenced in the Circuit Court of the United States for the Southern District of New York, and the Justices of that court being opposed in opinion in respect to the principal questions involved in the controversy, they were certified into the Supreme Court of the United States, and the majority of the court adopted in substance and effect, the views of the minority of the Court for the Correction of Errors. (Williamson v. Berry, 8 How. 495.) The same questions in respect to the same estate were subsequently presented to the Superior Court of the city of New York, and the court adopting the State decisions, held that those acts of the legislature were not inhibited by the State constitution, nor by that clause of the constitution of the United States which declares that no State shall pass any law impairiug the obligation of contracts. (Towle v. Forney, 4 Duer, 164.) Judgment was for the plaintiff, and the defendant appealed to the Court of Appeals that the questions might be re-examined. The express decision of the Court of Appeals was, that the judgment of the Court of Errors in Cochran v. Van Surlay, was a final determination of the Court of last resort in the State, not only upon all questions of law in the case, but upon the identical title in controversy, and that they ought not to re-examine the grounds of that decision. They also held that, as between judgments of their own courts and those of the Federal Government, where there is a conflict between them, they ought to follow their own decisions, except in cases arising under the constitutiou

and laws of the Union. (Towle v. Forney, 14 N. Y. 428.) Subsequently, the case of Williamson v. Suydam, was decided in the Circuit Court of the United States, S. District, in favor of the plaintiff, but the defendant removed the cause into the Supreme Court of the United States, by writ of error, where it was affirmed, because there was no bill of exceptions. (Suydam v. Williamson, 20 How. 429.) By consent a bill of exceptions was subsequently allowed, and the cause brought up on a second writ of error, and the court came to the unanimous conclusion that the decision of the Court of Errors, sanctioned by the subsequent decision of the Court of Appeals, established a rule of property in the State of New York, which it was the duty of the Court to follow in questions of real property situated in that State. (Suydam v. Williamson, 24 How. 427.)

The same questions were again brought before the United States Supreme Court on appeal; and in the case of Williamson v. Suydam (6 Wall. 723), the court reaffirmed the decisions in the Court of Appeals, and of Suydam v. Williamson, 24 How. 427. Question also arose in the case of Williamson v. Suydam, touching the construction of the 2d section of the Act of Ap. 1, 1814, which authorized the trustees to divide the estate into two equal parts for the purposes above mentioned. Authority to partition was conceded, but the argument was, that when the estate was divided into an Eastern and Western partition, the power was exhausted. The court held that the Chancellor had power to make the order of 29th March, 1816, as construed in connection with the preceding acts to which it was supplemental, and that the Chancellor's orders were valid, as established in the cases of Towle v. Forney, 14 N. Y. 426, and Clarke v. Van Surlay, *supra*. Another question presented to the court in the last case, of Williamson v. Suydam (6 Wall.), was whether the discharge of the trustees named in the will, by the legislature, was in contravention of the constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

The court held, that, inasmuch as all persons who were capable of acting for themselves, were applicants to the legislature for the passage of the acts, including the trustees, and inasmuch as the Chancellor had power to appoint new trustees, even without application to the legislature, and as the mere substitution of a new trustee could neither defeat the trust nor divert the rights of those interested, that the validity of the appointment of the new trustees or trustee was not to be questioned; and that no question of contract arose in the matter, the trustees having no beneficial interest.

Act of 1840. *Trusts for colleges and literary institutions, and for cities, &c., for certain purposes, and for common schools.* By act of May 14, 1840, ch. 318, real and personal property may be conveyed to incorporated colleges and literary incorporated institutions in the State, to be held in trust for either of the following purposes:

"1. To establish and maintain an observatory.

"2. To found and maintain professorships and scholarships.

"3. To provide and keep in repair a place for the burial of the "*dead*," or

"4. For any other specific purposes comprehended in the general objects authorized by their respective charters.

"The said trusts may be created subject to such conditions and visitations as may be prescribed by the grantor or donor, and agreed to by said trustees; and all property which shall hereafter be granted to any incorporated college or other literary incorporated institution in trust for either of the aforesaid purposes, may be held by such college or institution upon such trusts, and subject to such conditions and visitations as may be prescribed and agreed to as aforesaid.

"§ 2. Real and personal estate may be granted and conveyed to the corporation of any city or village of this State, to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, or for parks, gardens, or other ornamental grounds, or grounds for the purposes of military parades and exercise, or health and recreation, within or near such incorporated city or village, upon such conditions as may be prescribed by the grantor or donor, and agreed to by such corporation; and all real estate so granted or conveyed to such corporation may be held by the same, subject to such conditions as may be prescribed and agreed to as aforesaid.

"§ 3. Real and personal estate may be granted to commissioners of common schools of any town, and to trustees of any school district, in trust for the benefit of the common schools of such town, or for the benefit of the schools of such district.

"§ 4. The trusts authorized by this act may continue for such time as may be necessary to accomplish the purposes for which they may be created."

By law of May 26, 1841, ch. 261, devises and bequests of real and personal property in trust, for any of the purposes for which such trusts are authorized under the "act authorizing certain trusts passed May 14, 1840," and to such trustees as are therein authorized, shall be valid in

like manner as if such property had been granted and conveyed according to the provisions of the aforesaid act.

As to the interpretations of the above trusts in a certain special case, *vide* Adams v. Perry, 43 N. Y. 487; see, also, Yates v. Yates, 9 Barb. 324.

By law of April 21, 1846, ch. 74, "the income arising from any real or personal property granted or conveyed, devised or bequeathed in trust to any incorporated college or other incorporated literary institution, for any of the purposes specified in the "act authorizing certain trusts," passed May 14th, 1840, or for the purpose of providing for the support of any teacher in a grammar school or institute, may be permitted to accumulate till the same shall amount to a sum sufficient, in the opinion of the regents of the university, to carry into effect either of the purposes aforesaid, designated in said trust.

By act of April 13, 1855, ch. 432, if any principal, as allowed by the above acts, becomes diminished, it may be made up by the accumulation of the interest or income of principal of such trust fund, in accordance with the directions, if any, contained in the grant, &c., devise or bequest of said trust fund, and if there are no such directions, it may be made up in whole or in part by such accumulation, in the discretion of the trustees of such trust fund; the accumulation is not to increase beyond the original trust fund, less liens, incumbrances, and expenses incurred in obtaining the same.

Trusts for common schools. (*Law of* 1864). By law of May 2, 1864, ch. 555, § 15, real and personal estate may be granted, conveyed, devised, bequeathed, and given in trust and in perpetuity and otherwise to the State or to the superintendent of public instruction, for the support or benefit of common schools, as by the act provided. The trusts are not to be invalid for want of a trustee or donee.

Amended by laws of 1867, ch. 406.

Various other school acts have been passed with respect to different portions of the State, which may have to be specially considered.

Trusts liable to judgments, executions, &c. By the revised statutes, lands, tenements, and real estate, holden by any one in trust, or for the use of another, shall be liable to debts, judgments, decrees, executions, and attachments, against the person to whose use they are holden, in the case and in the manner prescribed in ch. i, part 2, of the revised statutes.

Vol I, p. 727, 1st ed.

The beneficial interest of a *cestui que trust* in lands, however, cannot be sold on a judgment and execution at law. Nor a resulting trust. Wright v. Douglas, 3 Barb. 555; Garfield v. Hatmaker, 15 N. Y. 475; overruling, 4 Den. 439; see *ante*, p. 281.

Trusts in Escheated Lands.—All escheated lands, when held by the State or its grantees, are subject to the same trusts, incumbrances, &c., to which they would have been subject had they descended; and the supreme court has the power to direct the attorney-general to convey such lands to those equitably entitled thereto, according to their respective rights, or to such new trustee as may be appointed by such court.

1 R. S. 1st ed. 718.

Trustees of Insolvent Debtors.—As to these, *vide post*, ch. xxxi.

Trustees may Impeach Assignments, &c.—By law of April 17, 1858, executors, administrators, receivers, assignees, or other trustees may disaffirm and resist all acts, transfers and agreements made in fraud of the rights of creditors, including themselves and others, interested in any estate or property held by, or of right belonging to, any such trustee or the estate represented. They may have actions for property fraudulently taken, &c., and have their costs and expenses allowed them.

Trusts for Aliens.—*Vide ante*, p. 97.

Responsibility of Trustees, Guardians, &c., as Stockholders.—*Vide* law of April 5, 1849, ch. 226.

Trustees of Academies.—*Vide* law of April 20, 1835, ch. 123.

Testamentary Trustees, Settlement of Accounts of.—*Vide* Part II, ch. vi, Title III, Art. III, 66th section of revised statutes.

Amended by law of March 9, 1866, ch. 115; also, laws of 1850, ch. 272; *vide*, also, 1 N. Y. 206; 3 Brad. 11, 291, 419.

Trustees of Idiots, Lunatics, Drunkards, &c.—See law of May 12, 1865, ch. 724; amending, § 25, Title II, ch. v, Part II, of revised statutes. See, also, law of April 28, 1845, ch. 112.

Trust Relative to Shaking Quakers.—Vide acts of April 15, 1839, ch. 174; April 11, 1849, ch. 373. See, also, laws of 1852, p. 275, ch. 203.

Trusts Relative to "Friends," or "Quakers."—Vide laws of April 17, 1839, ch. 184.

Trusts of Personal Estate.—It is considered by the courts that a trust of personalty is not within the statutes of uses and trusts, and may be created for any purpose not forbidden by law. No prohibition or restriction seems imposed on them by statute, except as to the limitation of future contingent interests therein.

A trust of personal estate for the use or benefit of the grantor or donor is valid, and vests the legal title in the trustee, unless the purposes of the trust are unlawful.

Brown v. Harris, 25 Barb. 134; Gott v. Cook, 7 Paige, 521; Foster v. Coe, 4 Lans. 53; Bucklin v. Bucklin, 1 Keyes, 141.

Vide, also, *ante*, p. 284, as to the transfer of trusts of personal property.

CHAPTER XI.

JOINT INTERESTS IN LAND.

A joint interest may be had either in the *title* or *possession* of land. As regards the *title*, the tenancy may be as *joint tenants* (formerly, also, under the common law, as *coparceners*), or in the *possession*, as *tenants in common*.

Tenancy as *coparceners* which existed in England between co-heirs who inherited equally by descent (e. g. females) is not recognized as such by our statutes; the revised statutes providing that such estates are held in common. The revised statutes divide estates as to ownership into those held in *severalty*, in *joint tenancy* and in *common;* and their nature and properties continue the same as theretofore established by law, except as modified by the Rev. Stat., ch. i, Part II.

TITLE I. JOINT TENANTS.

Joint tenants hold lands by a joint *title*, created expressly by one and the same deed or will. As a general rule, the tenancy must be created at the same time, and must be of the same duration or nature and quantity of interest. The estate is never created by descent, but only through deed or by devise.

Joint tenants are said to be seized *per my et per tout*, and each has the entire possession, as well of every parcel as of the whole; but alienation or forfeiture would only affect the individual interests.

The doctrine of *survivorship*, or *jus accrescendi*, is the distinguishing feature of *joint tenancy;* and on the death of any of the joint tenants, his share, at common law, went to the survivors; and such is still the rule.

The last survivor took an estate of inheritance *absolutely*, free from any liens or charges created by the others on their interests.

A joint tenant, therefore, could not devise his interest, and the widow had no dower therein. He could, however, alienate his undivided interest by deed, and it was subject to forfeiture, and to any liens created by him in case he survived the others.

Changes by N. Y. Statutes.—As early as 1782 and 1786, estates by joint tenancy were abolished, except in the case of executors and other trustees, or unless the estate was expressly declared in the deed or will to pass in joint tenancy. And any estate (with the following exception as to executors, &c.,) passing by any grant, devise, or conveyance, was to be deemed a tenancy *in common*, unless otherwise expressly declared.

Law of July 12, 1782; Law of Feb. 23, 1786; 1 Rev. Laws, p. 54, §§ 6 and 7.

The revised statutes provide that every estate vested in *executors or trustees*, as such, shall be held in *joint tenancy*. Every other estate granted or devised to two or more persons in their own right shall be a *tenancy in common*, unless expressly declared to be in joint tenancy. This provision is to apply to estates theretofore created, as well as to those to be thereafter granted or devised.

3 Rev. Stat. 5 ed. p. 14, § 43.

A conveyance to husband and wife, as seen above, however, p. 71, by reason of the legal unity of husband and wife, vests them both with the entirety. It creates not strictly a joint tenancy, but a conveyance as to one person, and on the death of one, the whole title survives to the other. Neither can transfer the title without the other uniting. In such a case the wife has no separate

estate; but is seized with her husband of the whole. They hold thus not as joint tenants, nor as tenants in common; and the same words of conveyance which would make two other persons joint tenants, will make the husband and wife tenants of the entirety.

Dickinson v. Codwise, 1 Sand. Ch. 214; Rogers v. Benson, 15 Johns. Ch. 431; and see cases cited *ante*, p. 72.

Therefore the recent statutes of 1848–9, and 1860, relating to the lands of married women, have no effect upon real estate conveyed to husband and wife jointly. The Farmers' Bank, &c. v. Gregory, 49 Barb. 155; and see *ante*, p. 84.

By express words, however, it is supposed that the husband and wife may be made tenants in common.

Effect of Alienation.—If a joint interest be conveyed by deed by one of the tenants, the alienee takes *in common*, as the tenants would then hold through different sources. The tenancy may also be severed through partition. The proper conveyance between joint tenants is a *release*.

Where two persons were joint tenants of a lake with right of piscary, it has been held that either could alien his share so as to give the right over the whole lake. Menzies v. Macdonald, 36 Eng. L. and E. 20.

Title II. Tenants in Common.

These hold by unity of *possession*, and may hold by several and distinct titles or by one derived at the same time and from the same source. There need be neither unity of tenure nor unity of estate. Unity of right of possession is all that is required. In this State, it may be created by descent as well as by deed or will, the statutes no longer recognizing tenancy in *coparceny*. Tenants in common are considered to have several and distinct freeholds. Each tenant is considered to be solely or severally seized of his share, and may convey his estate, but cannot convey any specific part of the lands. Tenants in common may convey to each other as if to a stranger; but by the common law could not convey to each other by *release*, as there was no privity of

estate. And one tenant in common has no power to convey the land or interest of his co-tenant.

As to the provision of the revised statutes relative to the presumption of a tenancy being in common, *vide ante*, p. 319; see also Blood v. Goodrich, 9 Wend. 68.

Possession.—The *possession* of one tenant in common is the possession of the others, though, if one is ousted by another, he may bring ejectment.

A demand of a deed from one tenant in common is sufficient, and binds the others. Blood v. Goodrich, 9 Wend. 68.

A widow is not tenant in common with the heir.

Shares in Crops.—Parties farming on shares are tenants in common of the crops, and even of the stubble or straw left.

Fobes v. Shattuck, 22 Barb. 568; Tanner v. Hills, 44 Barb. 428; Tripp v. Riley, 15 Barb. 333.

Improvements and Repairs.—One tenant cannot charge the others for improvements and buildings put upon the land, as a general rule.

On partition, however, it seems that any tenant in common who had made improvements would be entitled to that part on which the improvements were made, or to compensation on the general accounting. His grantee would have the same rights.

Robinson v. McDonald, 11 Texas, 385; Green v. Putnam, 1 Barb. 500.

One tenant in common, also, might charge the others for *necessary* repairs, if he first requested his co-tenant to unite with him in making the repairs. He cannot make others liable, however, for expensive and valuable improvements, not necessary to preserve the premises from dilapidation and ruin, without an express or implied agreement, or a promise to repay him. But, in general, he has no lien except by express agreement; and if such lien were held to exist, it would not take effect as against creditors who had received the legal title without notice.

Taylor v. Baldwin, 10 Barb. 582; also *Ib.* p. 628.

Tenants in common are obliged to repair a mill and its appurtenances, used jointly. Denman v. Prince, 40 Barb. 213.

Waste.—Tenants in common are liable to each other for waste; and they are bound to account to each other for due profits of the estate.

Hall v. Fisher, 20 Barb. 441.

Use and Occupation.—The mere occupation of the lands held in common, by one joint tenant or tenant in common, would not of itself, at common law, have entitled his co-tenant to call him to account for use and occupation. He must have stood in the light of bailiff or receiver in order to be rendered responsible. And such seems to be the law at the present day where there is no agreement.

Co. Litt. 200, *b.*; IV Kent, 406; Woolever v. Knapp, 18 Barb. 265; Hill & Denio, 181.

It has also been determined that if one tenant in common take a lease of his co-tenant's undivided portion, for a specified term, subject to a specified rent, and continue in possession of the premises after the expiration of his term, he will not be considered as holding over under the lease, and thus liable to an action for use and occupation; the presumption of law being that he is in possession under his own title. And such presumption will prevail, unless there be evidence that he holds as tenant to his co-tenant.

Dresser v. Dresser, 40 Barb. 300.

Trespass, &c.—One tenant in common cannot bring an action of trespass against another for entry upon and enjoyment of the common property; nor sue him to recover the documents relative to the joint estate. If, however, one tenant occupies one part of the premises by agreement, and his co-tenant disturbs him in his occupation, the latter becomes a trespasser.

Keay v. Goodwin, 16 Mass. 1; Wait v. Richardson, 33 Vermont, 190; Clowes v. Hawley, 12 Johns. 484; IV Kent, 370.

Acts of One Tenant as Affecting Others.—As a general rule, one tenant in common, or co-lessee, cannot purchase an outstanding title or get an extension of a lease

for his exclusive benefit, and use it against his co-tenant. Thus, if two devisees holding in common, under an imperfect title, one cannot buy up an outstanding or an adverse title, to disseize or expel his co-tenant; but such purchase will enure to their common benefit, subject to an equal contribution of the expense.

Van Horne v. Fonda, 5 Johns. Ch. 407; Burrell v. Bull, 3 Sand. Ch. 15; Phelan v. Kelly, 25 Wend. 389.

They may join in a real action or bring several actions for their several shares or interests.

Malcolm v. Rogers, 5 Cow. 188.

The acts of one tenant in common cannot amount to the dedication of part of the common property, as a public highway, against the other tenants.

Scott v. State, 1 Sneed (Tenn.), 629.

Remedies of Joint Tenants and Tenants in Common Against each Other.—By the revised statutes, one joint tenant or tenant in common and his executors or administrators may maintain an action of account, or for money had and received against his co-tenant for receiving more than his just proportion; and the like action may be maintained by him against the executors or administrators of such co-tenant.

1 R. L. 90; 1 R. S. p. 755, § 9, 1st ed.; Hall v. Fisher, 20 Barb. 441.

Joint Mortgage.—On a joint mortgage by tenants in common equity will not decree, at the request of one tenant, a sale of the undivided moieties separately, for the respective halves of the debt. Foot v. Bevins, 3 Sand. Ch. 188.

Ouster of Co-tenants.—Where one of several tenants in common, conveys the entire premises held in common, and the grantee enters into possession under the conveyance, claiming title to the whole premises, such possession is an ouster of and adverse to the co-tenants of the grantor, and at the expiration of the period of limitation, their right will be barred.

Bogardus v. Trinity Church, 4 Paige, 178; Town v. Needham, 3 Pai. 545; see, also, Clark v. Crego, 47 Barb. 600.

Title III. Partnership Lands.

When real estate is held by partners for the purposes of the partnership, they do not hold it as partners, but as tenants in common, and the rules relative to partnership property do not apply in regard to it. Therefore one partner can only sell his individual interest in the land, and when both partners join in a sale and conveyance, and one only receives the purchase money, the other partner may maintain an action against him for his proportion.

Coles v. Coles, 15 Johns. 159.

It is also a principle as to partnership property, that where real estate is purchased with partnership funds on partnership account, and for partnership purposes, the property will be deemed, virtually, to be partnership property, no matter in whose name the purchase may have been made or the conveyance taken. Let the legal title be vested in whom it may, in equity it belongs to the partnership, and the partners are deemed *cestuis que, trust thereof*, for partnership purposes.

Sugd. on Vend. ch. 15, § 1, p. 607; *Ib.* ch. 15, p. 127; Story's Eq. § 1206, Lake v. Gibson, 1 Eq. abridg. 290; Rigden v. Vallier, 2 Ves. R. 258.

Therefore real estate acquired with *partnership* effects, although so conveyed as to make the partners tenants in common at law, is in equity considered as converted into personalty, for the purpose of subjecting it to the debts of the firm in preference to those of the individual partners. The partner's interest in the land descends to his heirs, however, where the real estate is bought with partnership funds, and there is no right of survivorship.

Smith v. Jackson, 2 Edw. 28; Buchanan v. Sumner, 2 Barb. Ch. 165; Collumb v. Read, 24 N. Y. 505.

If the partnership trade is merely ancillary to the land, as in the case of selling the produce of the land, *e. g.*, stone out of a quarry, the land would still be considered as realty; *otherwise*, if the land is ancillary to the trade. This is the distinction drawn in the English courts, and would doubtless be deemed the law here. Stewart v. Blakeway, Eng. Eq. Cases, 1868, 32 Vic. 479.

Although at common law a conveyance to partners for the business of the firm might make them joint tenants, under the decisions of this State the several partners to whom such conveyance was made, would become tenants in common of the legal title; and upon the death of either the undivided portion of the legal title, thus vested in the deceased partner, would descend to his heirs at law, without reference to the equitable rights of the several partners in the land as part of the property of the firm. Buchan v. Sumner, 2 Barb. Ch. 165.

There are instances, however, of lands held for partnership purposes, which will be considered in equity as personalty, and be applied accordingly. Thus it may be agreed by the parties themselves to be so considered, and this agreement will work the change; and the same will go as personalty on the death of one partner. But if a purchase be made and a conveyance taken to partners as tenants in common, without any agreement to consider it as stock, although it be paid out of their joint funds, and to be used for partnership purposes, it will be deemed real estate. Whether it is considered as realty or personalty, however, it is liable for the partnership debts. But it will not be considered as partnership property liable to copartnership debt (preferentially) by the mere taking a deed in the joint name of two persons who are partner. It must be done by some express act or understanding. Smith v. Jackson, 2 Edw. 28.

It is held that a conveyance by one partner, having legal title to an undivided half of real estate, the whole of which, in equity, is partnership property, to a creditor of the firm in payment of a partnership debt, vests good title in such undivided half to his grantee, notwithstanding it is executed without the knowledge or consent of the other partner. Its effect is to give a preference to the grantee. Van Brunt v. Applegate, 44 N. Y. 544.

And a *bona fide* purchaser or mortgagee who obtains the legal title to partnership lands, or to an undivided portion thereof from the person who holds such legal title, and without notice of the equitable rights of others in the property, as a part of the funds of the copartnership, is entitled to protection in courts of equity, as well as in courts of law. Buchan v. Sumner, 2 Barb. Ch. 165.

One Partner cannot Bind the other by Deed.—Although one partner may, in general, bind his copartner by acts within the scope of their mutual business, it is considered that he cannot bind him by a deed, or so convey his interest in partnership lands.

Dower in.—A widow of a deceased partner is entitled to dower in a moiety of partnership lands held by two in common.

Smith v. Jackson, 2 Ed. 23.

CHAPTER XII.

POWERS.

I. POWERS GENERALLY.

A *Power* is defined by Sugden as "an authority enabling a person to dispose, through the medium of the Statute of Uses, of an interest vested either in himself or in another person."

Powers were introduced in connection with *uses* and trusts so that appointments and dispositions in the settlement of landed estates might be made according to the intention of parties, thereby avoiding the effect, in many instances, of the strict rules of the common law. Through them there might be a revocation reserved on a feoffment, an entry reserved, on condition broken, to a *stranger*, the disposal of a fee without words of inheritance, and other variations from strict common law principles.

By means of powers the owner was enabled either to reserve to himself a qualified species of dominion, distinct from the legal estate, or to delegate that dominion to strangers, and withdraw the legal estate out of the trustee, or give it a new direction by limitation to new uses and revoking others.

Before the statutory changes in this State, *Powers* might be created to an apparently unlimited extent.

They were made the instruments of great abuses, and enabled a person, through a power of revocation retained in a conveyance, to place his lands beyond the reach of his own creditors or of those of his alienee, and to defraud purchasers.

The English law respecting powers, as has been remarked, is one of the most intricate labyrinths of jurisprudence. The revised statutes have brought them in harmony with the general system of our laws as modified from the English code, and they have emerged into the light and simplicity of prescribed and intelligible rules.

In reviewing the subject of "Powers," the abstruse and obsolete learning of the common law, and the subtle distinctions that have arisen in the application of its rules will not be more than referred to.

In the chapter on "Powers" of the present revised statutes, have been digested and codified all such rules as are retained as part of our legal system, and their existence is made positive and distinct, freed from the uncertainty and various interpretation with which the common law and its many commentators had involved the subject.

The doctrine of settlements, as Chancellor Kent remarks, under the complicated machinery of uses and powers, became in England an abstruse science, which was in a great degree monopolized by a select body of conveyancers, who, by reason of their technical and verbose provisions, reaching to distant contingencies, rendered themselves almost inaccessible to the skill and curiosity of the profession at large.

Settlements, with their springing and shifting uses, obeying, at a remote period, the original impulse, and varying their phases with the change of persons and circumstances, and with the magic wand of powers, proved to be complicated contrivances; and, as the Chancellor intimates, often, from the want of skill in the artist, became potent engines of mischief planted in the heart of great landed estates, and operating to their destruction.

The revisers, also, in their notes, speak of the law of powers, as then existing, as preeminently abounding in useless distinctions and refinements, difficult to be understood and difficult to be applied, by which the subject, in its own nature, free from embarrassment, was exceedingly perplexed and darkened.

"Nor is it merely," they state, "because it is mysterious and complex, that a reform in this part of the law is desirable. It is liable to still more serious objections, since it affords a ready means of evading the most salutary provisions of the statute law. It avoids all the formalities wisely required in the execution of deeds and wills, frustrates the protection meant to be given to creditors and purchasers, and eludes nearly all the checks by which secrecy and fraud in the alienation of lands are sought to be prevented."

The revisers also express themselves as follows, in their review of the system of real estate law, as existing at the time of the revision of 1830: "It is not an uniform and consistent system, complex only from the multitude of its rules and the variety of its details; but it embraces two sets of distinct and opposite maxims, different in origin and hostile in principle. We have first, the rules of the common law, connected throughout with the doctrine of tenures, and meant and adapted to maintain the feudal system, in all its rigor; and we have, next, an elaborate system of expedients, very artificial and ingenious, devised, in the course of ages, by courts and lawyers, with some aid from the legislature, for the express purpose of evading the rules of the common law, both in respect to the qualities and the alienation of estates, and to introduce modifications of property before prohibited or unknown. It is the conflict continued through centuries, between these hostile systems, that has generated that infinity of subtleties and refinements with which this branch of our jurisprudence is overloaded."

"It is this conflict which seems to have involved the

law of real property in inextricable doubt, whilst, nearly in every case, as it arises, the uncertainty is, whether the strict rules of ancient law, or the doctrines of modern liberality, are to prevail; whether effect is to be given to the intention, or a technical and arbitrary construction is to triumph over reason and common sense."

The learned Chancellor, whose remarks relative to the obscurity of the law of real estate, prior to the revision, are above quoted, and whose understanding of the mischiefs of the older system was so keen and appreciative, elsewhere utters a lament, in his valued Commentaries, over the abolition of that mysterious and complex machinery that prevailed, under the common law, for the holding and movement of realty, through the medium of uses and powers.

"They seem," he says, "to be inseparable, in opulent communities, to the convenient and safe distribution of large masses of property, and to the discreet discharge of the various duties flowing from the domestic ties; and the evils are, after all, greatly exaggerated by the zeal and the phillipics of the English political and legal reformers."

Brought up in all the "learning of the Egyptians," and familiar with the profundities and labyrinths of the common law, in the interpretation of which he had become eminent, it was perhaps natural that the great commentator should express a regret over the fall of that system venerable with age and sacred through historic association, which, in 1830, succumbed, in this State, under the sturdy blows of the revisers; encouraged, as they were, by the awakening intelligence of a community that could not only throw off civil bonds, but emerge from the slavery of traditional error and cumbersome form.

The sages of former days brought up to worship and interpret the legal dogmas of old, and regarding modern change as heretical, recall the ancient Druids standing amid their ancestral oaks, hoary by time and dark

with parasitic entanglement, and mourning over their fall before the axe of the invader.

The modern student, when comparing the former system with the present one, will, perhaps, feel more inclined to appreciate the grim humor of one of the English legal reformers, a follower of Brougham and Humphreys, who, in a volume of the Jurist, illustrates the jurisdiction and paternal care of a court of equity over family estates placed under its protection, by applying to it the appalling inscription which Dante read over the gate leading to the infernal regions :

"*Lasciate ogni speranza, voi, ch' entrate.*"

Former classification of powers.—The usual classification of powers, by the common law writers, was: 1st. Powers appendant or appurtenant; which enabled a party to create an estate, which attached in whole or in part on his own interest ; as, for example, if a power were given to a tenant for life to make leases in possession, every lease which he executed under the power must take effect out of his life estate. 2. Powers collateral or in gross; which enabled a party to create an estate independent of his own ; *e. g.*, as a power to a life tenant to appoint the estate after his death, by disposing of the reversion. 3. Powers simply collateral, are those which are given to a stranger or a person who has no interest or estate in the land, as, for example, a power given to a stranger to revoke a settlement, and appoint new uses to other persons designated in the deed, is a power simply collateral.

Title II. Powers under the Revised Statutes.

Powers, as they existed both by common law and under the statute of uses (except a simple delegated power to act as attorney), were abolished by the revised statutes in 1830, and their creation, construction, and execution are now governed by the provisions of those

statutes, which relieve them from many restrictions merely technical and oppressive. Article III, title II, chap. I, part II, (3 Rev. Stat. 5th edition, p. 23) will, therefore, have to be attentively perused, if the validity of the creation or execution of a power is in question; as it is therein declared (§ 73) that powers as they then existed are abolished, and (§ 92) that no beneficial power, general or special, except as therein allowed, shall be valid.

The revised statutes define a *Power* as "an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform."

Division.—They are classified into (§§ 76 to 79): *General* or *Special*, and *Beneficial* or *in Trust*.

1. *General*, when an alienation is authorized in *fee* to *any* person, by means of a conveyance, will, or charge of the land.

2. *Special*, where the persons or class of persons to whom the disposition of the lands under the power is to be made are designated, or a *lesser* estate than a fee is authorized to be created, as above.

A power is *beneficial* (whether general or special), when the *grantee alone* is interested in the execution, according to the terms of its creation.

Powers in Trust.—A general power is *in trust*, when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from the alienation of the lands according to the power (§ 94).

A special power is in trust—

1. When the disposition which it authorizes is limited to be made to any person or class of persons other than the grantee of such power.

2. When any person or class of persons other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power. (§ 95).

Laws of 1830, ch. 320, sec. 11.

The distinction between trusts and powers in trust is at times difficult of determination. A *power in trust* is to be understood in contradistinction to an *estate in trust.* The former is a mere authority or right to limit a use, while the latter involves an estate or interest in the subject of the trust. A trustee is invested with the legal estate, but this is not necessary with respect to the donee of a power. In the case of a power in trust, there is always a person other than the donee or grantee of the power, which person is called the appointee, answering to the *cestui que trust* in a simple trust. A beneficiary is considered as necessary an ingredient in the case of a *power in trust* as a *cestui que trust* is in the case of a conveyance or devise in trust. A power in trust involves the idea of a trust as much as a trust estate. In both cases a confidence is implied. The difference is in the mode of effecting the object. In one case it is done through the conveyance or devise of an estate in trust, by which the grantee or devisee becomes seized of the legal estate in the land; in the other, by the creation or grant of a power by which the donee is invested with an authority with relation to the future use or disposition of the land.

See also, as to the above distinctions, *ante*, p. 269.

Parties to a Power.—In creating a power, the parties concerned in it are the *donor* who confers the power, the donee or appointee who executes, and the appointee in whose favor it is executed.

The revised statutes provide that the term "grantor of a power" is to be considered as used in the article as designating the person by whom a power is created, whether by grant or devise; and the term "grantee of a power" is to be used as designating the person in whom

a power is vested, whether by grant, devise or reservation.

Title III. Creation of Powers.

How Powers to be Granted.—By the revised statutes (§ 106), a power may be granted:

1. By a suitable clause contained in a conveyance of some estate in the lands, to which the power relates;

2. By a devise contained in a last will and testament.

No formal set of words is necessary to create or reserve a *Power*. It may be created, as seen above, by a deed conveying some estate in the land, or by will; and the intention of the grantor mainly regulates the interpretation and execution of the power, and the courts will often modify the direct language to suit the apparent intention.

Vide Dorland v. Dorland, 2 Barb. 63.

To be in Writing.—The revised statutes provide (§§ 6, 7) that no *power* over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed in *writing*, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent authorized by writing. *Declarations of trusts, implied trusts, and wills* are excepted, as more fully set forth, *ante*, p. 260.

Who may Create.—The revised statutes also provide that no person is capable in law of *granting a power* who is not at the same time capable of *aliening* some interest in the lands to which the power relates (§ 75), and that the *grantor* in any conveyance may reserve to himself any power beneficial or in trust, which he might lawfully grant to another; and every power thus reserved shall be subject to the provisions of the article in the same manner as if granted to another. (§ 105.)

Grantee.—The revised statutes further provide that the power may be vested in any person capable in law of holding lands (§ 109), but cannot be exercised by any person not capable of aliening lands, except in the single case mentioned in section 110, relative to married women.

It is indispensable to the creation of a trust or a power in trust that authority to perform the required act should be delegated to the trustee by the owner of the estate, or one having authority to dispose of it, or of some interest therein.

Selden v. Vermilyea, 3 Com. 526.

Title IV. Special Provisions of Statute.

The following important provisions relative to powers are also to be noted.

They will be found in the revised statutes, Art III, ch. i, Title II, Part II. The old numbers of the sections are given, as in the first edition of the revised statutes.

Suspension of Alienation.—§ 128. The period during which the absolute right of alienation may be suspended by any instrument in execution of a power, shall be computed not from the *date* of such instrument, but from the time of the *creation* of the power.

The Estate Given.—§ 129. "No estate or interest can be given or limited to any person by an instrument in execution of a power, which such person would not have been capable of taking under the instrument by which the power was granted."

This provision carries out the common law principle that the appointee, under the power, derives his title not from the person exercising the power, but from the instrument by which the power of appointment was created.

The uses declared in the execution of the power must be such as would have been good if limited in the orig-

inal deed; and if they would have been void, as being too remote or tending to a perpetuity, in the one case, they would be void in the other.

A party who takes under the execution of a power, takes under the authority of, and under the grantor of the power, in like manner as if the power and the instrument executing the power had been incorporated in one instrument.

Roach v. Wadham, 6 East. 289; Co. Litt. 113, *a;* Bradish v. Gibbs, 3 Johns. Ch. 523–550; Doolittle v. Lewis, 7 *Ib.* 45; Jackson v. Davenport, 20 Johns. 537.

Married Women.—A *general and beneficial* power may be given to a married woman, to dispose during her marriage, and without the concurrence of her husband, of lands conveyed or devised to her in fee. (§ 80.)

A married woman may have a *special and beneficial* power granted to her to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee belonging to her in the lands to which the power relates. (§ 87.)

This has been held an enabling, and not a restrictive provision. It was designed to enable the grantor to give the fee to a married woman, with an absolute power of disposition during coverture. Wright v. Tallmadge, 15 N. Y. 308.

A deed of appointment by a *feme covert* must be acknowledged in like manner as other conveyances executed by *femes covert.* Jackson v. Edwards, 7 Paige, 386; affirmed, 22 Wend. 498.

Where the power of appointment by the married woman is to be executed by a deed or will, a master's deed, in partition, will not cut off contingent interests dependent upon her non-execution of the power. Jackson v. Edwards, 22 Wend. 498; affirming, 7 Pai. 386.

§ 110. A married woman may execute a power during marriage, by grant or devise, as may be authorized by the power, without the concurrence of her husband, unless its execution is expressly or impliedly prohibited during coverture, by the terms of the power.

The power to devise real and personal property given to married women by the act of 1849 (*ante*, p. 79), is general, and not limited to property acquired subsequently to the passage of the act. Van Wert v. Benedict, 1 Brad. 114.

A married woman may execute a mortgage of her own estate, under a power reserved by her in a marriage settlement executed previous to the

marriage, and she may execute a mortgage to secure her husband's debt. Leavitt v. Pell, 27 Barb. 322; affi'd, 25 N. Y. 474; see, also, Wright v. Tallmadge, 15 N. Y. 308; and see *ante*, pp. 83, 85.

§ 130. When a married woman, entitled to an estate in fee, shall be authorized by a power to dispose of such estate during her marriage, she may, by virtue of such power, create any estate which she might create if unmarried; and if she execute by grant, *the concurrence of her husband* is not necessary, but to be valid it must be duly and separately acknowledged, as required to be by married women.

A power, general or special, beneficial or in trust, may be reserved to a married woman by a marriage settlement, by which the entire legal estate is vested in trustees. Wright v. Tallmadge, 15 N. Y. 308.

A power may be given to a *feme covert* to convey a future as well as a present estate in lands for her own benefit and support during coverture. Jackson v. Edwards, 7 Paige, 386; affirmed, 22 Wend. 498.

As a married woman cannot convey her real estate directly to her husband, she cannot, by uniting with him in a deed of her real estate to a trustee, reserve a valid power to appoint it to his use, or one which she can by a last will and testament devise to him. A will by a married woman, in pursuance and in execution of a power so reserved, by which she devises her real estate to her husband, is inoperative and void. Such a power might be created by an antenuptial settlement, however. Dempsey v. Tylee, 3 Duer, 74.

As to mortgages by a married woman under a power, see *post*, § 90.

Power to Sell in a Mortgage.—§ 133. Where a power to sell lands shall be given to the grantee in any mortgage or other conveyance intended to secure *the payment of money, the power shall be deemed a part of the security*, and shall vest in and may be executed by any person who, *by assignment or otherwise*, shall become entitled to the money so secured to be paid.

And see *post*, § 90, as to mortgages by life tenants and married women.

Rights of Creditors.—Special and beneficial powers are made liable in equity, to the claims of creditors, in the same manner as other interests that cannot be reached by an execution at law, and the execution of the power may be decreed for the benefit of the creditors entitled. (§ 93.)

It is also provided (§ 103) that the execution, in whole or in part, of any trust power, may be decreed in equity, for the benefit of the creditors or assignees of any person entitled, as one of the objects of the trust, to compel its execution, when the interest of the objects of such trust is assignable.

Absolute Power of Disposition. § 81.—"Where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts."

The rule before the revised statutes, was that the devise of an estate generally, with power of disposition, carried a fee, but not if the estate were given for life merely. [4 Kent, 319, 327.) It will only carry a fee, however, when the *grantee* has the right of disposal for his own benefit of the *whole* estate, and not merely of a residue. Ladd v. Ladd, 18 How. U. S. 10; Waldron v. Chasteney, 2 Blatch. C. C. 62; Scott v. Perkins, 28 Maine, 22; Denson v. Mitchell, 26 Ala. 360; Ward v. Amory, 1 Curtis, C. C. 419; Sugden on Powers, 96–101; Germond v. Jones, 2 Hill, 69. As to the former rule, *vide* Jackson v. Robbins, 16 Johns. 537.

§ 82.—"Such a power also gives a fee to a person to *whom no particular estate* is limited, subject to future estates, limited, if any, but absolute as to creditors and purchasers."

§ 83.—"Where such absolute power of disposition is given, and no remainder is limited on the estate of the grantee of the power, he takes a fee."

§ 84.—"Where a general and beneficial power to devise the inheritance shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning and subject to the provisions of the three last preceding sections.

Vide Tallmadge v. Sill, 21 Barb. 34.

§ 85.—"Every power of disposition is deemed *absolute* by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit."

§ 86.—"An absolute power of *revocation* in a conveyance, by a grantor for his own benefit, reserves a fee so far as the rights of creditors and purchasers are concerned, and he is still deemed the absolute owner."

Tenants for Life. § 87.—May have a special and beneficial power given them to make leases for not over twenty-one years, to commence in possession during the tenant's life.

Vide, Root v. Stuyvesant, 18 Wend. 257; partially overruled, 5 Sand. 372; 20 Wend. 569; 22 *Ib.* 496.

§ 108.—The power is not assignable separately, but passes with the estate, unless specially excepted, when it becomes *extinguished.*

Mortgages by Life Tenants and Married Women. § 90. —Mortgages by a *life tenant* having a power to lease, or by a married woman, by virtue of a beneficial power, do not extinguish or suspend the power, but the power, and any estate created by it, is bound by the mortgage, in the same manner as the lands embraced therein.

The effects of such a lien on the power are: 1. That the mortgagee is entitled, in equity, to an execution of the power, so far as the satisfaction of his debt may require. 2. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage, in the same manner as if in terms embraced therein. (§ 91.)

See also as to a power to sell in a mortgage, *ante.*

Provisions Relative to Trusts to Apply. § 102.—The provisions of statute relative to trusts, from section 66 to 71 inclusive, are to apply to powers in trust, and the grantees of such powers.

Vide ante, pp. 258, 287, and 309. (*Mem.*—§ 61, on p. 309, should be § 66.)

Assignment of Powers.—As a general rule, when a power coupled with an interest is given, it will pass by assignment.

§ 104.—Beneficial powers, and the interest of every

person entitled to compel the execution of trust powers, pass under assignments made under the provisions of the 5th chapter of the act (relative to absconding, &c., debtors and insolvent assignments mentioned in that chapter).

§ 88.—The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and will pass, unless specially excepted, by any conveyance of such estate. If specially excepted in such conveyance, it is extinguished (§ 108).

Vide ante, p. 338.

§ 89.—Such power may be released by the tenant to any person entitled to an expectant estate in the lands, and shall thereupon be extinguished.

All assignments must be by deed, subscribed by the party assigning, or his agent, unless it be by will, declaration of trust, or operation of law.

3 Rev. Stat. p. 220, §§ 6, 7.

When a Lien or Charge. § 107.—Every power is *a lien or charge upon the lands* which it embraces, as against creditors or purchasers in good faith and without notice of or from any person having an estate in such lands, only from the time the *instrument containing such power shall be duly recorded.*

As against all other persons, the power shall be a lien from the time the instrument in which it is contained *shall take effect.*

A naked power cannot lie dormant so as to prevail against the purchaser for value without notice. (Jackson v. Davenport, 20 Johns. 537.)

Certain Estates to be Advancements.—Every estate or interest given by a parent to a descendant, by virtue of a beneficial power, or of a power in trust, with a right of selection, shall be deemed an advancement to such descendant within the provisions of the second chapter of the act (§ 127).

Powers of Attorney. § 134.—The provisions of the

chapter relative to Powers do not extend to a simple power of attorney to convey lands in the name and for the benefit of the owner.

As to Powers of Attorney, *vide post*, ch. xiii.

Record of Powers.—Every instrument in execution of a power, except a will, including powers of revocation, is deemed a conveyance, so as to be subject to the provisions of ch. iii, R. S. relative to the record and proof of deeds.

Ib. § 114.

Alien Women.—As to power of alien women under marriage settlements, *vide ante*, "Aliens," p. 95.

Powers to Executors to sell Real Estate.—As to these, *vide post*, ch. xvii.

Title V. By whom Executed.

A power may be executed by *femes coverts* and infants also (when simply collateral), by the common law. By the common law a *feme covert* might execute any kind of power, whether simply collateral, appendant, or in gross; and it was immaterial whether it was given to her while sole or married. The concurrence of the husband was in no case necessary.

Sugden, 148–155; 4 Kent, p. 394. See, also, *post*, p. 347.

As to who may execute under the revised statutes, it is provided as follows:

By persons capable of Aliening Lands. § 109.—A power may be vested in any person capable in law of *holding*, but cannot be exercised by any person not capable of aliening lands, except in the case of a married woman, as specified in the succeeding section, 110, (which see *post*, p. 347).

Personal Trust and Confidence.—When personal trust, discretion, and confidence are implied, the power cannot be executed by attorney, nor delegated; nor does it descend to representatives, nor can it be renewed to others.

Berger v. Duff, 4 Johns. Ch. 368; Beekman v. Bonsor, 23 N. Y. 298; Powell v. Tuttle, 3 Com. 396; Newton v. Bronson, 3 Ker. 587.

When Powers Survive.—As a *general rule*, by the common law, a *naked authority*, without interest, given to several, as to executors, *by name*, does not survive, unless by express words. But where it is given to several generally as a *class*, as to my sons, or my executors, it survives so long as the plural remains. The power survives also when there is any vested legal or equitable interest in the estate, or where the donees are charged with a trust relative to the estate, and the execution of the power is necessary to carry out the trust.

As a general rule, also, a naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor; such as an interest present or future in land, or a power to sell in a mortgage; nor where there is a trust created.

In a preceding chapter, the subjects of the resignation, renunciation, and substitution of trustees have been fully investigated (*ante*, pp. 288 to 291); in a succeeding chapter (xvii), the appointment, renunciation, removal, and survivorship of executors will also be considered; and reference is made to those chapters as to the survivorship of powers connected with trust estates or trusts.

By the revised statutes, all persons vested with a power must unite in its execution, but in case of death, the survivors or survivor can act. (§ 112.)

This is held to apply even to the case of discretionary powers. Taylor v. Morris, 1 Com. 341; Leggett v. Hunter, 19 N. Y. 445.

As to a special case where provisions were made in a will for substitutions, *vide* Ogden v. Smith, 2 Paige, 197.

As a general rule, where an authority is confided to

several for a private purpose, all must unite and concur in its exercise, unless it is otherwise provided.

Green v. Miller, 6 Johns. 39; Perry v. Tynen, 22 Barb. 137; Gildersleeve v. The Board of Education, 17 Abb. 701: The People v. Walker, 23 Barb. 304; Sinclair v. Jackson, 8 Cow. 543.

And the one not meeting cannot subsequently ratify the acts of others.

Powers Conferred by Law.—By the revised statutes it is also provided that whenever any power, authority, or duty is confided by law to three or more persons, and whenever three or more officers are authorized or required by law to perform any act, such act may be done, and such power, authority, or duty may be exercised and performed by a majority of such persons or officers, upon a meeting of all the persons or officers so intrusted or empowered, unless special provision is otherwise made.

2 R. S. 555, § 27, 1st ed.

The above rule would apply to cases of assessors of taxes, a majority may act upon a meeting of all. The People v. Supervisors Chenango Co. 11 N. Y. 563.

Also to jurors under the law of 1847, ch. 31, for appraising damage. Cruger v. Hud. R. R. 2 Ker. 191.

It would also apply to a board of town auditors. See The People v. Supervisors, 1 Hill, 195.

Also to commissioners to receive subscriptions for stock of a R. Road Co. *Vide*, Crocker v. Crane, 21 Wend. 211.

Also to commissioners of assessments of street extension in N. York city, if all had notice. *In re* Church street, 49 Barb. 455.

But all of them must be present and act, although the report may be signed by two. Doughty v. Hope, 3 Den. 594; affirmed, 1 Com. 79.

And a ratification by the common council would not render the act valid. *Ib.*

The act is also held applicable to trustees of common schools. Gildersleeve v. Board of Education, 17 Abb. 202; Horton v. Garrison, 23 Barb. 176.

But not to two out of three trustees to apportion a school tax under a law (law of 1847, ch. 480) requiring the trustees to do so. Lee v. Parry, 4 Den. 125; Keeler v. Frost, 22 Barb. 400.

It is held not to apply to judicial officers. Hawes v. Walker, 23 Barb. 304; Corning v. Slosson, 16 N. Y. 294; Parrot v. Knickerbocker Ice Co. 38 How P. 508.

It has been held that the above section applies as to the persons to select a commissioner for jurors in N. Y. city. The People v. Walker, 23 Barb. 304.

As to commissioners of highways, *vide*, Stewart v. Wallis, 30 Barb. 344.

It is held that although the above statute does not apply to judicial officers, it does to *quasi* judicial and ministerial officers. Parrot v. Knickerbocker Ice Co. 38 How. 508, and cases hereafter cited.

Where a statute prescribes that acts are to be performed by "the commissioners"—*i. e.*, in partition—all must act. Schuyler v. Marsh, 37 Barb. 350.

As a general rule, where a public authority is conferred upon individuals not a court, as a continuous public trust or duty, and some die or become disqualified, the others may discharge the trust or perform the duty, provided there be a sufficient number to confer together, deliberate, and in view of a possibility of division of opinion, to decide upon the course to be adopted.

Downing v. Rugar, 21 Wend. 178; Gildersleeve v. The Board of Education, 17 Abb. 202; Perry v. Tynen, 22 Barb. 137; *in re* Church St. 49 Barb. 455.

If a statute or charter require all or a certain number to be present, all must be present, and if an act is required upon the joint consultation of all of a body, all must be present for the deliberation, and continue present. Where the authority is public, and the number be such as to admit of a majority, such majority will bind the minority, after all have duly met and conferred. Where the authority is conferred upon two, nothing can be done without the assent of both, yet where the authority is public, to prevent a failure of justice, one may act, if the other be dead, interested, or absent.

In re Rogers, 8 Cow. 526; Downing v. Rugar, 21 Wend. 182; Woolsey v. Tompkins, 23 Wend. 324; The People v. Walker, 2 Abb. 421; Keeler v. Frost, 22 Barb. 400; Powell v. Tuttle, 3 Com. 396; Doughty v. Hope, 3 Den. 594; affirmed, 1 Com. 79.

Where a public authority is conferred upon individuals not a court, nor acting judicially, all members should be notified to attend in some proper manner, either directly or through by-laws. If, thereupon, the majority of the whole number attends, the majority so attending may organize, and legally proceed to the transaction of business, and the majority of that quorum will bind the whole body.

As respects those who neglect or refuse to attend, it is the same as if they had attended and dissented from the act of those who were present. All, however, are entitled to reasonable notice of the time and place of the meeting. The members of a corporate or other body,

interested with the management of a matter of public concern, are deemed to have notice of a general or stated meeting, held pursuant to the by-laws of the body.

In re Church St. 49 Barb. 455; Stewart v. Wallis, 30 Barb. 344; The People v. McSpedon, 18 How. P. 152; Gildersleeve v. The Board of Ed'n, 17 Abb. 201; Perry v. Finehout, 22 Barb. 137; Horton v. Garrison, 23 Barb. 176; The People v. Walker, 23 Barb. 304; The People v. Loew, 28 Barb. 310; affirmed, 22 N. Y. 128.

Where nothing is shown to the contrary, it will be presumed that all persons necessary, met and consulted in doing the act. Keeler v. Frost, 22 Barb. 400; McCoy v. Curtice, 9 Wend. 17; Downing v. Rugar, 21 *Id.* 178; Doughty v. Hope, 3 Den. 253 and 594; affirmed, 1 N. Y. 79; The People v. Com. C. of Rochester, 5 Lans. 11.

If the act be of a nature to require the exercise of discretion and judgment—in other words, if it be a judicial act, or one of that nature—all the persons to whom the authority is delegated must meet and confer together, but a majority may decide.

Harris v. The Commissioners, &c. 6 How. P. 175; Woolsey v. Tompkins, 23 Wend. 324; *in re* Rogers, 8 Cow. 526; The People v. Walker, 2 Abb. 421; Crocker v. Crane, 21 Wend. 211; Perry v. Tynen, 22 Barb. 137; The People v. Walker, 23 Barb. 304.

If two only of three referees sign a report, it will be presumed that all met and consulted. Yates v. Russel, 17 Johns. 466.

Private Corporations.—By the revised statutes (5th ed. p. 597, § 6), when the corporate powers of any corporation are directed by its charter to be exercised by any particular body or number of persons, a majority of such body or persons, if it be not otherwise provided in the charter, shall be a sufficient number to form a board for the transaction of business; and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act.

Vide Story v. Furman, 25 N. Y. 214.

Where Persons not Designated.—Though the persons to execute a power are not specified, it may be valid, and its execution would devolve on the Court of Chancery.

Crocheran v. Jaques, 3 Edw. 207.

Title VI. Valid Execution of Powers.

A power cannot be exercised before or after the time prescribed for its exercise. When the mode in which a power is to be executed is not defined, it may be executed by deed or will, or simply by writing. The revised statutes prescribe that the power must be executed by some instrument in writing which would be sufficient in law to pass the estate if the person executing the power were the actual owner. The general modes in which the power is to be exercised are given fully below.

As a general rule, powers of revocation and appointment and sale need not be executed to the full extent of them at once, but may be exercised at different times over different parts of the estate.

Power Exhausted by its Exercise.—A power conferred by statute is exhausted by once exercising it.

People v. Woodruff, 32 N. Y. 355.

Dormant Powers.—A naked power cannot lie dormant so as to prevail against a *bona fide* purchaser for value without notice.

Jackson v. Davenport, 20 Johns. 537.

Powers to Mortgage, to Sell, or to Lease.—A power to *mortgage* implies a power to authorize a sale on default.

Wilson v. Troup, 2 Cow. 195.

Sales under a power in a mortgage must be according to the foreclosure statute in force at the time of *default* made, although the power may provide differently.

Lawrence v. The Farmers' Loan and Trust Co. 3 Kern. 200; *Ib.* 642; James v. Stull, 9 Barb. 482; Wilson v. Troup, 2 Cow. 196.

As a general rule, a power *to sell* does not convey a power to mortgage. The rule, however, is subject to qualifications.

Bloomer v. Waldron, 3 Hill, 361; Albany Insurance Co. v. Bay, 4 Coms. 9; Coutant v. Servoss, 3 Barb. 128; Pitcher v. Carter, 4 Sand. Ch. 1.

A power to *sell* authorizes a lease with a covenant to give a fee.

Williams v. Woodward, 2 Wend. 487.

A power to contract to sell means an absolute sale, and not one optional with the purchaser.

Ives v. Davenport, 3 Hill, 373.

A power to *repair and improve* authorizes a mortgage.

Wetmore v. Holsman, 23 How. Pr. 202.

A power to *divide* gives no power to sell.

Craig v. Craig, 3 Barb. Ch. 76.

As a general rule, a power to execute an instrument of known and definite signification in the law will not authorize the execution of one having a different effect.

Trustees having the legal estate in lands, with a duty to perform with respect to the rents and profits, and without any restriction upon the right to lease, may lease vacant lots for 21 years, and give covenants for renewal for a similar term, and for appraisal; and such covenants may be enforced against a new trustee.

Newcomb v. Kettletas, 19 Barb. 608; affirmed, 17 N. Y. 91. See, also, Root v. Stuyvesant, 18 Wend, 257. The latter case, however, is not considered now of authority. *Vide* 20 Wend. 569; 22 *Ib.* 496; 5 Sand. 372.

Where a power in trust to executors to lease the real estate of the testator until it can be sold would have the effect to suspend the absolute power of alienation in such real estate beyond the time allowed by law, it is void. But the power to sell in such a case would still be valid; and the real estate in equity will be considered as converted into personalty immediately, where such conversion is necessary to carry into effect the will of the testator. Haxton v. Corse, 2 Barb. Ch. 506; Hawley v. James, 16 Wend. 60.

When the object of a power is illegal, the power is void; and where it is void, or no appointment is made, the future estates limited take effect as if the power had not been given. The estates limited are held to be *vested*, subject to the execution of the power if valid.

Execution by Devise.—Where a power to dispose of lands is confined to a disposition by devise or will, the instrument of execution must be a will duly executed

according to the provisions of the 6th chapter of the act.

§ 115, Rev. Stat. vol. III, p. 27.

By § 126, lands embraced in a power to devise shall pass by a will purporting to convey *all* the real property of the testator, unless a contrary intent appear by the will, directly or by implication.

Wills made under a power must be executed with the same formalities, and be proved in the same manner as proper wills. They must be proved in the Probate Court; but that court has nothing to do with the question whether the power is well executed, or whether it authorizes the will, or in fact exists at all.

The question of its being a due execution of a power is for the determination of a court of construction. A will in execution of a power is ambulatory, and revocable in the same manner as a proper will. The testamentary instrument, however, which a married woman might execute under a power of appointment is not strictly a will, nor does it operate as such in the proper legal sense of the term. It operates as an appointment, and the devisee or legatee takes the property by force of the power. This was the rule before the statutes of 1848–9.

Frazer v. Western, 1 Barb. Ch. 240; Van Wert v. Benedict, 1 Brad. 114; Strong v. Wilkin, 1 Barb. Ch. 13.

Execution by Grant.—Where a power is confined to a disposition by grant, it cannot be executed by will, although the disposition is not intended to take effect until after the death of the party executing the power.

Rev. Stat. § 116.

Married Women.—When not prohibited by the terms of the power, a married woman may execute a power, if so authorized by it, by grant or devise, without the concurrence of her husband.

Jackson v. Edwards, 7 Paige, 386; affirmed, 22 Wend. 498; Rev. Stat. § 110; and see *ante*, p. 340.

But no power vested in her during infancy shall be exercised by her until of age (§ 111).

A power to mortgage, reserved to married women in respect to lands held in trust for her separate use, will support a mortgage to secure her husband's debt. Leavitt v. Pell, 25 N. Y. 474; affirming, 27 Barb. 322.

If a married woman execute a power by grant, the concurrence of her husband as a party shall not be requisite, but it must be acknowledged separate and apart from him to be valid. As to which, *vide* ch. iii, Title III.

Method and Formalities of Execution.—When the grantor of a power shall have directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power shall not be void, but its execution shall be governed by the rules theretofore prescribed in the article relative to powers.

§ 118, *Ib.*

When the grantor shall have directed any *formalities* to be observed in the execution of the power, in addition to those sufficient in law to pass the estate, the observance of such additional formalities shall not be necessary to a valid execution of the power (§ 119).

As a general rule, there must be a substantial compliance with every *condition* required to precede or accompany the exercise of a power, and the power must not be exceeded.

Nixon v. Hyserott, 5 Johns. 58; Allen v. DeWitt, 3 N. Y. 276; Cleveland v. Boerum, 27 Barb. 252; affirmed, 24 N. Y. 613; Ladd v. Ladd, 8 How. U. S. 10.

Where there are several modes, however, of executing the power, the donee may select his mode.

Where the *conditions* are merely nominal, and without apparent intent to benefit the party for whom or for whose benefit they are to be performed, they may be disregarded.

3 Rev. Stat. p. 27, § 120.

A power of sale cannot be executed *after* the time limited.

Richardson v. Sharpe, 29 Barb. 222.

A power to sell on a credit of twelve months is not exceeded on a sale at a six months' credit. Richardson v. Hayden, 18 B. Mon. 242.

A power of sale may be executed by contract as well as by deed. Demarest v. Ray, 29 Barb. 563.

Intentions of Grantor.—With the above exceptions, the intentions of a grantor of a power as to the mode, time, and condition of its execution shall be observed, subject to the power of the Supreme Court to supply a defective execution in the cases thereinafter provided (§ 121).

Where the direction is that the power must be exercised for a special purpose, any deviation (*e. g.*, as a transfer to pay a precedent debt were made under a power of sale to pay legacies) would make the execution void. Russell v. Russell, Court of Appeals, June, 1867. *Vide* "Powers of Sale to Executors," *post.*

Consent of Third Person.—When the consent of a third person to the execution of a power is requisite, such consent shall be expressed *in the instrument* by which the power is executed, or shall be *certified in writing thereon*, in either case to be signed by the party whose consent is required, and lawfully proved or acknowledged if required to be recorded (§ 122).

Even since the revised statutes, if the consent of a third person is required, the power cannot be executed if he die before execution. Barber v. Cary, 11 N. Y. 397.

Unauthorized Exercise.—No disposition by virtue of a power shall be void in law or equity on the ground that it was more extensive than was authorized by the power, but every estate or interest so created, so far as embraced by the terms of the power, shall be valid (§ 123).

Purchases for Value.—Purchases for value claiming under the defective execution of a power are entitled to the same relief in equity as similar purchasers claiming under a defective conveyance from an actual owner (§ 132).

Disposition among Several.—Where a disposition under a power is directed to be made to or among *several* persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion; otherwise, if the trustee of the power has a selection, he may allot the whole estate to any one or more of such persons, in exclusion of the others (§§ 98, 99).

It is a settled principle that where a discretion has been conferred by statute, its exercise cannot be reviewed, and is not subject to any appellate tribunal. See Extension of Church St. 49 Barb. 455.

See *post*, p. 351, as to the imperative nature of such trust powers.

Decease of Trustee.—If such trustee with power of selection die, leaving the power unexecuted, its execution shall be decreed in equity, for the benefit equally of all the persons designated as objects of the trust (§ 100).

Trustee not Designated.—"And where no trustee of a power in trust is designated by a will creating it, its execution devolves upon the Supreme Court." But frequently, from the terms of the will, a power of sale in the executors will be implied.

Meakings v. Cromwell, 2 Sand. 512; affirmed, 5 N. Y. 136; and see *post*, ch. xvii.

Power not Referred to in the Instrument.—Every instrument executed by the grantee of a power conveying an estate or creating a charge which such grantee would have no right to convey or create unless by virtue of his power, shall be deemed a valid execution of the power, although the power be not referred to or recited therein (§ 124).

This settled the former law on the subject, which in most cases required a reference to the power in the instrument, particularly where the donee had an interest separate from the power.

A person may execute a will without reference to the power (White v. Hicks, 43 Barb. 64; affirmed, 33 N. Y. 383), and this would be a valid execution of the power, if it otherwise appear that the intention was to execute the power; and the amount of a testator's property may be inquired into to show an intention to execute the power. *Ib.*

Trust Powers.—It has been seen in a previous chapter (ch. x), that where, in a devise to executors or other trustees, and they are not entitled to receive the rents and profits, no estate vests in them.

Another provision of statute has also been considered, to the effect that where an express trust shall be created for any purpose not authorized by statute, no estate shall vest in the trustee; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of article third, respecting powers; and the lands vest in the persons entitled, subject to the execution of the trust as a power.

The interpretation of these statutory provisions has been fully considered in a previous chapter relative to trusts.

A general power, it has been seen (*ante*, Title I), is in trust when persons other than the grantee of the power are entitled to all or a portion of the proceeds or benefits resulting from the alienation of the lands according to the power.

A special power is in trust—

1. Where the disposition authorized is limited to persons other than the grantee of the power.

2. Where persons other than the grantee are designated as entitled to benefit from the disposition or charge authorized by the power.

The provisions of the revised statutes relative to the valid execution of such trust powers will now be considered.

By section 96 of the above chapter, in is provided that every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested.

Under the views of our courts, a power is always considered imperative when its subject—that is, the property given—and its object—that is, the persons to whom it is given—are certain. Such a power is not to be construed as discretionary because the terms used are simply those of authority, request, or recommendation, and not terms of direction; nor because a right of selection is given to the donee of the power. A power is always considered a trust when a disposition is made to a class, unless its execution is made, in terms, to depend upon the mere discretion of the grantee. It is considered, in equity, a gift to all who are the objects of the power, subject to be altered or restricted by its execution.

A power is also considered imperative, if its execution is not made to depend upon the will of the grantee, and if it imposes on the grantee a duty the performance of which may be compelled in equity for the benefit of the parties interested.

Selden v. Vermilyea, 1 Barb. 58; partially reversed, 3 Com. 525.

A general power in trust, the execution or non-execution of which does not depend on the mere volition of the trustee, is imperative in its nature, and imposes a duty the performance of which may be compelled in equity. Arnold v. Gilbert, 5 Barb. 190.

The revised statutes further expressly provide (§ 97) that a trust power does not cease to be imperative where the grantee has the right to select any, and exclude others of the persons designated as the objects of the trust.

Where an express power in trust is given to executors to divide specified real estate in certain proportions among a class, it is a valid and imperative power in trust, and the executors must perform it by setting off the shares in severalty by a valid and legal instrument. Dominick v. Sayre, 3 Sand. 555; Craig v. Craig, 3 Barb. Ch. 76.

Where the execution of a power in trust shall be defective in whole or in part, under the provisions of the article, its proper execution may be decreed in equity in favor of the persons designated as the objects of the trust.

A defective execution of an appointment, made for a valuable consideration, is not wholly void. It amounts only to a defective execution, and equity will supply it. Schenck v. Ellingwood, 3 Ed. 175.

The court will also exercise a power of distribution given in trust to a party who has died. Hoey v. Kenney, 25 Barb. 396; Bolton v. De Peyster, 25 Barb. 540.

Fraud.—Instruments in execution of a power are affected by fraud, both in law and equity, in the same manner as conveyances by owners or trustees. (§ 125.)

Powers Executed by Alien Women.—By law of Apr. 30, 1845, ch. 115, alien women, residents of the State, are authorized to take land by devise, and to execute every power relative to real estate devised to them, lawfully created, as if they were citizens.

Vide ante, p. 95, as to Alien Women.

TITLE VII. REVOCATION OF POWERS.

Formerly there might be a power of *revocation* reserved even in the deed executing the power, though the deed creating the power did not authorize it.

On every execution of the power, a new power of revocation had to be reserved, otherwise the appointment could not be revoked.

4 Kent, 336.

On this head of appointment and revocation, *vide* Evans v. Sanders, 31 Eng. Law & Eq. 366; Gelb v. Tugwell, 35 *Ib.* 429.

The Revised Statutes provide, as to the revocation of powers, that every power beneficial or in trust is *irrevocable*, unless an authority to revoke it is granted or reserved in the instrument creating the power. (§ 108.) It is also provided that where a grantor, in any conveyance, reserves for his own benefit an absolute power of revocation, he shall be deemed absolute owner of the estate, as regards creditors and purchasers.

Ib. § 86.

A power coupled with an interest is not revoked by the death of the grantor, as a power to sell in a mortgage, but passes with the mortgage and is not revoked by decease of the mortgagor. Nor is a power to sell for the benefit of the grantee revocable.

A mere naked authority expires with the person who gave it.

Statute of Frauds as to Power to Revoke.—By the Revised Statutes also (vol. III, p. 220, § 3), every conveyance or charge of or upon any estate &c. in lands, containing any provision for the revocation, determination or alteration of such estate or interest, or any part thereof, at the will of the grantor, shall be void as against subsequent purchasers for value from the grantor of such estate, &c., although the same be not expressly revoked, determined or altered by such grantor by virtue of the power reserved or expressed in such prior conveyance or charge.

1 R. L. 75, § 5.

§ 4.—Where a power to revoke a conveyance of lands or of rents and profits and to reconvey the same shall be given to any person other than the grantor in such conveyance, and such person shall thereafter convey the same lands, rents, &c., to a purchaser for value, such subsequent conveyance shall be valid as if the power of revocation were recited therein, and the intent to revoke the former conveyance expressly declared. (§ 5.) If a conveyance under the above two sections be made before the person making the same shall be entitled to execute his power of revocation, it shall nevertheless be valid from the time the power of revocation shall actually vest in such person, in the same manner and to the same extent as if then made.

Title VIII. Extinguishment of Powers.

Powers may be suspended, merged or extinguished. As a general rule a party cannot defeat his own action where other rights have attached under it, by a subsequent act extinguishing the power. A power is also considered extinguished where its execution becomes practically impossible.

It is a general rule that a purchaser under a power

purchases at his peril, and is bound to inquire whether the power has not been extinguished.

Stafford v. Williams, 12 Barb., 240.

An alienation of the estate formerly extinguished the power even in cases of mortgage; also a release to the tenant of the freehold; also a fine and recovery.

By the Revised Statutes the power to sell passes by assignment of the mortgage, when given in a mortgage or other conveyance intended to secure the payment of money, and the power shall be deemed a part of the security, and shall vest in and may be executed by any person who, by assignment or otherwise, shall become entitled to the money so secured to be paid.

1 R. S., p. 733, § 133, 1st ed.

A mortgage by the tenant for life having power to make leases, or by a married woman by virtue of a beneficial power, does not extinguish or suspend it. The power is bound by the mortgage in the same manner as the lands embraced therein.

Ib. § 90. See further as to this section, *ante* Title IV.

It was also a question if an estate were limited to *uses* to be appointed by a person, and in default of appointment, *to himself in fee*, whether the power was not merged in *the fee*. The revised statutes provide that where there is no trust, and the absolute power of disposition is given, and no remainder limited on the estate of the grantee, he takes a fee absolute. (Ib. § 89.) See fully as to these provisions, *ante* Title IV.

Power of Life Tenant to make Leases, when Extinguished.—The Revised Statutes provide that the power of a tenant for life to make leases, is not assignable as a *separate* interest, but if specially excepted in any conveyance of the estate, it *is extinguished*, and it is also extinguished if released to the person having an expectant estate. (§§ 88, 89.)

Express Powers.—An express power to dispose of lands when not clothed with an estate or interest, is not descendible or transmissible, but terminates with the lives, or according to the terms of its creation, with the life of the survivor of those in whom it is vested.

Hence, when a power to sell lands, even for the payment of debts, is given to executors, if it pass to a surviving executor at all it ceases upon his death, and cannot be exercised by his executor when he makes a will, nor when he dies intestate, by an administrator with the original will annexed. Dominick v. Michael, 4 Sand., 374.

As to the survivorship of trust powers, however, and the substitution of executors and trustees for those removed, dying or discharged, see *ante* p. 288, and *post*, ch. xvii, and *ante* Title V.

Powers simply collateral can neither be barred nor extinguished by any act of the party in whom they are vested. Learned v. Tallmadge, 26 Barb. 443.

When the Objects or Purposes of the Power cease.—The power is also considered no longer operative when its alleged purposes no longer exist—as to provide for a widow who dies, or when its objects are unattainable. Thereupon it ceases or becomes extinguished by operation of law, and lands formerly affected by it are no longer subject to its exercise.

Jackson v. Jansen, 6 Johns., 72; Slocum v. Slocum, 4 Edw., 613; Hutchins v. Jones, 7 Bos., 236; Hotchkiss v. Elting, 36 Barb., 38; Sharpsteen v. Tillou, 3 Cow., 651; and see *post* ch. xvii.

CHAPTER XIII.

POWERS OF ATTORNEY.

TITLE I. CONTRACTS AND CONVEYANCES BY ATTORNEY.

A person may make a contract or conveyance by attorney "in *fact*," through a power of attorney, with the like effect as if made personally. If the subject matter is real estate, the power should be in writing.

2 R. S., 1st ed., p. 134, § 6. See fully as to the law regulating powers in general, *ante*, ch.

A *sealed* contract executed by an agent with only *parol* authority, is not the deed of the principal, and no act *in pais* can make it his unless the ratification be written. Hanford v. McNair, 9 Wend., 54; Blood v. Goodrich, 12 *Ib.*, 525.

As to the construction and effect of a general power of attorney between partners and others, *vide* Fereira v. De Pew, 17 How. P. 418.

As a general rule a power to sell, if general and unqualified, does not include a power to mortgage. Coutant v. Servoss, 3 Barb. 128; The Albany Fire Ins. v. Bay, 4 N. Y. 9; Bloomer v. Waldron, 3 Hill, 361; and see *ante*, "Powers," ch. xii.

The authority given under a power of attorney is strictly construed, and any act substantially varying from it would be void.

Therefore, if a party were authorized as an attorney in fact, to sell and grant lands and execute conveyances, he would not be authorized to enter into covenants or do any other act than was actually necessary to transfer the property by deed sufficient for the purpose. Nixon v. Hyserott, 5 Johns. 58; Gibson v. Colt, 7 Johns. 390.

But a power to sell for the purpose of raising money might imply a power to mortgage, which is a conditional sale, and within the object of the power. 4 Kent, 147; 1 Powell on Mortgages, 61.

A power to mortgage includes a power to execute a mortgage with a power of sale in it. Wilson v. Troup, 7 Johns. ch. 25.

A trust to raise money out of the profits of land will include a power to sell or mortgage. 4 Kent, 148.

Instruments, how Executed by Attorney.—Instruments executed through an attorney in fact, duly authorized, are executed by the attorney in the principal's name, *per* the attorney's name, appended as such.

A contract or deed, to be obligatory upon the principal when made by the agent, must be made in the name of the principal. If the agent contract *in his own name*, although describing himself as agent or attorney for his principal, the contract is the contract of the attorney and not of the constituent.

The principle or theory of the above rule is, that the interest in the estate that is the subject of the power is vested alone in the principal, and the power of attorney as such vests no interest in the representative, consequently none can pass from him. A covenant for the sale of land, therefore, or a deed passing an interest in land where the contract or instrument is made by an attorney in fact, to be valid as against the principal, must be executed in the name of the principal *by* his attorney. If the attorney affix only his own name, the covenant is void, although in the body of the instrument it be stated that it is the agreement or deed of the principal by his attorney, and although the principal be individualized as making the covenants. This would be the case even if, in the testatum clause, it be alleged that the attorney, as the attorney of the principal, had signed and sealed the instrument.

4 Wash. C. C. 280; Spencer v. Field, 10 Wend. 88; Taylor's Landlord and Tenant, §§ 139, 140, 141; Stone v. Wood, 7 Cow. 453; Townsend v. Corning, 23 Wend. 435; *vide* as to mistake in name of the principal, 14 Wall. 173.

Title II. Revocation.

It will be necessary for the conveyancer to ascertain before taking title, under a deed executed through attorney, that the power has neither been *revoked* in *fact*, or by law, as, by the decease or civil disability of the grantor,

before the execution of the deed. A power of attorney, not coupled with an interest, is revocable at will.

The decease of the attorney revokes the appointment of any sub-attorney made by him. Watt v. Watt, 2 Barb. Ch. 371.

As a general rule the revocation takes effect, as to the agent, from the time it was made known to him. As regards third persons, it depends upon the notice given. But the question as to what amounts to notice seems unsettled. If, with the exercise of ordinary caution, a party would be led to a knowledge of the revocation, it seems sufficient. *Vide* Williams v. Birbeck, 1 Hoff. 259.

Lunacy of the Principal.—This does not, *per se*, revoke a power of attorney nor invalidate the acts of the attorney until the fact of lunacy is judicially established. Wallis v. The President, &c., of the Manhattan Co., 2 Hall Supr. Ct. 395. *Vide* also as to Records of Revocation as notice, *infra.*

Title III. Record of Powers of Attorney.

To make a proper title of record, the power should be properly acknowledged and recorded; but by Revised Statutes, it is provided, that a power of attorney need not be recorded, but when legally proved and acknowledged, it, or any contract for sale of lands, *may* be recorded in the clerk's office of any county in which any real estate to which such power or contract relates may be situated, and when so recorded, its record or the transcript thereof may be read in evidence, &c.

1 R. S. 1st ed. p. 714, § 39.

Power of attorney may be acknowledged and proved in the same manner as deeds. St. John v. Croel, 5 Hill, 573.

Books of powers of attorney are kept properly indexed, in the offices of the various registers or clerks of counties, also books of revocation of such powers.

Record of Revocation.—It is also provided that no letter of attorney or other instrument, so recorded, shall be deemed to be *revoked* by any act of the party by whom it was executed, unless the instrument containing such revocation *be also recorded* in the same office in which the instrument containing the power was recorded. (§ 40.)

It is a rule that no one is chargeable with constructive notice of an instrument merely from its being recorded,

unless the law makes it necessary to record it. If, however, a power to convey is recorded, an instrument of revocation also recorded in the same county appears to be sufficient notice.

Williams v. Birbeck, 1 Hoff. 359.

Title IV. Powers by Married Women.

When any married woman, residing out of this State, shall have joined or shall join with her husband in executing a power of attorney for conveyance of land, in this State, the conveyance shall have the same force and effect as if executed by such married woman in her own proper person, provided that the execution of such power shall have been first duly proved or acknowledged, as required by law for conveyances of married women residing out of the State.

Law of May 11, 1835, ch. 275.

Even since the acts of 1848 and 1849, it is doubtful if a married woman can execute a power of attorney to her husband. Hunt v. Johnson, 19 N. Y. 279.

CHAPTER XIV.

TITLE BY DESCENT.

Descent, or hereditary succession, is defined by Blackstone as the title whereby a man, on the death of his ancestor, obtains his estate by right of representation, as his heir at law. *Purchase*, in *law*, is used in contradistinction to *descent*, and is any other mode of acquiring real property.

Descent of land is regulated by the law of the State where it is situated. The law on this point has been fully reviewed in a preceding chapter.

TITLE I. WHO TAKE BY DESCENT.

By Revised Statutes, every *citizen of the United States* is capable of taking lands by descent.

1 R. S. 1st ed., p. 719.

As to aliens and descent through them, *vide* ch. iii., *supra*, p. 86, *et seq.*

Lunatics, &c.—In the case of the decease of idiots, lunatics or persons of unsound mind, or persons incapable of conducting their affairs, the powers of their trustees are to cease, and their real estates shall descend

as if they had been sane, except that the provision is not to affect any *valid* will made by them that shall be admitted to probate.

1 R. L. 148; 2 R. S. 55; Laws of 1865, p. 1446.

Heirs.—As a general rule the *heir* takes, although excluded by name in a will, unless some *valid* disposition of the land is made. He also takes on an invalid or insufficient devise in preference to the residuary devisee, unless the contingency of the failure of the devise can be deemed to have been foreseen by the testator.

To deprive an heir at law or a distributee of what comes to him by operation of law, as property not effectually disposed of by will, it is not sufficient that the testator, in his will has signified his intention that such heir or distributee shall not inherit any part of the estate; but the testator must make a valid and effectual disposition thereof to some other person.

Haxtun v. Corse, 2 Barb. Ch. 506; Roosevelt v. Fulton, 7 Cow. 71; see also Vail v. Vail, 4 Paige, 317; 7 Barb. 226; Tucker v. Tucker, 1 Seld. 408; Adams v. Perry, 43 N. Y. 488; Manice v. Manice, 43 N. Y. 305.

Where also a devisee is by law incapable of taking, as well, also, as in the case where a devise lapses by the death of the devisee in the lifetime of the testator, or from the not happening of the contingency upon which, as a condition-precedent, the devise was made or was to take effect, the property descends to the heirs at law as property undisposed of by the will. This is the case particularly where it is apparent, from the context of the will, that the testator's intent was that the property was not to pass to the residuary devisee.

Van Kleeck v. The Dutch Church, 20 Wend. 457; Waring v. Waring, 17 Barb. 552; Beekman v. Bonsor, 23 N. Y. 298.

The above case of Van Kleeck v. The Dutch Church, was upon a devise to a corporation incapable of taking; and it was held, that nothing could be claimed on the lapse of such a devise by the residuary devisee on the ground of a contingent interest given by the residuary

clause, based upon the possibility of a reversion of the estate by the dissolution of the corporation, or by a forfeiture of its rights in consequence of the non-performance of conditions.

Also that it appeared from the will that the testator presumed that he had, by the will, disposed of the entire fee, leaving nothing remaining for further disposition, and therefore could not have intended to dispose of any interest in such land by the residuary clause.

The opinions show that if the disposition made had been upon a contingency that might have left an interest undisposed of, such contingent interest would have passed under the residuary clause.

The court in this case also holds that, at the common law, a residuary devisee of real estate takes only what was intended for him at the time of making the will.

Not so as to a residuary legatee of personal estate. The latter takes not only what was undisposed of by the will, but also that which became undisposed of at the death of the testator by the disappointment of his intention. It was supposed, however, that the distinction between them was abolished by the Revised Statutes.

This case of Van Kleeck v. The Dutch Church was commented on in the case of Youngs v. Youngs, 45 N. Y. 254, below referred to, and the opinion therein expressed was approved by the Court of Appeals, to the effect that if the disposition made had been upon a contingency that might have left an interest undisposed of, such contingent interest would have passed under the residuary clause.

It is held, however, as an exception to the above rule, that the heir takes, on a lapse or void devise, that a residuary devise of real or personal estate carries with it not only the property of the testator in which no interest is devised or bequeathed by other parts of the will, but also all the reversionary and contingent interest in the property, which, *in events contemplated by the testator*, are not otherwise disposed of.

Brigham v. Shattuck, 10 Pick. 309; Hopewell v. Ackland, 10 Salk. 239; Doe v. Weatherby, 11 East, 332; Craig v. Craig, 3 Barb. Ch. 76.

It is also held that where a codicil revokes a specific devise in a will without making any further disposition of the property, it will, in general, pass to the residuary devisee, the codicil being held to be a republication of the will.

The intention of the testator is to govern, so far as it can be ascertained from both the will and codicil taken together. In cases of lapsed and void devises, the residuary clause in a will would not embrace property which the testator had designed *to give to persons other than the residuary devisee.*

A distinction is drawn, therefore, between lapsed or void and revoked devises, and it is held that the reason of the rule in the case of lapsed and void devises for excepting the property embraced therein from the residuary clause, viz., that the testator intended to give the property to others, altogether fails in cases of revocation.

Vide Kip v. Van Cortlandt, 7 Hill, 346.

In the case of Youngs v. Youngs (45 N. Y. 254), lands were specifically devised to two nephews for life, and on their deaths respectively to their children. They both died, unmarried, before the testator. There was a residuary clause devising all his real and personal estate whatsoever to residuary devisees. The nephews having died in the lifetime of the testator, it was held that the lands in which a life estate was devised to them, passed under the will to the residuary devisees and not to the heirs.

The decision in this case is put upon the ground that, since the Revised Statutes, the common law rule was changed, and the will operated upon all the real estate left by the testator at the time of his death, in default of other specification; and the residuary clause was intended to cover *all* the testator's real estate not before specifically disposed of, especially as by the recitals in

the will the intention appeared to be to dispose, in the residuary clause, of all that should be undisposed of.

The court held that there was a remainder in the lands given to the nephews, contingent upon the death of either, leaving no descendants, and this remainder was not disposed of by the will unless under the residuary clause.

The residuary clause gave all the real estate not otherwise disposed of, and thus brought the contingent remainder directly within the language of that clause, and the presumption was that the testator so understood it.

See also Bowers v. Smith, 10 Paige, 193; Redfield on Wills, Part II, 444; 1 Jarmin on Wills, 590, 591; Doe v. Weatherby, 11 East, 322.

If real estate has been converted into personalty for the purpose of carrying into effect the will of the testator, and a contingency happens by which an interest in the converted fund is undisposed of by the will, such interest belongs to the heirs at law of the testator, and not to the distributees of the personal estate. Wood v. Keyes, 8 Paige, 365; Vail v. Vail, 4 Paige, 317.

Where land was devised specifically to a wife in lieu of dower, and she declined to accept it, but took her dower in the real estate, the land devised passed to the residuary devisee and not to the heirs. James v. James, 4 Paige, 115.

Where, by reason of a legal incapacity, but one of the persons of a class can take, that one takes all the estate which a devise, by its terms, gives to the whole class, but where, by reason of their alienage, none of the class is competent to take, the estate does not pass to the residuary devisees, but descends to the heirs of the testator. Downing v. Marshall, 23 N. Y. 366.

Descents are of two sorts, lineal, as from father or grandfather; and collateral, as from brother to brother, and cousin to cousin, &c.

With reference to the line of pedigree or consanguinity, a descent is considered immediate when the ancestor from whom the party derives his blood is *sic*, without any intervening link or degrees, and *mediate* when the kindred is derived from him, another ancestor intervening between them.

A descent from father to son is considered immediate, but a descent from grandfather to grandson, (the father being dead), or from uncle to nephew, (the brother being dead), would be deemed mediate, the father and the broth-

er being, in these latter cases, the *medium deferens*, as it was called, of the descent or consanguinity.

In the leading case of Collingwood v. Pace, 1 Vent. 413, where the question of succession arose as between two brothers, the father being an alien, it was determined that the descent from brother to brother was to be considered immediate and not mediate through the father, and that the latter's alien blood could not prejudice the descent.

The case of inheritance as between brothers, although they were collaterals, was, therefore, by this case held to be *immediate*. This case is fully reviewed in Levy v. McCartee, 6 Peters, 102, where it was held that, the descent between an intestate and the children of his cousin being mediate through their grandfather, an alien, and the testator's maternal uncle, that they could not inherit.

Vide, as to modification of these rules as to alienage, *ante*, pp. 91–101. See, also, Valentine v. Wetherell, 31 Barb. 655; McGregor v. Comstock, 3 Com. 408; Beebee v. Griffing, 4 Kern. 235.

Title II. What Descends.

Everything comprised in the terms *lands* and *real estate* descends to the heirs at law, according to the law existing at the time the descent takes effect. The word *real estate* as used in the chapter on Descents in the Revised Statutes, it is provided, shall be construed to include *every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except* what may be determined or extinguished by the death of the intestate, and except leases for years, and estates for the life of another person, and the word "*inheritance*" is to be understood to mean "real estate," as therein defined, descended according to the provisions of the chapter.

Under the statute of distribution of *personal* assets, *leases for years, lands* held by the deceased from *year to year, estates* held by him for the *life of another*, his interest

in a term of years, after the expiration of any estate for years therein granted by him or any other person, *things annexed to the freehold* or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential for its support; *crops* growing on the lands of the deceased at the time of his death; every kind of *produce* raised annually by labor and cultivation, excepting grass growing and fruit not gathered; *rent* reserved to the deceased which had *accrued* at the time of his death; stock in any company, whether incorporated or not, and certain other effects of a personal character are to be deemed assets, to go to the executor or administrator to be applied and distributed as *personalty.*

2 R. S. 1st ed. p. 82, § 6.

It is also provided that things annexed to the freehold or to any building shall not go to the executors, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned above. (§ 7.)

Whether a thing be a substantial part of the freehold, or a mere annexation thereto, for the purpose of trade and manufacture, depends upon its relation to the inheritance. Murdock v. Gifford, 18 N. Y. 28; and Potter v. Cromwell, 40 *Id.* 287; Hovey v. Smith, 1 Barb. 372; Ford v. Cobb, 20 *Id.* 344. See more fully as to fixtures, *ante*, pp. 107 and 208.

It is also provided that the right of an heir to any property not enumerated in the 6th section, which, by the common law, would descend to them, shall not be impaired by the general terms of that section. (§ 8.)

Rent.—Where a lessor dies before the rent becomes due, rent payable after the death of the decedent goes to the heir or devisee as the case may be, and not to the executors. The heir would take it as an incident of the reversion, and no apportionment of rent would be allowed as between the executor of the lessor and a remainderman. A remainderman who succeeded to the reversion would be entitled to the entire rent due after lessor's death, as an entire sum due him. So also there is no apportionment between tenant for life and remainder-

man. As to rent becoming due after the termination of the life estate, on a lease executed *by the testator of the parties, vide, ante, p.* 207.

Wright v. Williams, 5 Cow. 501; Fay v. Holloran, 35 Barb. 295; Marshall v. Moseley, 21 N. Y. 280; Jones v. Felch, 3 Bos. 63.
As to apportionment of rent on leases made by a *tenant for life, vide ante*, p. 208.

Rent reserved on a Grant in Fee.—Such rent is a hereditament, descendible and devisable.

Van Rensselaer v. Hays, 19 N. Y. 68; Tyler v. Heidorn, 46 Barb. 439; *vide, ante*, p. 149. See, also, *ante*, p. 148, as to the apportionment of a rent charge.

Crops.—Grass, trees, and fruits growing upon lands belonging to an intestate at the time of his decease are not assets belonging to the administrator, but descend with the land to the heir. Nor can the widow retain one-third on account of her right of dower in the land, prior to any assignment thereof for dower, nor even in the case of annual crops.

The *annual* produce of crops, however, are chattels, and would go to the executor, as distinguished from the *spontaneous* produce as above.

Kain v. Fisher, 2 Seld. 597; Evans v. Roberts, 5 Barn. and Cress. 829; Whipple v. Foote, 2 Johns. 418; Austin v. Sawyer, 9 Cow. 39; James v. Flint, 10 Adol. and El. 753; The Bank of Lansingburgh v. Crary, 1 Barb. 542; Warren v. Leland, 2 Barb. 613.

Equity of Redemption and Converted Property.—The equity of redemption in mortgaged lands also descends, the mortgagor, before entry or foreclosure, being legally seized as to all persons except the mortgagee, and even as to him, according to the later views of the courts, the mortgagor is only supposed to give a lien, and not to disturb the legal estate of the mortgagor.

Where, by a foreclosure and sale of mortgaged premises, however, the interests of the owners of the equity of redemption is converted into personal estate; if any of the owners subsequently to the conversion die, their

interests in the surplus moneys must be distributed as personal estate among the legatees and next of kin.

Roosevelt v. Fulton, &c. 7 Cow. 71; Bogert v. Furman, 10 Paige, 496; Wright v. Rose, 2 Simm. and Stw. 323; Cox v. McBurney, 2 Sand. 561.

The distinction drawn is, that if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate, but if after his death, real estate, because in the latter case the equity of redemption descended to the heir.

Where, at the time of the sale of mortgaged premises, however, under a decree, the equity of redemption is owned by a minor, and a surplus arises from the sale, his interest would be deemed real estate, and will be disposed of as such at his death, if he die under age.

In converting the real estate of an infant for a particular purpose, courts have no power to convert to all intents and purposes any more than was required to answer such purpose, and if it incidentally happen that more was converted, courts will treat the excess as property of the same nature as that converted, and dispose of it accordingly.

Character of Converted Property.—The general principle asserted by the courts is, that where real estate is converted by operation of law, in the lifetime of an adult owner, the surplus, if any, will be treated as money, and at his decease, will be distributed as such; also where a court of equity is required to determine between persons claiming converted property by the right of succession, it will treat it as property impressed by the will or act of the party who is the ultimate source of title, with a specific character different from that in which it is found, and will dispose of it as continuing to possess that character, until some one entitled to the whole beneficial interest has elected to take it in the form in which it is found, or has received it under the performance of the contract, or in execution of the provisions of a will by which the original right to it was created.

A Court of Equity, therefore, would not divest prop-

erty of the character which it finds impressed upon it, except at the instance of some party having the whole beneficial interest, and who has a right to convert it himself from one form to another, and who is of legal capacity to make an election.

It is pursuant to and in the application of the above principles that surplus monies arising after sales of real estate in which lunatics or infants are interested, or monies arising from the sale of their lands, made in order to raise money for a particular purpose by order of a court, are considered to represent the land of which they were the proceeds, and are treated as realty until the party is capable of electing, and elects to take the amount as money.

Craig v. Leslie, 3 Wheat. 563; 2 Story's Eq. 790, 793, § 1357; Stagg v. Jackson, 1 Com. 206; Lloyd v. Hart, 2 Barr. 473; 2 Yeates' R. 261; Deller v. Young, 5 Whart. 64; Scull v. Janegan, 2 Dev. and Bat. Eq. R. 144; March v. Berrier, 6 Iredell Eq. 524; Banks v. Scott, 5 Mad. 500; Dixon v. Dawson, 2 Sim. and Stew. 327; Sweezy v. Thayer, 1 Duer, 286; Morris v. Murgatroyd, 1 Johns. Ch. 119, p. 73; Horton v. McCoy, 47 N. Y. 21.

Where on the decease of an intestate, lands were sold on the petition of infant heirs, and the proceeds brought into court, and the infants subsequently died, the infants, it was held, owned the fund as realty, not personalty, and it descended as such. Valentine v. Wetherell, 31 Barb. 655.

Where real estate, owned by tenants in common of whom an infant is one, is sold under and in pursuance of a judgment in a partition suit instituted by others of the tenants in common, the portion of the proceeds belonging to the infant remains impressed with the character of real estate, and as such, does not pass under the infant's will. Horton v. McCoy, 47 N. Y. 21; Bowman v. Tallman, 27 How. 212.

Proceeds of sale of Infant's Estates under Order of the Supreme Court.—By the Revised States (1 R. S. 1st ed. p. 195, § 180), the proceeds of lands of infants sold pursuant to article 7, title 2, ch. i, part iii, of the Revised Statutes, shall be deemed real estate of the same nature as the property sold. As to the temporary disposition of such proceeds, see Rule 71 of the Supreme Court.

The above provisions of the statutes do not apply after the infant is of age, and the estate has come into his possession and under his control.

Forman v. Marsh, 11 N. Y. (1 Ker.) 544; reversing, 7 Barb. 215, *sub. nom.* Foreman v. Foreman; and see Stiles v. Stiles, 1 Lan. 90.

See, also, as to the further interpretation of this provision, *post*, ch. xxv.

Effect of a Power of Sale.—Where, according to the terms of a will, its provisions do not work an equitable conversion of the real into personal estate, a power of sale to executors does not affect the descent of realty; but it descends to heirs, subject to the exercise of the power.

As to when the land is considered as converted into personalty under the terms of a will, reference is made to a subsequent chapter relative to title by devise (*post* ch. xv).

See, also, Reed v. Underhill, 12 Barb. 113; Dominick v. Michael, 4 Sand. 374; Germond v. Jones, 2 Hill, 469; Allen v. De Witt, 3 Com. 276.

Expectant Estates.—Expectant estates are descendible in like manner as those in possession; and a limitation over, whether considered as a vested or contingent remainder or an executory devise, is descendible as an expectant estate.

R. S. 725, 1st ed. § 35; Savage v. Pike, 45 Barb. 464.

Pews.—These, as usufructuary interests in land, would pass by descent as incorporeal hereditaments.

McNabb v. Pond, 4 Bradf. 7. *Vide*, *ante*, more fully as to pews, p. 107.

Equitable Interest in a Contract to purchase Lands.—As to this, *vide post*, ch. xix, *contracts* to purchase, &c., real estate.

Rights of Entry.—As to rights of re-entry by heirs on default of rent by lessees, *vide*, *ante*, pp. 140, 148.

Law of 1846, ch. 274.

Lands in Trust.—By the Revised Statutes, real estate held in trust for any other person, if not devised by the person for whose use it is held, shall descend to his heirs, according to the provisions of the chapter on descents.

1 R. L. p. 74; 3 R. S. p. 43.

Partnership Lands.—*Vide ante*, p. 324 as to the descent of such lands; and Buckley v. Buckley, 11 Barb. 43.

Loss on an Insurance Policy on Buildings.—Upon the decease of a party who had insured buildings, the interest in the policy devolves upon his heirs at law, and, in case of loss, the damages accrue to them. It seems that the personal representatives might sustain an action for those beneficially interested as heirs, &c.

Wyman v. Wyman, 26 N. Y. 253; Parry v. Ashley, 3 Simm. 97; Carter v. Rocket, 8 Paige, 437; Lappin v. The Charter Oak Insurance Co. 58 Barb. 325.

Lands conveyed as Security for Money lost at Play.—The Revised Statutes provide that instruments affecting realty executed by a person for money lost at play, shall immediately enure to the benefit of the person who would be entitled thereto on the death of the grantor, and shall be taken and held to his use; and all grants, covenants and conveyances to the contrary are to be deemed void.

1 R. L. p. 153; 2 R. S. p. 925.

Advancements.—The Revised Statutes provide as follows as to advancements, in the chapter relative to descents:

§ 23. If any child of an *intestate* shall have been advanced by him, by settlement or portion of real or personal estate or of both of them, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal estate of such intestate, descendible to his heirs and to be distributed to his next of kin according to law; and if such advancement be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate.

1 R. L. p. 213.

§ 24. But if such advancements be not equal to such share, such child and his descendants shall be entitled to receive so much only of the personal estate, and to inherit so much only of the real estate of the intestate as

shall be sufficient to make all the shares of the children in such real and personal estate and advancement to be equal as near as can be estimated.

§ 25. The value of any real or personal estate so advanced shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise, such value shall be estimated according to the worth of the property when given.

§ 26. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement.

The Revised Statutes also provide, in ch. vi, art. iii of part ii, relative to the distribution of personal estates, that advancements of real or personal estate are to be charged against children of a deceased person in the distribution of the surplus of personalty. The provisions are not to apply where there shall be any real estate of an intestate to descend to his heirs.

2 R. S. 1st ed. p. 97.

The general course of decisions is to the effect that the maintenance and education of a child or the gift of money, without a view to a portion or settlement in life, is not deemed an advancement. An advancement of money or property to a child is *prima facie* an advancement, though it may be shown it was intended as a gift and not an advancement. If originally intended as a gift, it cannot subsequently be treated as an advancement. Mitchell v. Mitchell, 8 Ala. 414; Browne v. Burke, 22 Geo. 574; Hodgson v. Macy, 8 Ired. 21; Grattan v. Grattan, 18 Ill. 167; Lawrence v. Mitchell, 3 Jones (N. C.) 190; Sherwood v. Smith, 23 Con. 516; Hook v. Hook, 23 B. Mon. 526; Vail v. Vail, 10 Barb. 69; Sanford v. Sanford, 5 Lans. 486.

The provision in the statute regulating descents for bringing advancements made by an intestate into *hotch pot*, in the division of his real estate, does not apply where there is a will disposing of a part of the decedent's property either real or personal; it relates to a total intestacy only. Thompson v. Carmichael, 3 Sand. Ch. 120.

As to how the fact of an advancement is proved by evidence, and the *modus* by which a child is charged with advancements in the courts, *vide* Hicks v. Gildersleeve, 4 Abb. 1. As to what "Powers" are deemed "Advancements," *vide* p. 339.

Title III. Successive Changes of the Law in this State.

The *law of descents* in this State, until changed by statute, was the same as that of the *common law* of

England, and had its foundation in principles of feudal policy not now in accord with the spirit or theory of the institutions of this country. The common law of descents was the law of the Colony and State of New York down to the 12th of July, 1782, (6th Sess. ch. 2). The law was then altered by directing descent to be, in future, to lawful issue of equal degree in equal parts; and to those of unequal degree by representation, and in default of issue, to brothers and sisters or their descendants. But the act was repealed (as to subsequent descents), by the new act regulating title by descent, passed 23d February, 1786 (1 Greenl. 205; 1 Rev. Laws 1813, p. 52). The Revised Statutes, as will be seen hereafter, have further changed the common law.

Although the common law rules of descent were, in the main, abolished as early as 1782—as in the investigation of titles in this State the common law rules will have to be understood and sometimes applied—a brief abstract of them is given, particularly as in some respects they are still expressly retained. The force and effect of the English common law in this State generally has been considered in a previous chapter. (*Ante*, p. 25.)

By the common law must be understood the general unwritten principles and rules of the common law, exclusive of any amendments or changes therein which had been made by British statutes anterior to the Revolution or otherwise.

Levy v. McCartee, 6 Pet. 102.

Title IV. Common Law Rules of Descent.

The prominent common law principles of descent are as follows:

1st. *Descent to Issue of Person last seized.*—Inheritance descended lineally to the issue of the person who last died, *actually seized, in infinitum*, but it never *ascended.*

It was the *seizin* and not the *right to* seizin that made the *stirps* or stock of descent. A *constructive seizin* indeed for all legal purposes was equivalent to actual seizin. (Green v. Liter, 8 Cranch, 244, 249.) And a constructive seizin, resulting from proof of the legal title without actual seizin has been held sufficient to maintain a writ of right. Bradstreet v. Clarke, 12 Wend. 603.

A seizin might be either by the ancestor's own entry, or by the possession of the ancestor's lessee for years, or by being in receipt of rent from the lessee of the freehold.

By the common law a reversion or remainder in fee, expectant on a freehold estate, would not during the continuance of such freehold pass, by descent, from a person in whom the title thereto had vested by descent, as a new stock of inheritance, unless some act of ownership which the law regarded as equivalent to an actual seizin of a present estate of inheritance had been exercised by the owner over such expectant estate.

The heir, to be entitled to take, had to be the nearest male heir of the whole blood to the person who was last actually seized of the freehold, the seizin making the *stirps* or stock from which future inheritance was derived. Therefore, if the presumptive heir died before he acquired the requisite seizin so as to make him the new *stirps* or stock, his ancestor and not himself was the person last actually seized of the inheritance, and to him those claiming had to establish themselves as heirs.

The exceptions or qualifications to the above rule were, that if a person acquired land by purchase, he might transmit without having had actual seizin, or if, on an exchange of lands, he died before entry, or if a person were seized of an equitable interest, as in a contract to purchase, or if a tenant for years were possessed, it enured to the remainderman or reversioner; but not if the estate were under a freehold lease, or life lease, unless the party entered in his lifetime, or received rent after the expiration of the life estate.

If the heir had not become a *stirps* or stock of descent by reason of an intervening life estate, and the expectant estate had been purchased, then the claimant had to make himself heir to the first purchaser of the expectant estate, at the time when it came into possession. The heir of such purchaser would take the inheritance, though he were a stranger to all the *mesne* reversioners and remaindermen through whom the inheritance had devolved. Bates v. Shroeder, 13 Johns. 260; Vanderheyden v. Crandall, 2 Dem. 9.

The rule has been held to apply where the seizin was not complete until actual entry, and would not apply where the estate came by purchase. Jackson v. Johnson, 5 Cow. 74.

Seizin of one Tenant in Common, Guardian, &c.—The seizin of one coparcener or tenant in common, is considered the seizin of others. So also the possession of a guardian in soccage is the possession of his ward.

Assignment of Dower, Effect of.—Before assignment the widow has no estate in the lands of her husband. After assignment, the seizin of the heir is defeated *ab initio*, and the doweress is in of the seizin of her husband, as of

the time when that seizin was first acquired or held during the coverture, or to the time of marriage if he were seized before coverture. By assignment of dower the seizin of the heir is defeated *ab initio:* Lawrence v. Miller, 2 Com. 245; Lawrence v. Brown, 1 Seld. 5 N. Y. 394.

The Revised Statutes, however, have now altered the above rule, and include in the descent every legal and equitable *right and interest* to which the intestate was in any manner *entitled* at his decease, except leases for years, and estates for the life of any other person.

2d. *Preference of Males.*—The *male* was admitted before the *female;* the eldest male taking in preference to others of equal degree, and the females equally.

The lineal descendants *in infinitum* of any person deceased, represented their ancestor. Thus the child, grandchild, or great-grandchild, either male or female, of an oldest son, succeeded before the younger son or his representatives, and so on *in infinitum, per stirpes*, a child or children taking by representation the ancestor's share.

3d. *Descent to Collaterals.*—On failure of lineal descendants, or *issue* of the person last seized, the inheritance descended, subject to the above rules, to his *collateral relatives* being of the *blood of the first purchaser, i. e.*, he who first acquired the land by any means other than by descent.

To be of the *blood of the first ancestor* was to be either immediately descended from him, or to be descended from the same couple of common ancestors.

4th. *Nearest Collateral of Whole Blood.*—The *collateral heir* of the person last seized had to be the *next* collateral kinsman (either personally or *jure representationis*) of the *whole* blood.

Therefore the brother, being in the first degree, he and his descendants excluded the uncle and his issue who was only in the second, and in default of the uncle or his issue, the estate passed to the descendants of the great-grandfather, and so on *ad infinitum.* The degrees were reckoned by distance from the common ancestor (*the father of the propositus.*) On failure of the issue of the person last seized, therefore, the inheritance descended to the issue of his next *immediate ancestor.* The lineal ancestors, therefore, though themselves incapable of inheriting, became common stocks from which the next succession sprang.

In the mode of computing the degrees of consanguinity, the civil law begins with the intestate, and ascends from him to a common ancestor, and descends from that ancestor to the next heir, reckoning a degree for each person, as well in the ascending as descending lines. According to this

rule, the father of the intestate stands in the first degree, his brother in the second, and his brother's children in the third; or, the grandfather stands in the second degree, the uncle in the third, the cousins in the fourth, and so on in a series in genealogical order. In the *canon* law, which is also the rule of the *common law* in tracing title by descent, the common ancestor is the *terminus a quo*. The several degrees of kindred are deduced from him. By this method of computation, the brother of A is related to him in the first degree instead of being in the second, according to the civil law; for he is but one degree removed from the common ancestor.

The uncle is related to A in the second degree; for though the uncle be but one degree from the common ancestor, yet A is removed two degrees from the grandfather, who is the common ancestor. 2 Black. Comm. 206, 224, 504; 4 Kent. 413.

The descent between brothers was held *immediate*, and therefore title might be made by one brother or his representatives to or through another without mentioning their common ancestor. *Vide ante*, as to the descent of brothers, p. 566.

5th. *Preference of Males to Females as to Collateral Stocks.*—In collateral inheritances, the male stocks were preferred to the female (that is, kindred derived from the blood of the male ancestor, however remote, were admitted before those from the blood of the female, however near), unless where the lands in fact descended from a female.

Thus the relations on the father's side were admitted *in infinitum*, before those on the mother's side were admitted at all, and the relatives of the father's father before those of the father's mother, and so on.

Whenever, however, the land descended from the mother's side, the rule was reversed; and no relation by the father's side as such could be admitted to them, because he could not possibly be of the blood of the first purchaser. And so *e converso*, if the lands descended from the father's side, no relation of the mother as such could ever inherit.

When the side from which the land descended was unknown, the right of inheritance first ran up the father's side with a preference of the male stocks in every instance, and if no heirs are found there, it then only reverted to the mother's side.

Posthumous Children.—By the principles of the common law, also, a child in *ventre sa mere*, for all the beneficial purposes of heirship, is considered as absolutely born.

They would take intermediate profits between the decease of the ancestor and their birth. Basset v. Basset, 3 Atk. 203; Doe v. Clarke, 2 H. Blacks. 399.

TITLE V. THE N. Y. STATUTE OF 1786.

The English *common law* was the law of the land until statutes were passed modifying or repealing it.

Reference has been made above (p. 374), to the acts of July 12th, 1782, and February 23d, 1786. By the latter act (1 Greenl. 205), repealing the former, the law still required the heir to be the heir of the person dying *seized* (*i. e.*, the ancestor had not only to have the title but the possession), and estates descended to the lawful descendants of the person *seized*, in the direct line of lineal descent as tenants in common in equal parts, if of equal consanguinity.

The rule of the common law, requiring the heir to deduce his title from the person last actually seized, existed in New York under the statute of descents of 1786, down to the Revision of 1830.

The effect of the rule under the statute of 1786, as applied by the courts, was that where there was an adverse possession at the time of the death of the ancestor, or where the right of the ancestor was contingent or executory, the inheritance, instead of descending according to the principles of the statute of 1786, to all the heirs equally, passed, by the rules of the common law, to the eldest male heir. Thus, if the ancestor, although his title was certain, had lost the possession by force or fraud, or was entitled to the lands under a contingent remainder or executory devise and died before the determination of the preceding estate, his whole property might pass to his eldest son or the eldest male descendants of such son, in exclusion of all his other children. Jackson v. Hendricks, 3 John. Ca. 214; Bates v. Schroeder, 13 Johns. 360; Jackson v. Hilton, 16 Johns. 96; Reports of the Revisors, title "Descents."

An estate of dower or curtesy or other life estate suspended the descent, and the heir was not seized to make a new stock of descents. Also if the heir to the reversion died during an existing life estate, he was not held seized so as to make a stock of descent. Jackson v. Hilton, 16 Johns. 96; Bates v. Schroeder, *supra*.

One who had a vested remainder in fee simple, expectant on the determination of a freehold estate, had such a seizin in law during the continuance of the freehold estate where the estate was acquired by purchase, as would constitute him a *stirps* or stock of descent. Not so, however, if the estate had vested by descent. Vanderheyden and Wendell v. Crandall, 2 Denio, 24; 1 N. Y. (1 Com.) 491.

A right of entry, it was held, would pass by descent under the statute of 1786. 1 R. L. 52.

There was no disseizen in fact, except by the wrongful entry of a person claiming the freehold and an actual ouster or expulsion of the true owner, or by some act tantamount thereto, such as a common law conveyance with livery of seizin by a person actually seized of an estate of freehold in the premises, or some one lawfully in possession representing the freeholder, or by a common recovery in which there is a judgment for the freehold and an actual delivery of seizin by the execution or by levying a

fine, which is an acknowledgment of a feoffment of record. Varick v. Jackson, 2 Wend. 166; affirming, 7 Cow. 166.

Where a woman died seized, leaving a husband and sons and daughters, and the husband continued seized in curtesy, and the eldest son died intestate without issue, the second son, on the death of the father, entered as heir of the mother. It was held that the descent was suspended during the tenancy by the curtesy, and that the wife being last seized, was the stock of descent, and as she died before the statute of descents (*i. e.* in 1795,) the second son took the inheritance as sole heir to his mother. Jackson v. Gomez, 3 John. Ca. 214.

Wild Lands.—Ownership of wild lands was sufficient without seizin in fact. Jackson v. Howe, 14 Johns. 105; Bradstreet v. Clarke, 12 Wend. 602.

Rights of Reversions Alienable.—Although the owner in reversion might not be so seized as to make a stock of descent, he might alien his interest. Fowler v. Griffin, 3 Sand. 385; and see *ante*, ch. IX, p. 221.

Title of Officers and Soldiers in the Revolutionary War.—See act of April 5th, 1803, re-enacted April 8th, 1813. 1 R. L. 303.

As to the interpretation of this law, *vide* 3 Caines' Rep. 62; 2 Johns. R. 80; Jackson v. Howe, 14 John. R. 405.

By the above law of 1786, also, the preference of males over females was removed, and parents could inherit from children. The inheritance descended—

1. To the lawful issue standing in equal degrees as tenants in common in equal parts, however remote the common degree of consanguinity might be.

2. To the lawful issue in the direct line and their descendants in different degrees as tenants in common, according to the right of representation.

3. If there were no issue, to the father, unless the inheritance came from the mother. In case it came from the mother, then it descended as if the intestate had survived the father.

This would refer to inheritances that came by devise as well as by descent from a relative on the mother's side. Torry v. Shaw, 3 Edw. 356.

But would not apply to land bought with money by the intestate, no matter whence the money came. Champlin v. Baldwin, 5 Paige, 562.

And those of the half blood would take equally with those of the whole blood.

4. If there were no father or lawful issue, then to the brothers and sisters of the whole or half blood in equal parts, excluding those not of the blood of the ancestor from whom the intestate derived the inheritance.

5. To the children of brothers and sisters, taking by representation.

In all cases of descent beyond those, the common law, it was enacted, should govern. The Revised Statutes have made further changes of the common law, and in the general repealing act of 1828, repealed the law of 1786, except the second and seventh sections.

These sections (2d and 7th), turned estates tail into fees simple.

Under the law of 1786, nephews and nieces took *per stirpes* in all cases. Jackson v. Thurman, 6 Johns. 322.

Under the statute of descents, in force before the Revised Statutes, there was no representation among collateral heirs of a decedent beyond brothers' and sisters' children. Harman v. Osborn, 4 Paige, 336.

A grand-nephew could not take at all under the statute.

The said statute of descents extended to brothers and sisters equally of the half blood as those of the whole blood, but not to the grandchildren. Fuller v. Williams, 7 Cow. 53.

The words "*ex parte materna*," at *common law*, apply to a descendible estate when it is a question of inheritance among collaterals on the father's or mother's side. If the point be as to property acquired by purchase, and the party last seized die without issue or lineal descendant, the heirs on the father's side are preferred, and those *ex parte materna* do not take until the father's side are extinct. But where the estate comes to the person last seized by descent and no act has changed it, the descent goes to the blood of the first purchaser, so that if the property came by descent from or through the mother, it will descend *ex parte materna*. Torry v. Shaw, 3 Edw. Ch. 356.

Title VI. Descent Under the Revised Statutes.

The main provisions of the Revised Statutes of 1830, which abrogate the previous statutes relative to the descent of land, are to the effect as follows: They are taken from ch. 2d, of part 2d of the Rev. Stat. vol. I, p. 751 of the 1st ed., and are made applicable after the Revised Statutes take effect.

§ 1. *General Rule of Descents.*—The real estate of a person who shall die without devising the same, shall descend in manner following:

1. *To his Lineal Descendants.*
2. *To his Father.*
3. *To his Mother; and*

4. *To his Collateral Relatives*, subject to the rules thereafter prescribed.

§ 2. *Lineal Descendants in equal Degrees.*—If he leave descendants in the direct line of *lineal* descent, all of equal degree of consanguinity to him, they shall take the inheritance in equal parts, however remote from the intestate the common degree of consanguinity may be.

1 R. L. 52.

§ 3. *Descendants in different Degrees.*—If some of the intestate's children are living and some dead, the children take their share as if all the children were living, and the descendants of each deceased child take what would have been their respective parent's share.

1 R. L. 52, § 3.

§ 4. *Descendants of unequal Degrees.*—The above last rule applies where the descendants are of unequal degrees of consanguinity to the intestate.

§ 5. *When Father to Inherit.*—In case the intestate die without lawful descendants, leaving a father, then the father takes, unless the inheritance came to the intestate on the part of the mother and the mother be living. But if such mother be dead, the inheritance, descending on her part, goes to the father for life, and the reversion to the brothers and sisters of the intestate, and to their descendants according to the law of inheritance provided for collateral relatives; and if there be no such brothers or sisters or their descendants living, such inheritance descends to the father in fee.

1 R. L. 52; Laws of 1830, ch. 320, § 13.
The words "But if such mother be dead," to the end of the section, were not in the section as originally passed, but were added by law of April 20, 1830, ch. 3, 20, p. 384. *Vide* § 30, *infra*, as to the meaning of the words "come to the intestate on the part of the father or mother."

§ 6. *When Mother to Inherit for Life.*—If the intestate die without descendants, and leaving no father, or leav-

ing a father not entitled to take the inheritance under the last section, and leaving a mother and a brother or sister, or the descendant of a brother or sister, then the inheritance descends to the mother during life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided.

When to Mother in Fee.—If the intestate in such case leave no brother or sister, nor any descendants of any brother or sister, the inheritance descends to the mother in fee.

§ 7. *Collateral Relatives.*—If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified, to the *collateral* relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from the intestate the common degree of consanguinity may be.

1 R. L. 52.

§ 8. *Brothers and Sisters and their Descendants.*—If all the brothers and sisters of the intestate be living the inheritance shall descend to them. If any of them be living, and any be dead, then to the brothers and sisters and every of them who are living, and to the descendants of such as shall have died; the descendants to take the parent's share.

The inheritance between brothers is immediate, and not affected by the alienage of the father. Parish v. Ward, 28 Barb. 328.

(Under the law of 1783, and before the Revised Statutes, it is supposed a grand-nephew could not take at all.)

§ 9. *Lineal Descendants of Brother and Sister of unequal Degrees.*—The same law of inheritance prescribed in the last section, shall prevail as to the other direct lineal descendants of every brother and sister of the in-

testate, to the remotest degree, whenever such descendants are of unequal degrees.

§ 10. *Brothers and Sisters of Father and their Descendants.*—If there be no heir entitled to take under either of the preceding sections, the inheritance, if the same shall have come to the intestate on the part of his father, shall descend—

1. To the brothers and sisters of his father in equal shares, if all be living;

2. If any be living, and any shall have died, leaving issue, then to such brothers and sisters as shall be living, and to the descendants of such of the said brothers and sisters as shall have died;

3. If all such brothers and sisters shall have died, then to their descendants.

In all cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate.

Under the above sub. 1, brothers and sisters of the half blood would take equally with those of the whole blood. Beebee v. Griffing, 14 N. Y. 235.

By the 8th, 9th, and 10th sections above, the descent to collateral relatives of the decedent is placed upon the same footing as the descent to lineal heirs. That is, if all the heirs are in the same degree of consanguinity to the intestate, they take equally, however remote they may be from him; but if some of the class of relatives nearest to the decedent are dead, and leave issue, the survivors of the class take equally among themselves, and the representatives of those who are dead take the share which their ancestors of that class would be entitled to if living.

Pond v. Bergh, 10 Paige, 140.

§ 11. *Brothers and Sisters of Mother and their Descendants.*—If there be no brothers and sisters, or any of them, of the father of the intestate, and no descendants of

such brothers and sisters, then the inheritance shall descend to the brothers and sisters of the mother of the intestate, and to the descendants of such of the said brothers and sisters as shall have died; or if all shall have died, then to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the father.

§ 12. *Brothers and Sisters of Mother, when to be Preferred.*—When the inheritance shall have come through the mother, then the preceding sections are reversed, the mother's brothers and sisters and their descendants first taking.

1 R. L. 52, § 3.

§ 13. *Brothers and Sisters of Father and Mother, when to Inherit Equally.*—In cases where the inheritance has not come to the intestate on the part of either the father or mother, the inheritance shall descend to the brothers and sisters, both of the father and mother of the intestate, in equal shares, and to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate.

Where the intestate inherits land from a brother, the brothers and sisters, or their descendants, both of the father and mother of the intestate, take equally, irrespective of the source from which the brother received it. Hyatt v. Pugsley, 33 Barb. 373.

Lands Partitioned.—Lands allotted to an heir by voluntary partition and release, are deemed to come to him by inheritance from the ancestor, and not by purchase, and on his death such of his heirs as are not of the blood of the ancestor are excluded. Conkling v. Brown 8 Abb. N. S. 345.

§ 14. *Mother of Illegitimate.*—"In case of the death, without descendants, of an intestate who shall have been illegitimate, the inheritance shall descend to his mother; if she be dead, it shall descend to the relatives of the intestate on the part of the mother, as if the intestate had been legitimate."

This changes the principle of the common law, by which a person of illegitimate birth can neither inherit lands himself nor transmit them by

descent to any others except his own legitimate offspring, or persons otherwise capable of inheriting, claiming by virtue of inheritance from or through them.

This applies only to the relatives in case the mother is dead at the death of the intestate. If she be living and an alien, she could not take nor her relatives through her. The People v. Irvin, 21 Wend. 128; McLean v. Swanton, 13 N. Y. 535; St. John v. Northrup, 23 Barb. 26.

§ 15. *Relatives of Half Blood.*—Relatives of the half blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

See, as to the application of this section in certain cases, Valentine v. Wetherell, 31 Barb. 655. The terms "the blood of the ancestor" include his relations of the half blood. Beebee v. Griffing, 4 Kern. 235.

The meaning of this section is that the relatives of the half blood shall inherit precisely as if they were of the whole blood, in every case of descent provided for in the previous sections. In all cases of a newly purchased inheritance that can arise under § 8, all brothers and sisters, and their descendants of the half blood, would take as if relatives of the whole blood. Brown v. Burlingham, 5 Sand. 418.

Where lands descend to the brothers and sisters of the father, those of the half blood take equally with those of the whole blood. Beebee v. Griffing, 4 Ker. (14 N. Y.) 235.

§ 16. *Common Law, when to Prevail.*—In all cases not provided for by the preceding rules, the inheritance shall descend according to the course of the common law.

1 R. L. 52.

Under this provision, the *old* rule of the common law would seem to apply relative to the exclusion of the *half* blood, where the English common law still applies. Brown v. Burlingham, 5 Sand. 418.

§ 17. *Tenants in Common.*—Whenever there shall be but one person entitled to inherit according to the provisions of the chapter, he shall take and hold the inheritance solely; and whenever an inheritance or a share of an inheritance shall descend to several persons, under the provisions of the chapter, they shall take as *tenants in common*, in proportion to their respective rights.

§ 18. *Posthumous Children.*—Posthumous descendants and relatives inherit the same as others.

1 R. L. 54; *Vide* Mason v. Jones, 2 Barb. 229.

§ 19. *Illegitimates.*—Children and relatives who are illegitimate shall not be entitled to inherit under any of the provisions of the chapter.

Presumption of Legitimacy.—The law presumes every one born during wedlock legitimate, until the contrary is shown, even if born so short a time after wedlock as to have been necessarily begotten before. 2 R. S. 145, §§ 43, 44; Cross v. Cross, 3 Paige, 139; Montgomery v. Montgomery, 3 Barb. Ch. 132; Caujolle v. Ferrie, 26 Barb. 177; affirmed, 23 N. Y. 90.

Under the common law, illegitimate children cannot take by descent; for they have not, in contemplation of law, inheritable blood; nor could they transmit by descent, except to their own offspring.

By law of Apr. 18, 1855 (ch. 547), illegitimate children, in default of lawful issue, may inherit real and personal property from their mothers, as if legitimate; but nothing in the act is to affect any right or title to property *already* vested in the lawful heirs of any person theretofore deceased.

Ferrie v. The Pub. Admr. 3 Brad. 249.

§ 20. *Certain Estates not Affected.*—The estates of tenants by the curtesy or dower, and limitations of an estate by deed or will, shall not be affected by any of the provisions of the chapter.

1 R. L. 54.

§ 21. *Estates in Trust.*—Real estate held in trust for any other person, if not devised by the person for whose use it was held, shall descend to his heirs, according to the provisions of this chapter.

1 R. L. 74.

§ 22. *Alienism of Ancestor.*—No person capable of inheriting under the provisions of this chapter shall be precluded from such inheritance by reason of the alienism of any ancestor of such person.

At common law, no one could make title by descent through an alien ancestor (2 Hill, 67; 10 Wend. 9; 7 Id. 333); and if the heirs were alien, the land vested immediately in the State. 33 Barb. 360; Id. 371. The

above provision of the Revised Statutes of 1830 is purely prospective, and does not affect inheritances through persons dying before that time. 3 Sandf. 79; 7 Wend. 333. It applies only to the case of a deceased, not a living ancestor. 21 Wend. 128; 23 Barb. 25; 13 N. Y. 535. The word "ancestor" held to embrace collaterals. 1 Seld. 263. See also the recent statutes of 1868 and 1872, and the whole subject of title of and and through aliens, reviewed, *ante*, pp. 86 to 100.

§§ 23 to 26. *Advancements.*—These sections provide that advancements, by way of settlement or portion, to a child, shall be charged against his descendible portion, as of the value at the time of the advancement.

They are based upon Laws of 1787, and 1 R. L. of 1813, 313. They are given in full, *ante*, p. 372. An advancement will cut off the heirs of the party advanced from their share in the other real estate, if the advancement would equal the party's distributive share. Parkes v. McClure, 36 How. Pr. 301. See, also, "Powers," *ante*, p. 339.

§ 28. *The words "Living," &c., Construed.*—Whenever in the preceding sections any person is described as *living*, it shall be understood that he was living at the time of the death of the *intestate* from whom the descent came: and whenever any person is described as having died, it shall be understood that he died before such *intestate*.

§ 29. *Other Expressions.*—"The expressions used in the chapter, 'where the estate shall have come to the intestate on the part of the father,' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by devise, gift, or descent, from the parent referred to, or from any relative of the blood of such parent."

This was different from the common law which traced back the title to the purchaser, in order to decide from which side the estate was derived. 33 Barb. 373. It is held that the insertion of a small pecuniary nominal consideration in a deed of *gift* as "one dollar," does not change the nature of the gift into a purchase. Morris v. Ward, 36 N. Y. 587.

Law of 1850.—By Law of 1860, ch. 90 (repealed), the following provisions were enacted:

§ 10. At the decease of husband or wife, leaving no minor child or children, the survivor shall hold, possess, and enjoy a life estate in one-third of all the real estate of which the husband or wife died seized.

§ 11. At the decease of the husband or wife *intestate*, leaving minor child or children, the survivor shall hold forever and enjoy all the real estate of which the husband or wife died seized, and all the rents, issues,

and profits thereof, during the minority of the youngest child, and one-third thereof during his or her natural life.

These sections were repealed by Law of 1862, ch. 172, but they are given here as they may affect interests vesting when they were in force.

Descent of Lands Mortgaged.—It is further provided (contrary to the general principle), that whenever any real estate, subject to a mortgage executed by the ancestor or testator, shall descend to the heirs, or pass to a devisee, the mortgage shall be satisfied out of such estate, without resorting to the executor or administrator, unless there be an express direction in the will to the contrary.

This provision would apply as well to a mortgage that had been assumed, although not executed by the testator. Halsey v. Reid, 9 Paige, 446; approved, 12 N. Y. 74.

An equitable lien for the purchase money is not a mortgage within this statute. Wright v. Holbrook, 32 N. Y. 587; affirming, Supreme Court, 18 Abb. Pr. 302. And the heir or devisee has the right to have the same paid out of the personal estate of the decedent. *Ib.*

See further, as to the above provision charging the payment of a mortgage on the land descended. Johnson v. Corbett, 11 Paige, 265.

Descent of Lands subject to a Power.—As to this, *vide, ante*, pp. 269, 355.

Descent Cast.—By the revised statutes it is provided as follows: "The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property."

2 R. S. 1st ed. p. 295; also "Code," § 87.

Descent where a Child is Born after a Will made.—By Law of Feb. 19, 1869, ch. 22, section 49, of Title I of ch. vi, of Part 2 of the Revised Statutes, is amended so as to read as follows:

"§ 49. Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after born, unprovided for by any settlement, and neither provided for nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would

have descended or been distributed to such child if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will."

See further as to this section, *post*, ch.

Devise.—The heir takes as such rather than as devisee.

11 Barb. 43.

Title VII. Liability of Land Descended to Pay Debts.

The general rule of the English and American law is, that the *personal estate* is the primary fund for the discharge of the debts, and is to be first exhausted.

The order of marshalling assets in equity towards payment of debts is to apply them as follows:

1. The general personal estate.
2. Estates specially devised for the payment of debts.
3. Estates descended.
4. Estates devised, though generally charged with the payment of debts.

It requires express words, or the manifest intent of the testator, to disturb this order, or express statute.

The mere charge by will of a secondary fund with the payment of debts, does not exempt the primary fund, unless it plainly appears to have been the testator's intention to exonerate it for the benefit of some legatee. Lowndes on Legacies, 329, and *vide* 4 Kent, 447, and cases cited.

Liability of Land to Contract Debts.—By the common law, land descended or devised was not liable to simple contract debts of the ancestor or testator, nor was the heir bound even by a specialty, unless he were expressly named.

4 Kent, p. 446.

But by the law of 1786 (1 Rev. Laws, 316, § 1), and Vol. II, p. 453, §§ 32, 33, of the Revised Statutes, 1st ed., the heirs of intestates and the heirs and devisees of a

testator are rendered liable for the debt of the ancestor arising by simple *contract*, as well as by specialty, and whether specially named or not, to the extent of the estate interest and rights in the real estate devised or which shall have descended, on condition that the personal estate of the ancestor be situated out of the State, or shall be insufficient, and shall have been previously exhausted, through proceedings before the Surrogate's Court and at law, both against the representatives, legatees, and next of kin.

Laws of 1859, ch. 110. When lands are exonerated after surrogate's sales, *vide post*, ch. xviii.

This condition does not apply, when the debt is, by the will of the ancestor, charged *expressly* and *exclusively* upon the real estate descended to the heirs, or directed to be paid out of the real estate descended, before resorting to the personal estate. (§ 35.)

Youngs v. Youngs, 45 N. Y. 254.

Debts as above, due by the heirs or devisees, have to be paid in a certain order of preference. The statutes also provide for proceedings against said heirs and devisees, and the defences that may be set up. 3 Rev. Stat. p. 750, 5th ed., with the amending statutes.

The debts are not a lien; the heir takes an absolute title, subject to be charged with the debts, on proper steps being taken. Wilson v. Wilson, 13 Barb. R. 252. See Van Sycle v. Richardson, 3 Ill. 171.

Lien of Judgment on Lands Descended.—Every final decree rendered against the heirs shall have preference as a lien on the real estate descended, over any judgment, &c., obtained against such heir personally, for any debt or demand in his own right. (§ 48.)

Morris v. Mowatt, 2 Paige, 586.

Alienation of Land.—If the heir has aliened the descended land before suit, he shall be personally liable for the value of the estate so aliened; but no lands, &c. aliened in *good faith* by any heir before any suit commenced against him shall be liable to execution, or affected by a decree against such heir.

Ib. §§ 49, 51; 1 R. L. 317.

In suits brought against joint heirs or devisees, the

amount recovered is to be apportioned among them respectively according to their respective interests. (§ 52.)

Wambaugh v. Gates, 1 How. App. Ca. 247.

Devisees, Liability of.—Devisees are made liable to the extent of the lands devised to them respectively, when it is ascertained that the personal estate and the real estate descended to the heirs were insufficient. Where, however, the debt is charged expressly and exclusively upon the real estate devised, or made exclusively payable by the devisee of the land devised, the devisee is liable before resorting to the personal estate or any other real property. (§§ 56 to 58.)

Alienation by Devisee.—Devisees are made liable to the same extent as heirs, notwithstanding they may have aliened the real estate devised before suit brought. But no *real estate* aliened in *good faith* by any devisee before the commencement of a suit against him, shall be liable to execution upon, or in any manner affected by, a decree against such devisee. (§ 61.)

1 R. L. 317.

The above provisions are made applicable to the case of children born after the making of a will, and entitled to take as heirs under statutory provisions, and also to witnesses to a will entitled to recover against portions of real or personal estate from legatees or devisees. (§§ 61 to 66.)

Heirs to be Prosecuted Jointly.—By law of May 16, 1837, ch. 460, the heirs of any person who may be liable to any creditor of such person in consequence of lands having descended to them, shall be prosecuted jointly in a court of law or equity, and not separately, for any such liability.

Where land is devised to the children and heirs at law of the testator, after the payment of debts, if it does not appear that the devisees have taken possession of the real estate, or have accepted the devise to them, or promised to pay, or have paid, any portion of a debt owing by the testator, or sold the land, or any part of it, as heirs at law of the testator, they are not personally liable to pay the debt.

An action brought to reach real estate which a testator devised to the defendants, and to have the same sold, for the purpose of satisfying a debt which the testator owed to the plaintiff, is an action *in rem* for equitable relief, of which the Supreme Court had not jurisdiction previous to the code, and may be commenced at any time within ten years after the cause of action accrued. Wood v. Wood, 26 Barb. 356.

A final decree in a suit against heirs and devisees, to obtain satisfaction of the debts due from the estate of the testator or intestate, has a prefer-

ence as a lien on the estate descended or devised, over any judgment or decree obtained against the heir or devisee for his personal debt.

And a sale under an execution, issued upon such decree, will overreach not only all judgments and decrees which have been recovered against such heir or devisee, but also all mortgages and alienations of the estate, subsequent to the commencement of the suit. Whether a sale under execution issued on the decree is necessary to give the purchaser a legal title, sufficient to protect him at law against a sale under a previous judgment against the heir or devisee? *Quære.* Morris v. Mowatt, 2 Pai. 586.

To entitle a creditor of a deceased debtor to a legal preference over a judgment creditor of the heir at law of the debtor, he must himself proceed to a judgment against the heir at law, for the debt due from the latter in respect to the lands descended from the deceased debtor; or he must apply to the surrogate for a sale of the land, to satisfy the debts of the decedent which the personal estate is insufficient to pay. Pierce v. Alsop, 3 Barb. Ch. 184.

Actions cannot be brought against heirs or devisees to charge them with the debts of the testator or intestate, until the expiration of three years from the time of granting letters testamentary or of administration on his estate. 2 R. S. 1st ed. p. 109.

A decree for deficiency cannot be obtained against them in a foreclosure suit. Leonard v. Morris, 9 Paige, 90; Roe v. Swezey, 10 Barb. 247.

See further as to the time when such suits are to be brought. 2 R. S. 1st ed. p. 109, §§ 53, 54.

A suit at law against the prior parties is an essential preliminary to a right to sue the devisee's heirs. The heirs are to be sued jointly in equity. Stuart v. Kissam, 11 Barb. 271.

An heir takes an absolute title to the land descended, subject only to be defeated or charged with the debts of the testator or intestate, either by the representatives or the creditors taking the steps authorized by statute; but the debts due by a decedent, or advances made for the estate, are not a lien or charge upon the land in the possession of the heir, in law or equity. Wilson v. Wilson, 13 Barb. 252.

Under the provisions of the Revised Statutes, heirs or devisees who have not aliened any part of the property descended or devised to them, cannot be charged personally for the debts of the testator or intestate; nor are they personally liable for contribution for the payment of such debts. The judgment or decree can only direct a satisfaction of their portion of the debt out of the estate so descended or devised. Schermerhorn v. Barhydt, 9 Paige, 28.

This case fully reviews all the proceedings against heirs and devisees, and the provisions of the revised statutes, and the laws prior to them, affecting heirs and devisees. See also Johnson v. Corbett, 11 Paige, 265; Wilkes v. Harper, 1 Com. 586; Mersereau v. Ryers, 3 N. Y. (3 Com.) 261; Roe v. Swezey, 10 Barb. 247; Stuart v. Kissam, 11 Barb. 271; Sanford v. Granger, 12 Barb. 392; Loomis v. Tifts, 16 Barb. 541; Roosevelt v. Carpenter, 28 Barb. 426; Morris v. Mowatt, 2 Pa. 586; Wood v. Wood, 26 Barb. 256; Kellogg v. Olmstead, 10 How. Pr. 487; Herkimer v. Rice, 27 N. Y. 163; Hyde v. Tanner, 1 Barb. 75; Lane v. Doty, 4 Barb. 539; Waring v. Waring, 3 Abb. 246; Ferguson v. Broome, 1 Brad. 10.

These cases give the manner of procedure in obtaining judgments against heirs and devisees, and the effect and lien of such judgments. See also, *post*, ch. xviii, as to suits against heirs and devisees, to charge them with debts, when to be brought and when stayed, when lands are sold by order of surrogate to pay debts.

CHAPTER XV.

TITLE BY DEVISE.

A *Will* is defined as a disposition of real or personal property, to take effect after the death of the testator.

Under the earlier periods of the English common law, lands held in tenure were not devisable, except through a devise of the use; subsequent statutes, however, in time gave the right to dispose of every estate in real property by will.

The form, construction, and efficacy of devises of real estate involve numerous and important principles; and so intricate and extensive is the law on the subject, as to render impossible in this volume more than a general reference to it.

The English law of devises was incorporated into our colonial jurisprudence; and the statutory regulations on the subject, in this State, are framed upon the English statutes of 32 Hen. VIII, and 29 Charles II.

TITLE I. THOSE CAPABLE OF MAKING A WILL.

By the earlier statutes of New York (see an act to reduce the laws concerning wills into one, statute 3d

March, 1787, 1 Greenl. 386; the act of 20th Feb. 1801, 1 Webster, 178; 1 R. L. of 1813, p. 364,) substantially re-enacted in the revised statutes, 3 Rev. Stat. p. 138), *all* persons except *idiots*, persons of *unsound mind*, (*married women*) and *infants*, may devise their real estate by a last will and testament, duly executed according to the statutes.

Art. I, Title I, ch. vi, Part 2d, 1 R. L. 364.

By act of Ap. 25, 1867, ch. 782, § 3, the words "married women" are striken out of the excepting clause, and also the words "not being a married woman," out of § 21, as to wills of personal property; and such women may become executrixes, administratrixes, and guardians, and give bonds thereon, as if sole.

The statute of New York of 1787 (1 Greenl. 385), gave the power of devise to persons having a sole estate or interest in fee, or of any estate of inheritance, or to persons *seized* as tenants in common or coparceners of estates of inheritance in lands, rents, and other hereditaments in possession, remainder, or reversion, &c., also estates, *pur auter vie*, &c. The subsequent provisions of the statute law (1 Web. 178; 1 R. L. p. 304) dropped the word *seized*, and gave the power of devising to all persons *having* estates of inheritance either in severalty or common (except bodies politic or corporate). The above statutes were incorporated in the Rev. Laws of 1813, and were superseded by the provisions of the Rev. Stat. of 1830.

Under the above statutes, a devise of a right of entry was good, notwithstanding an actual disseizin or adverse possession. Such right would also pass by descent, or be bound by a judgment. Varick v. Bacon, 7 Cow. 238; affi'd, 2 Wend. 166.

Married Women.—A married woman, by the common law, was considered to be incapable of making a valid will of lands, even with the consent of the husband, and without any statutory prohibition to that effect.

Notwithstanding, however, the prohibition against the making of wills of real estate by married women, of the common law, and as contained in the English statutes, which were re-enacted in this State, a married woman was competent to appoint, by a will, the uses of land, where a power for that purpose had been reserved by or given to her by some conveyance competent to raise and to direct the execution of such uses; or where land had been conveyed in trust for her benefit, with a like power of appointment.

Her devise by way of appointment was held as not an

infringement of the law or the statutes, because her action was supposed to be through a delegation of a power, and she was a mere donee of a use, acting, in other words, as the instrument or attorney of another. When the power was executed, the person in whose favor the appointment was made became invested with the use, and instantly gained the legal estate by force of the Statute of Uses.

A married woman in this country could not, until the passage of the act respecting married women in 1849 (*ante*, p. 79), make a will of her real estate, except by virtue of such a power, or by way of appointing a use; but where she was clothed with such power, her coverture formed no impediment to the transaction. It was also a principle of the law, that a formal conveyance to uses or to trustees upon trusts to be executed by virtue of a power, was unnecessary; and marriage articles, and ante-nuptial contracts, in which the husband gave his intended wife power to dispose of her real estate, might be enforced in the same manner as if there was a formal conveyance.

The Revised Statutes, it will be remembered, specially exclude the exercise of a power by a married woman during infancy. *Ante*, *p.* 348.

If the appointment authorized was not made, then the estate given passed to the parties otherwise entitled to it by law.

As to the above principles, *vide* Osgood v. Breed, 12 Mass. 525; Peacock v. Monk, 2 Ves. Sen. 190, 191; Fettiplace v. Gorges, 1 Ves. Jun. 46; Wagstaff v. Smith, 9 *Id.* 520; 1 Sugden on Powers, 210, 211; Jaques v. M. E. Church, 17 Johns. 548; Stewart v. Stewart, 7 Johns. Ch. 229; Thomlinson v. Dighton, 1 P. Williams, 149; Bradish v. Gibb, 3 J. C. R. 523; Wright v. Cadagan, 6 Brown's P. C. 156; Wadhams v. Am. Miss. Co., 12 N. Y. 2 Ker. 415; reversing, 10 Barb. 597; Van Wert v. Benedict, 1 Brad. 114; Brown v. Torrey, 24 Barb. 283; and *vide ante*, pp. 335, 336, "Powers."

The above principles of law would not apply to wills of personal property, for the statute of uses had no reference to such property.

Power of Married Women to Devise Under the Acts of 1848, 1849.—As to married women's powers under the acts of 1848–49, to dispose of their real estate as if sole, *vide ante*, pp. 82, 83, where the constitutionality of those acts, as affecting real estate acquired before those acts went into effect, is reviewed.

It is held that married women, by the Married Woman's Act of 1849 (*ante*, p. 79), are competent to devise and bequeath real and personal property in the same manner and with like effect as if they were unmarried.

It has been held that the married woman's act of 1848 did not give them power to make a will. Wadhams v. American, &c. Missionary Society, 12 N. Y. 415; reversing, 10 Barb. 597; Waters v. Cullen, 2 Brad. 354.

Joint Tenants.—A joint tenant has not an interest which is devisable.

4 Kent, 606.

Persons of Unsound Mind.—The legal presumption at common law and under our statutes is, that every man is *compos mentis.* As to what weakness or unsoundness of mind is necessary in order to disqualify a person from making a will, the decision in each particular case would be so dependent upon the facts involved in it that it would be impossible for courts to lay down any general rule or guiding principle. To avoid a will on the ground of the mental disability of the testator, however, it is not enough that the testator be of weak understanding, or may, at some former period, have been of feeble intellect or laboring under some disability; but the question is, had he capacity to make a will at the time of the execution of the instrument? Until the contrary appears, sanity is presumed; and where an act is sought to be avoided on the ground of mental disability, the burden of proof is on the party who alleges the disability. It is also held, that mere erroneous, foolish, or even absurd opinions on certain subjects do not indicate insanity when the person entertaining them still continues in the possession of his faculties and discreetly conducts his business affairs. The following are some of the leading cases on the above subject:

Thompson v. Thompson, 21 Barb. 107; Newhouse v. Godwin, 17 Barb. 236; Alston v. Jones, *Ib.* 276; Delafield v. Parish, 25 N. Y. 9; disapproving, Stewart v. Lispenard, *infra;* Thompson v. Quimby, 2 Bradf. 261; Brown v. Torrey, 24 Barb. 583; Watson v. Donnelly, 28 *Id.* 653; Austin v. Graham, 29 Eng. Law and Eq. 38; Van Alst v. Hunter, 5 Johns. Ch. 148; Gombault v. Pub. Ad. 4 Brad. 226; Stewart's Ex'rs v. Lispenard, 26 Wend. 255; Alston v. Jones, 17 Barb. 276; Clark v. Fisher, 1 Pai. 171. See, also, Jarman on Wills, vol. I, ch. 13; Blanchard v. Nestle, 3 Den. 37.

A lunatic, under commission, if temporarily sane, may make a valid will. *In re* Burr, 2 Barb. Ch. 208; Eau v. Snyder, 46 Barb. 230.

Age or failure of memory will not incapacitate a person from making a will. Reynolds v. Root, 62 Barb. 250.

The term "unsound mind" is interpreted to be of like significance as "*non compos mentis.*" Blanchard v. Nestle, 3 Den. 37; Stanton v. Weatherwax, 16 Barb. 259.

A permanent "delusion" constitutes unsoundness if it impairs the testator's judgment and understanding in relation to subjects connected with the will. *Ib.*

Wills may also be rendered invalid by the exercise of undue influence or duress, or by importunity so exercised over the testator as to impair the freedom of his will and action, especially if exercised by parties who stand in a confidential and intimate relation with him. Some of the prominent cases on the subject in our courts are the following:

Tunison v. Tunison, 4 Bradf. 138; Waterman v. Whitney, 1 Ker. 157; O'Neil v. Murray, 4 Brad. 311; Coffin v. Coffin, 23 N. Y. 9. See, also, Jarman on Wills, 4th ed. 4; Newhouse v. Godwin, 17 Barb. 236; Reynolds v. Root, 62 Barb. 250.

The mere fact that the mind of a testator has been influenced by the suggestions, arguments or persuasion of the person principally benefited, however indecorous, indelicate or improper they may be, will not, ordinarily, in the absence of fraud, vitiate a will where a testator is in possession of his faculties. Still, it *must be the will of the testator*, however induced. If it be the will of another, to which the testator assented from mere habit, and that habit produced by prostration of both body and mind, it cannot be considered his will, and ought not to be sustained. Newhouse v. Godwin, 17 Barb. 236; Tunison v. Tunison, 4 Brad. 138; O'Neil v. Murray, 4 *Ib.* 311; Blanchard v. Nestle, 3 Den. 37.

Title II. Devises, to Whom Made.

§ 3. A devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise.

2 R. S. p. 57, 1st ed. § 3.

Illegitimate children would not take under a devise generally to children, unless such intent were manifested. Collins v. Hoxie, 9 Paige, 81; Gardner v. Heyer, 2 Paige, 11.

Aliens.—At common law, an alien could take by devise, except as against the State. Wadsworth v. Wadsworth, 12 N. Y. 376. Devises to aliens were made void by statute, and the estate devised passes to the heirs of the testator. 3 Rev. Stat. p. 139. The law on this subject has been extensively modified. *Vide ante*, title "Aliens," pp. 86, 100.

Heirs of One Living.—A general devise to the heirs of a person who is then living, but is not referred to as living, is void; but a devise to the heirs of one who is stated in the will to be living, is a valid disposition in

favor of those who would be his heirs, if he should then die. Heard v. Horton, 1 Den. 165.

But a devise of a *future* estate to the "heirs," in a strict sense, of a living person, is a valid limitation, and the rule construing the word "heirs," used in a will in respect to a living person, as merely *designatio personarum*, is inapplicable to the devise of a future estate. In such case the word has its strict legal meaning, and carries the inheritance, unless a different intention appears clearly from the context. Campbell v. Rawden, 18 N. Y. 410; reversing, 19 Barb. 494.

Where the word "heirs" is used in a will, and there are no other words to control the presumption, the legal inference is, that it designates the persons whom the law appoints to succeed to the inheritance, in cases of intestacy.

Citizens.—By the Rev. Stat. every citizen of the United States is capable of holding lands within this State, and of taking the same by descent, devise or purchase. 1 R. S. 1st ed. p. 718. As to citizens, *vide ante*, p. 49.

Devise to a Class.—A devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, unless a contrary intent can be inferred from some particular language of the will, or from such extrinsic facts as may be entitled to consideration in construing its provisions.

To a Government.—In Levy v. Levy, it was held that a devise to the government of the United States, or to a State government, was void, so far as that such governments were incompetent to act as trustees, they being created for certain determinate political purposes, and having no other functions or existence. 33 N. Y. 97; reversing, 40 Barb. 585.

In re Fox (63 Barb. 157), it is held, that neither under the common law nor under our statutes regulating devises to corporations, can a devise of lands to the United States be held valid, nor can they act as trustee. Affirmed, 1873.

In the case of Burrill v. Boardman, 43 N. Y. 254, cited at length, *ante*, p. 304, it was stated to be a doubtful question whether a devise and bequest of residuary estate to the United States, with precatory words creating a trust, would be valid. It is suggested, in view of the above and other decisions bearing on the subject, that a bequest of personalty or of the proceeds of realty to the government or to a State without any words of qualification or trust, would be valid, although a direct devise of real estate might be invalid. *Vide post*, more fully as to this subject, "Devises to Corporations," Title X.

Infants, Femes-coverts, &c.—Infants, *femes coverts*, and persons of non sane memory and aliens may be devisees, for the devise is without consideration and requires no action on their part.

Witnesses.—By the Revised Statutes, beneficial devises, legacies, and any interest or appointment to a witness to a will, if the will cannot be proved without the testimony of such witness, are void so far as the witness is concerned, or those claiming under him; but he is a competent witness, and may be made to testify. If he would be entitled to any share in the estate, however, that will be saved to him. 1 R. L. 367; 2 R. S. p. 66, 1st ed. §§ 50, 51; Burrit v. Silliman, 3 Ker. 93.

Under the statutes in force before the Revised Statutes, a devise, since March 1, 1753, to a witness, was absolutely void, except charges to pay debts to them. Jackson v. Denniston, 4 Johns. 311; 1 Green. 386.

The above statute would not apply to legacies or devises in trust. McDonough v. Loughlin, 20 Barb. 238.

Nor to a non-resident witness whose testimony is unnecessary, nor to one of three who is not examined. Caw v. Robertson, 5 N. Y. 128; reversing, 3 Barb. 410; Cornwell v. Wooley, 47 Barb. 327.

Devises to Corporations in Trust.—As to these, *vide ante*, ch. x, pp. 305, and *post* title x.

Devises to Corporations.—As to these, *vide post*, title x.

Devises for Charitable Uses.—As to these, *vide ante*, ch. x, title viii.

Title III. Nature of the Estate Devised.

The Revised Statutes provided that "*every estate* and *interest* in real property descendible to heirs, may be devised."

A mere *expectancy*, or a naked *possibility* of interest was considered not devisable, or even assignable, before the Revised Statutes, although all possibilities coupled with an interest (as the interest under a contingent remainder, or executory devise, or future or springing use), were devisable.

But not the mere possibility of an expectant heir, nor an interest in an estate settled in the alternative on a contingency of survivorship, the person to take not being ascertained. The testator had to have a legal or equitable title at the time of making the will, or nothing would pass. A title subsequently acquired was of no avail. 3 Johns. Ch. 307; *Id.* 312. *Vide* the cases of Jackson v. Waldron, affirming, Pelletreau v. Jackson, 13 Wend. 78; 11 *Id.* 110, as to the transfer of expectant estates or possible interests before the Revised Statutes. The case of Miller v. Emans, 19 N. Y. p. 384, however, seems in a measure to have modified or overruled the decisions in those cases, and to hold that a future possible contingent interest might pass, even before the Revised Statutes, at least by release. See also the case of Lintner v. Snyder, 15 Barb. 621. And see *ante* p. 221, other cases cited.

It has been held that a devise of a right of entry to land held adversely, would pass the right. Jackson v. Varick, 7 Cow. R. 238; 2 Wend. 166.

The interest of the tenant in a lease in fee is devisable. Vandersee v. Vandersee, 30 Barb. 331; and see *ante* p. 139.

The statute of 1787, *ante*, p. 394, gave the power of devise to persons in severalty and to those *seized* in common of estates of inheritance in lands, rents and other hereditaments in possession, remainder, or reversion. The subsequent provisions of statute dropped the word "seized," and gave the power of devising to persons having estates of inheritance, &c., either in severalty or in common. *Vide ante*, p. 394.

By the Revised Statutes (vol. III, p. 13, § 35), *expectant* estates are made descendible, devisable, and alienable in the same manner as estates in possession.

A possibility coupled with an interest is devisable, if the person in whom the interest is to vest can be ascertained; and the Revised Statutes in terms declare that every interest which is descendible may be devised, and this embraces all contingent interests.

Lawrence v. Bayard, 7 Paige, 70; Freeborn v. Wagner, 49 Barb. 43; 4 Keyes, 27; Striker v. Mott, 28 N. Y. 82.

Lands.—The term "lands," in a will, is synonymous with real estate and, unless restrained by something else, embraces future and contingent, as well as present freehold estates in land, also rent charges. Pond v. Bergh, 10 Paige, 142; Hunter v. Hunter, 17 Barb. 84; Main v. Green, 32 Barb. 448.

The Word "Estate."—"Estate," used in a devise, refers to the testator's title, and indicates an intent to give all the estate or interest in the property which the testator can dispose of by will, unless by express terms or by necessary implication it appear that it was used as descriptive of, or referring to the *corpus* of the property; but it may be controlled by other portions of the will. Terry v. Wiggins, 47 N. Y. 512.

Definition of "Real Estate," and "Lands" by the Revised Statutes.—The terms "real estate" and "lands," as used in chap. I, title 5, part II, shall be construed as coextensive in meaning with "lands, tenements and hereditaments." 1 R. S. 1st ed. p. 750, § 10.

Effect of the Revised Statutes on Vested Interests.—By § 11 none of the provisions of the chapter, except those converting formal trusts into legal estates, shall be construed as altering or impairing any vested estate, interest or right; or as altering or affecting the construction of any deed, will, or other instrument which shall have taken effect at any time before chap. I shall be in force as a law.

Conversion by Virtue of a Power.—A conversion of the nature or quality of the subject devised is often operated through a power of sale conferred by the testator upon his executors or trustess.

Lands which have been agreed or directed to be sold, are considered under the rules of equity as *money*. *Money* which has been agreed or directed to be laid out

in the purchase of *land*, is considered as land, and therefore, in equity, money directed to be laid out in land, will not pass by will, unless devised as if the property were land; but land directed to be converted into money, will pass by a will competent to pass money. Where a direction to invest the proceeds of land in land fails from illegality, the fund is still regarded as land, and descends. As a general rule to cause a conversion from real estate to personal, the will should decisively and definitely fix upon the land the quality of money, and leave no option.

A devisor may give to his devisee either the land or the price of the land at his pleasure; and the devisee must receive it in the quality in which it is given, and cannot intercept the purposes of the testator. And if the general scope of a will renders it evident that sales of the whole real estate were intended; this would amount to a conversion of the same into personalty, to all intents; and the beneficiaries would so take the property.

Meakings v. Cromwell, 1 Seld. 136; Horton v. McCoy, 47 N. Y. 21; Arnold v. Gilbert, 5 Barb. 190; White v. Howard, 52 Barb. 296; affirmed, 46 N. Y. 144; Marsh v. Wheeler, 2 Edw. 156; Bunce v. Vandergrift, 8 Paige, 37; Johnson v. Bennett, 39 Barb. 237. See further, as to converted property, *ante*, p. 368.

Where, however, in the case of a power to sell lands to executors, the exercise of the power is not *obligatory*, but *discretionary, the power does not effect a conversion of the real into personal estate.* A mere power to sell, therefore, without a direction so to do, will not operate a change in the subject matter of the devise, unless the intent of the testator is manifest to the contrary.

Fowler v. Depau, 26 Barb. 224; Dominick v. Michael, 4 Sand. 434; White v. Howard, 46 N. Y. 144; Harris v. Clark, 3 Seld. 237; Lovett v. Lovett, 44 Barb. 560; Phelps v. Phelps, 28 Barb. 121; in re Fox, 63 Barb. 158; McCarthy v. Deming, 4 Lans. 440.

The equitable conversion theoretically takes place at the time prescribed in the will for it to be made, or, if no time is fixed, from the death of the testator.

Chamberlain v. Chamberlain, 43 N. Y. 424; Irish v. Huested, 39 Barb. 411; Arnold v. Gilbert, 5 Barb. 190; in re Lee, 3 Brad. 186.

If the testator authorize his executors to sell real estate, and it is ap-

parent, from the general provisions of the will, that he intended such estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not in terms imperstive. Dodge v. Pond, 23 N. Y. 69.

An absolute direction to sell, but at the discretion of the executors as to time, effects a conversion. Martin v. Sherman, 2 Sand. Ch. 341; Harris v. Clark, 3 Seld. 242.

Where the power of sale is restricted to a sale to pay debts, or to raise moneys for a certain purpose; and then a distribution is to be made of the "avails" of the estate, the power would not work an equitable conversion, but the lands descend to heirs, subject to the exercise of the power. Allen v. Dewitt, 3 Com. (N. Y.) 276.

A devise to a wife for life, in lieu of dower, of a part of rents of real estate, so long as it should remain unsold, will not operate a conversion. Arnold v. Gilbert, 3 Sand. Ch. 352.

Where land is directed to be sold for a specified purpose, and not absolutely, the estate, in equity, is considered converted *pro tanto*. In case the purpose fail in whole or part, the estate descends if it fail entirely; or if the part is not converted, it descends as money and not as land to the heir, if the purposes of the will require the conversion. Bogert v. Hertell, 4 Hill, 492. *Vide infra.*

A *contract* of sale of lands devised as such will be held personal estate. Smith v. Gage, 41 Barb. 60.

A power to executors if for an invalid purpose, will not make a conversion. McCarty v. Deming, 4 Lans. 440; in re Fox, 63 Barb. 157.

See, also, as to conversion by a power, *ante*, p. 371.

Failure of Object.—If the object for which the conversion of lands is directed fails in whole or part, there is no equitable conversion of the whole, and there is a resulting trust in favor of the heir at law, *pro tanto*. Hawley v. James, 7 Paige, 213; De Peyster v. Clendenning, 8 Id. 295; 26 Wend. 21; and see *supra*.

Election to prevent Conversion.—The beneficiary may elect to prevent a conversion and hold the property as it is, if the rights of others are not affected, where there is a mere power given to the executors to sell and not a direction. Van Vart v. Underhill, 12 Barb. 113; Marsh v. Wheeler, 2 Edw. 156.

Heirs, whose lands are directed to be sold, may take them and alien their interests, subject to the power of sale. Ib.

Infant's Estates.—It has been seen above, p. 370, that where the real estate of infants is converted *in invitum* into personalty, the fund is still in law treated as realty, until there can be a legal election and taking by the infant, when of age. See, also, Horton v. McCoy, 47 N. Y. 21.

The principles, as gathered from the above cases, appear to be, that where there is an unqualified direction to convert money into land or land into money, the property will have the character so directed even in case of devolution, before such character has in fact been assumed. But where there is a mere general power or discretion to change the quality of the estate, the succession will take effect according to the nature of the

property at the time the succession attaches. In the latter case, until the power is exercised, if the property were real estate it remains and is to be considered as realty; but after it is exercised, and the conversion has been affected, the property must be treated as personalty; and where parties interested die subsequent to the sale, the succession would pass to their next of kin and not to their heirs at law. But if real estate were *directed* to be sold under a power, and to be distributed as personalty, if the person entitled to the proceeds die before the execution of the power, such proceeds are to be distributed as the personal estate of the decedent, in the same manner as if the property had been sold before his death.

As to converted property, *vide*, also, *ante*, pp. 368 to 370.

Title IV. Extent of the Estate Devised.

Before the Revised Statutes of 1830, a devise to a person generally, without the words "*and to his heirs*," or other sufficient words of inheritance, or perpetuity, did not convey a *fee*, but merely a *life estate*. And even where the devise was a remainder on a prior life estate.

Jackson v. Embler, 14 Johns. 198; Jackson v. Wells, 9 Johns. 222; Ferris v. Smith, 17 Johns. 221; Olmsted v. Harvey, 1 Barb. 102; Olmstead v. Olmsted, 4 Com. 56; Harvey v. Olmsted, 1 Com. 483; Vanderzee v. Vanderzee, 30 Barb. 331.

The mere word "assigns" did not carry a fee. Chrystie v. Phyfe, 19 N. Y. 344.

As great latitude, however, was extended to the construction of *wills*, in order to carry out the intention of the testator, strict and technical rules of law were made subservient to that intention, if it were clearly apparent that a fee was intended; and courts would look beyond the mere phraseology of the devise, and gather the intention of the testator from the whole instrument; and, in fact, as the enforcement of the rule generally defeated the intention of the testator, the courts have been astute in finding exceptions to it.

Thus if land were given with a power of disposition, or with the words *forever*, or to him and his "*blood*" or his "*children*."

Also absolute charges imposed on the *devisee*, in respect to the *lands* devised, or duties that required a greater than a life estate, raised a fee by implication. 1 Coms. 483; 1 Barb. 102; 7 Barb. 221; 4 Coms. 56; Mesick v. New, 3 Seld. (7 N. Y.) 163; Dumond v. Stringham, 26 Barb. 104; Heard v. Horton, 1 Den. 165; King v. Ackerman, 2 Black. 408; Barheydt v. Barheydt, 20 Wend. 576. Though it seems a mere charge on the testator's estate generally, or on the *lands*, would not do it unless there were other words showing an intent to devise a fee. 10 Johns. 148; 18 Wend. 200; 4 N. Y. 56; Van Dyke v. Emmons, 34 N. Y. 186; Christie v. Gage, 5 Lans. 139. The word "*estate*" in a devise passed a fee. 13 Johns. 537. Also "*all my estate.*" 12 Johns. 389; 10 Paige, 140. A devise sufficient to create an estate tail, carried a fee since the statnte abolishing entails. 2 Den. 336.

Thus, too, other words denoting an intention to pass the whole interest of the testator, as a devise of *all my real estate, all my interest, all my property, my whole remainder*, all *I am worth or own, all my right, or my title*, or *all I shall die possessed of*, and other like expressions, would carry an estate of inheritance, if there be nothing in the other parts of the will to limit or contract the operation of the words. 10 Paige, 140; 4 Johns. Ch. 388; 4 Kent, 602; 6 Johns. 185.

A fee would not be implied from a charge to "pay debts" on a devise of a life estate. 12 Wend. 83.

Where another fund than the devise is plainly indicated as an equivalent for the charge imposed, the devise is not enlarged into a fee by implication. Burlingham v. Belding, 21 Wend. 463.

A devise for *life*, with power of disposal annexed, would not enlarge the estate into a fee, but an absolute power of disposition annexed to a general devise would pass a fee, and any subsequent limitation would be void. Jackson v. Robins, 16 Johns. 537; Jackson v. Bull, 10 Johns. 119; *vide* "Powers," *ante*, p. 337; and Terry v. Wiggins, 47 N. Y. 521.

Where the introductory clause in a will shows the testator designed to dispose of his *whole* estate, a subsequent devise of lands, without words of perpetuity, may be held to convey a fee, that is if the subsequent parts of the will confirm such an intention. Vanderzee v. Vanderzee, 36 N. Y. 231.

The Revised Statutes of 1830, however, as to wills made *after* them, have established a new rule in respect to the quantity of interest conveyed. It being declared by them that *every grant or devise of real estate, or any interest* therein, thereafter to be executed, *should pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest should appear by express terms, or be necessarily implied*, in the terms of such grant. The word "heirs" or other words of inheritance are stated not to be requisite to create or convey an estate in fee.

This statutory provision does not apply to wills executed before Jan. 1, 1830, although the testator died after that day. Campbell v. Rawdon, 19 Barb. 494; 18 N. Y. 412.

Lands embraced in a Power to Devise. These would pass by a will of all

the real property of the testator, unless it were otherwise expressed. Bolton v. De Peyster, 25 Barb. 33.

Under the above clause, also, all future and contingent interests would pass as well as present freehold estates. Pond v. Bergh, 10 Paige, 140.

But a mere possibility of a right of entry is not assignable, even since the Revised Statutes. The Revised Statutes provide for a present right or interest, and a right to reenter is not such. Nicoll v. N. Y. & E. R. R. Co. 12 N. Y. 2 Ker. 121.

See also *ante*, title IV, "nature of the estate devised." Also, 19 N. Y. 96, as to an implied enlargement of a devise.

Devise of Lands subject to a Mortgage.—Whenever any real estate subject to a mortgage executed by any ancestor or testator shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator that such mortgage be otherwise paid.

1 R. S. 749, § 4.

This statute does not apply to an equitable lien growing out of a contract of purchase of real estate; but in case of unpaid purchase money of real estate, the heir or devisee has the right to have the same paid out of the personal estate of the decedent. Wright v. Holbrook, 32 N. Y. 587; 18 Abb. 202; Johnson v. Corbett, 11 Pa. 265; see also, as to this section, Halsey v. Reed, 9 Pai. 446 (approved, 12 N. Y. 74); Mollan v. Griffith, 3 Pai. 402; House v. House, 10 Pai. 163; Moseley v. Marshall, 27 Barb. 42; reversed, 22 N. Y. 200; Rapalye v. Rapalye, 27 Barb. 610; Rosevelt v. Carpenter, 28 Barb. 426.

Crops.—The devise of a farm carries "crops."

Bradner v. Faulkner, 34 N. Y. 347.

Title V. Lands Acquired after the Will Made.

Prior to the Revised Statutes, a will devising *all* the testator's real estate, would not pass lands *subsequently* acquired by him.

The rule of the common law was, that the testator must be *seized* of the lands at the time of *making the will*, the devise being considered in the nature of a conveyance or appointment of a particular estate.

By the Revised Statutes of 1830, however (vol. III, p. 139, § 5), it is enacted as follows:

"Every will that shall be made by a testator, in express terms of *all* his real estate, or in any other terms

denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise *at the time of his death.*"

This provision, it has been held, does not apply to a *will executed* before the Revised Statutes took effect, even if the testator had died subsequently to the enactment. Parker v. Bogardus, 5 N. Y. 309; Ellison v. Miller, 11 Barb. 332; Green v. Dikeman, 18 Barb. 535. The words "all my real estate," held not to pass land held in trust, unless an intention otherwise were apparent; Merritt v. The Farmers' Fire Ins. Co. 2 Ed. 547; nor where the intention was apparent to limit the devise. Havens v. Havens, 1 Sand. Ch. 324.

All the testator's "real estate in a county" would, however, only pass what he owned in the county at the time of making the will. Pond v. Bergh, 10 Paige, 140.

A devise of real estate, universal in its terms, would carry after-acquired lands without any language pointing to the period of the testator's death; but, in the absence of unlimited terms in the will, there must be language which will enable the court to see that the testator intended to operate upon real estate which he should afterwards purchase. Lynes v. Townsend, 33 N. Y. 558; McNaughton v. McNaughton, 11 Barb. 50; 41 Barb. 50; affirmed, 34 N. Y. 201; Havens v. Havens, 1 Sand. Ch. 324.

Under the above provisions of the Revised Statutes, the rule of law is changed in some particulars in relation to lapsed devises passing to the heir instead of the residuary devisee, and a will whose introductory clause expresses a desire to "make a suitable disposition of such worldly property and estate" as the testator should leave behind him, the residuary clause expressly devising all his real estate not before specifically devised, would carry all after-acquired lands belonging to the testator at the time of his death, including a devise which had not taken effect by reason of the decease of the devisee before the testator.

The above case is distinguished from others establishing the rule above referred to, in that in the former case there is a supposed presumption of intendment in the testator's mind, from the facts of the case, that the prior devise might not take effect. Youngs v. Youngs, 45 N. Y. 284.

The case of Kip v. Van Courtlandt, 7 Hill, 346, also holds that where a codicil revokes a specific devise in a will, without making any further disposition of the property, it will in general pass to the residuary devisee. See also Bowers v. Smith, 10 Paige, 193; Redfield on Wills, part 2, 444; 1 Jarmin on Wills, 590, 591; Doe v. Weatherby, 11 East, 322; Wheeler v. Walroone, Aleyn R. 285; James v. James, 4 Paige, 115; and see *ante*, p. 362, where this question is more fully reviewed; and *post*, Title VIII.

Title VI. Execution of Wills.

As to requisites of the execution of wills under the English statutes, and in this State before 1830—

Vide 4 Wend. 168; 2 Barb. Ch. 40; 1 Bradf. 291; 27 Barb. 556; 19 N. Y. 279; 1 Green. 386; 1 Web. 178; and the statutes of 1787 and 1801, *ante*, Title I.

A will of real or personal property, to be duly executed as required by the Revised Statutes, before it can

be proved and recorded, must conform to the following provisions, it being first shown that the testator was in all respects *competent* to devise real estate, and not under restraint:

3 Rev. Stat. p. 139, § 10.

1st. It shall be subscribed by the testator at the end of the will.

The law of 1787 and 1813 required the will to be in writing, signed by the testator, or by some one in his presence and by his express direction.

The signature of a will at the request of testator, in his presence, by a third person, is a sufficient execution. Meehan v. Rourke, 2 Brad. 385; Lewis v. Lewis, 13 Barb. 17; 11 N. Y. 220; Robins v. Coryell, 27 Barb. 556

Subscribing by making a mark, and declaring the instrument to be testator's will, immediately thereafter, is sufficient. Keeney v. Whitmarsh, 16 Barb. 141; Chaffee v. Baptist Miss'ry, &c. 10 Pai. 86; Jackson v. Jackson, 39 N. Y. 153; Robins v. Coryell, 27 Barb. 556; Butler v. Benson, 1 Barb. 526.

The writing of the testator's name, with the words "his mark," done by a third person, to identify the testator's subscription by a mark is held sufficient. Jackson v. Jackson, 39 N. Y. 153.

The subscription of the testator and the publication of the instrument are held independent facts, each of which is essential to the complete execution of a will.

If the signature is written by another, and concealed from the view of the testator and the witnesses, the mere publication of the instrument as his will cannot be deemed an acknowledgment that the unseen subscription was made by his direction.

When, however, the testator produces a paper bearing his personal signature, and requests the witnesses to attest it, and declares it to be his last will and testament, he thereby acknowledges the subscription, within the meaning of the statute. Baskin v. Baskin, 36 N. Y. 416; Willis v. Mott, 36 N. Y. 486.

Another paper referred to and described in the will makes part of it, and need not be *subscribed* or attached. Tonnele v. Hall, 4 Coms. 140; Van Wert v. Benedict, 1 Bradf. 114.

2d. Such subscription shall be made by the *testator in the presence* of *each* of the *attesting witnesses*, or shall be *acknowledged* by him to have been so made, to each of the attesting witnesses.

Chaffee v. The Bap. Con. 10 Pai. 86.

The witnesses must see the testator's signature, either while or after it is written. Lewis v. Lewis, 1 Ker. 220; Tyler v. Mapes, 19 Barb. 448.

An acknowledgment by testator of his signature is equivalent to the witnesses' actually seeing the act of subscription. Hyserott v. Kingman, 22 N. Y. 372.

3d. The testator, at the time of making such subscrip-

tion, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.

Equivalent words or acts are sufficient. 4 Sandf. 10; 2 Seld. 120; 15 Barb. 304. The publication of some kind is essential; 26 Wend. 325; 19 Paige, 85); that is, the testator must in some manner declare the instrument to be his will, although the declaration need not precede his subscription. Tyler v. Mapes, 19 Barb. 448; Jackson v. Jackson, 39 N. Y. 153.

The signing and the declaration should be at the same time, and not on different occasions. Doe v. Roe, 2 Barb. 200.

But the publication may be made in any form whereby the testator makes known to the witnesses that he means the instrument to take effect as his will. There must be mutuality of knowledge as to the nature of the transaction. Torry v. Bowen, 15 Barb. 304; Seguine v. Seguine, 2 Barb. 385; Hunt v. Mootrie, 3 Brad. 322; Nipper v. Groesbeck, 22 Barb. 670; Coffin v. Coffin, 23 N. Y. 9.

He may declare it his will just before he signs it. Leaycraft v. Simmons, 3 Brad. 35; Gamble v. Gamble, 39 Barb. 373.

He must declare it to be a will, and the witnesses are to so understand it. The Trustees, &c. v. Calhoun, 62 Barb. 381; Brinckerhoof v. Remsen, 8 Pa. 488; 26 Wend. 325; Hunt v. Mootrie, 3 Brad. 322; *ex parte* Beers, 2 Brad. 163; Brown v. De Selding, 4 Sand. 10.

The declaration must be made in the presence of both witnesses (Seymour v. Van Wyck, 2 Sel. (6 N. Y.) 120); or acknowledged by the testator, in their presence, that it is his will. Lewis v. Lewis, 13 Barb. 17; 11 N. Y. 220.

The declaration is required to show knowledge in the testator that it was his will, and that may be shown in contradiction to the testimony of both the subscribing witnesses. The Trustees, &c. v. Calhoun, 25 N. Y. 422; reversing, 38 Barb. 148.

4th. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, *at the request of the testator*, and in his presence.

The sufficiency of the attestation of wills in this State is much considered in 3 Barb. Ch. 158; Butler v. Benson, 1 Barb. 527; 13 Barb. 17; and Coffin v. Coffin, 23 N. Y. 9.

If they sign it in an adjoining hall, and not in the immediate presence of the testator, it has been held sufficient. Lyon v. Smith, 11 Barb. 124; Ruddon v. McDonald, 1 Brad. 352.

They may sign by making their mark. Morris v. Kniffen, 37 Barb. 336.

But they must sign after the testator has subscribed it. Jackson v. Jackson, 39 N. Y. 153; see, also, Jauncey v. Thorne, 2 Barb. Ch. 40.

The above various provisions are generally incorporated in what is called the testatum clause at the end of a will over the signatures of the witnesses, the signature of whom under the clause is thus made generally satisfactory evidence, at least to their own minds, that the requisitions of the statute have been complied with, and on the death of the witnesses it may be *prima facie* evidence that the formalities which it recites have

been performed. Chaffee v. Bap. Con. 10 Pai. 86; Jackson v. Jackson, 39 N. Y. 153; Grant v. Grant, 1 Sand. Ch. 235; Brinckerhoof v. Remsen, 8 Pa. 488; 26 Wend. 325.

Where there are three witnesses, if two of them act in compliance with the statute it is sufficient. Lyon v. Smith, 11 Barb. 124.

And a third is not incompetent to take under the will who does not join in proving it. Caw v. Robertson, 1 Seld. 125.

The witnesses need not sign in presence of each other. It is sufficient if each subscribe in the presence of the testator, and at his request. But they must sign with the intention of being witnesses to the will at the time. Nor need they see the subscription of the testator. Hoysradt v. Kingman, 22 N. Y. 372; *ex parte* LeRoy, 3 Brad. 227; Willis v. Mott, 36 N. Y. 486.

The declarations of the decedent are not competent to prove the existence or execution of a will. Grant v. Grant, 1 Sand. Ch. 235.

Reading over the testatum clause to the testator, and his assent to it on the interrogatory of another present is sufficient. M'Donough v. Loughlin, 20 Barb. 238.

The request must be part of the *res gestæ*, *i. e.*, made at the time of signing, &c. Seguine v. Seguine, 2 Barb. 385.

Where one of the subscribing witnesses to a will swears positively that the will was executed with the requisite formalities, that is sufficient. Newhouse v. Godwin, 17 Barb. 236.

The request to the witnesses may be implied from acts and declarations at the time. Brown v. De Selding, 4 Sand. 10; Gamble v. Gamble, 39 Barb. 373; Torry v. Bowen, 15 Barb. 304; Doe v. Roe, 2 Barb. 200; see also, 13 Ab. 359; 20 Barb. 238; 22 N. Y. 272; 23 N. Y. 9.

The following points have been determined by the Court of Appeals, as to the above formalities: 1. The publication of a testator of a will may be made in any form of words whereby he makes it known to the witnesses that he intends the instrument to take effect as his will. 2d. Where the attendance of two witnesses is procured by the testator for the purpose of attesting his will, and one of them inquires if he wishes him to sign the will as a witness, to which the testator answers in the affirmative, this may be taken as a request to each of them. 3d. No precise form of communicating the request is necessary, and the publication and request may both be embraced in a single formula of words; and both the requisites are satisfied by answering affirmatively a question put by the witnesses whether he wishes them to sign the will as witnesses. Coffin v. Coffin, 23 N. Y. 9; see, also, Lewis v. Lewis, 1 Ker. 226; Brinckerhoof v. Remsen, 8 Paige, 488; 26 Wend. 325.

It is not indispensable that each witness should be able to swear to all the requisites of the statute. The court may form its conclusion from all the evidence in the case. Jauncey v. Thorne, 2 Barb. Ch. 40; 3 *Id.* 158; The Trustees, &c. v. Calhoun, 62 Barb. 381; Cornwell v. Wooley, 47 How. 475.)

Creditor Competent Witness.—By the Revised Statutes, if by any will any real estate be charged with any debt, and the creditor whose debt is so charged, shall attest the execution thereof, such creditor, notwithstanding such charge, shall be admitted as a competent witness to prove the execution of such will. 1 R. L. 367; 2 R. S. 52, 1st ed.

Under the laws of 1787, 1801, and the Revised Statutes of 1813, the will had to be attested by three witnesses, otherwise it was void. 1 Greenl. 386; 1 Rev. L. 364.

Residence of Witnesses.—By § 41 the witnesses are required to write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to the will.

A penalty of $50 is prescribed for omission of the above. For the details of which, see the statute. 2 R. S. 1st ed. p. 64.

Title VII. Revocation.

It will be necessary to ascertain whether the will has been revoked or canceled in fact or in law. The Revised Statutes provide that in these cases, and no others, a will may be altered or revoked in whole or in part, viz..:

By another will or writing executed with the same formalities as required by law for the will, and declaring such revocation or alteration. (2 Rev. Stat. p. 64, § 42, 1st ed.) It may also be revoked by being intentionally burnt, torn, canceled, obliterated, or destroyed by the testator, or in his presence, by his direction or consent (Ib.), with the intent of revoking the same; when destroyed by another, the testator's assent is to be proved by two witnesses, and also the direction and consent of the testator thereto; and the destruction or injury.

These were substantially provisions of the English Statute of Frauds, and in the law of 20th Feb., 1801; also, 1 R. L. 365; 2 R. S. 1st ed. p. 64, § 42.

By § 53 it is also provided that, if, after the making of any will, the testator shall duly make and execute another, the destruction cancellation or revocation of the second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, cancelling, or revocation, he shall duly republish his first will.

A subsequent will not executed with the forms requisite to pass real estate, is not a revocation of a will duly executed, and both instruments may be admitted to probate, the one as a will of personalty and the other as a will of realty. M'Loskey v. Reid, 4 Brad. 334.

Neither is a codicil a revocation of a will, except in the precise degree in which it is inconsistent with it, unless there be words of revocation. Brant v. Wilson, 8 Cow. 56.

The intention of a testator to cancel or revoke a will or a clause in his will, however strongly expressed, whether in writing or not, will not do so unless there be acts sufficient in law to constitute a revocation. Clark v. Smith, 34 N. Y. 140; Nelson v. The Pub. Ad. 2 Brad. 210; Delafield v. Parish, 25 N. Y. 9.

A will which makes a full disposition of all the testator's property, is inconsistent with the valid existence of any prior will; and, therefore, amounts to a revocation of all wills previously executed. Simmons v. Simmons, 26 Barb. 68; and *vide infra.*

As to what constitutes a fraudulent destruction of a will under the Revised Statutes, and what testimony may be given. *Vide* Timon v. Claffy, 45 Barb. 438; affi'd, 41 N. Y. 619.

An intended destruction frustrated by fraud, has been held a virtual destruction and cancellation. Where a testator was sick in bed and called for his will, and was deceived by one of the legatees, who handed him an old letter, which he destroyed, intending to revoke his will and supposed he had destroyed that, the will was held revoked. See, as to this subject, Pryor v. Coggin, 17 Geo. 444; White v. Casten, 1 Jones' Law, N. C. 197; Marsh v. Marsh, 3 *Ib.* 77; see also, Doe v. Harris, 6 Ad. & El. 209; Kent v. McCaffey, 10 Ohio St. 204; Sawyer v. Smith, 8 Mich. 411; Smiley v. Gambill, 2 Head. 164.

A lunatic cannot revoke a will by its destruction or otherwise. There must be an intent to revoke by a competent person. Smith v. Wait, 4 Barb. 28.

There cannot be a revocation by a mere obliteration, without re-execution and re-attestation. McPherson v. Clark, 3 Brad. 93.

The Revised Statutes permit the revocation of a will by its "destruction" by the testator; and do not require proof of the mode of destruction, when the instrument was last in the testator's possession and cannot be found. Bulkley v. Redmond, 2 Bradf. 281.

Where a will is shown to have been last in the testator's possession, the presumption is that he revoked it by destroying it, *animo revocandi.* Idley v. Bowen, 11 Wend. 227; Bulkley v. Redmond, 2 Bradf. 281.

The legal existence of a destroyed will may be proved by circumstantial testimony. Schultz v. Schultz, 35 N. Y. 653.

The prevention of the execution of a codicil by improper means cannot operate to revoke the will. Leaycraft v. Simmons, 3 Brad. 35.

A conjoint mutual will is revocable as a will, but not as a contract. *Ex parte* Day, 1 Brad. 476.

A subsequent will or codicil does not revoke a prior one, unless it contains a clause of revocation, or is inconsistent with it; and there may be such a revocation, *pro tanto*, where it is inconsistent with a former will in some of its provisions only. A will which makes a full disposition of all a testator's property revokes all wills previously executed. Nelson v. McGiffert, 3 Barb. Ch. 158; Brant v. Wilson, 8 Cow. 56; Gaines v. City of New Orleans, 6 Wall. 642; Simmons v. Simmons, 26 Barb. 68.

Upon the question of revocation of a will, no declarations of the testator are competent evidence, except those which accompany the alleged act of revocation. Waterman v. Whitney, 11 N. Y. 157.

Codicil as a Republication.—A codicil to a will of real estate, when executed in the mode prescribed with respect to devices, is considered to operate as a republication, and make the will speak from the date of the codicil. The codicil need not be actually annexed to or endorsed on the will to operate as a republication.

Provisions of the Revised Statutes as to Time of Revocation.—The provisions of the title of the Revised Statutes in relation to the revocation of wills, are to apply to all wills made by any testator who shall be living, at the expiration of one year from the time the chapter relative to wills shall take effect.

2 R. S. p. 68, 1st ed.

As to wills executed before the Revised Statues went into effect, by a testator who was living at the expiration of a year after the statutes went into effect, the provisions of the Revised Statutes relative to revocations are held applicable only in respect to revocations made subsequent to that time. These provisions are held prospective, and not retrospective, and cannot be applied so as to invalidate a previous revocation, good at the time it was made, but not conformable to those statutes. Sherry v. Lozier, 1 Brad. 437; see, also, as to the above provisions, 5 N. Y. 312; 8 Pai. 446.

Revocations in Law.—By the common law, either an intention to revoke, or an alteration of the estate without such intention, would work a revocation. The least alteration of the testator's interest from what it was at the time the will was made would work a revocation. Thus a sale of real estate would be a revocation of a devise of it; and if land was turned into personalty, the proceeds passed with the personal estate.

A change in the property of the testator would operate also as a revocation of the devise *pro tanto*.

The Revised Statutes provide that a bond, agreement, or covenant made for a valuable consideration by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them. (§ 45.)

Vide Knight v. Weatherwax, 7 Pai. 182.

By the Revised Statutes, also, a charge or incumbrance upon any real or personal estate, for the purpose

of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained shall pass and take effect subject to such charge or incumbrance.

2 R. S., 1st ed., p. 65, § 46.

"A conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property previously devised or bequeated by him, shall be altered but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest." (§ 47.)

"But if the provisions of the instrument by which such alteration is made are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed or such contingency do not happen." (§ 48.)

In our courts, it has been decided, that if a testator, after the execution of a will by which he has devised land, sell and convey the land, it works a revocation of the devise, even though he take back a mortgage to secure the purchase money; but if the land be reconveyed to the testator by an absolute deed, and he be the owner at the time of his decease, the devise will not be revoked and republication of the will is not necessary. It is also held that a change in the property of the testator subsequent to the execution of his will operates as a revocation of devises in the will so far as the alteration places the property beyond the operation of the provisions of the will, and no further. A conveyance for example made subsequent to a devise of land, would not be a revocation or satisfaction of a devise of other lands to the grantee. But, if the conveyance be of a portion of the same land, that is a revocation *pro tanto*. Monroe v. Cox, 5 Johns. ch. 441; Notbeck v. Wilks, 4 Abb. 315; Adams v. Winne, 7 Pai. 97; Brown v. Brown, 16 Barb. 569; Vandemark v. Vandemark, 26 Barb. 416; McNaughton v. McNaughton, 34 N. Y. 201; Arthur v. Arthur, 10 Barb. 9;

23 How. 410; Beek v. McGillis, 9 Barb. 35; Barstow v. Goodwin, 2 Brad. 413.

If the testamentary gift were of proceeds of realty, the sale might not revoke the devise, if the avails are separable. McNaughton v. McNaughton, 34 N. Y. 201.

An exchange of lands will not prevent the implied revocation, and the devisee will not take the exchanged lands under a devise of the original ones. Gilbert v. Gilbert, 9 Barb. 532.

If land converted were reconveyed to the testator, it would pass under the prior devise without republication. Brown v. Brown, 16 Barb. 569.

A subsequent conveyance would be a revocation only so far as necessary to carry out the purposes of the conveyance as declared therein, *e. g.* a trust created for a certain purpose. Livingston v. Livingston, 3 Johns. Ch. 148.

It has been held also in the English courts that inoperative conveyances would amount to a revocation of a devise, *pro tanto*, if there were evidence of an intention to convey and thereby to revoke the will—also, even if the testator convey the estate, and then take it back. The strict rule is, that either an intention to revoke or an alteration of the estate, without such intention, would work a revocation. The rule would not apply to mortgages and charges. The above rule of the English courts have not been retained here, at least to their full extent. As seen by the cases stated from the reports of this State, and the above statutory provisions, under this title.

Before the Revised Statutes, a contract to convey land was held in equity, an implied revocation of a devise thereof. Knollys v. Alcock, 5 Vesey, 654; Walton v. Walton, 7 Johns. Ch. 258.

In the case of Gaines v. Winthrop, 2 Ed. Ch. 571, it is held that a contract to sell lands is a revocation, *pro tanto*, of a prior will; but the latter remains in force as to the legal estate; the title passes to the devisee; and he will be a trustee for the purchaser and compelled to convey.

A physical act of revocation of a clause in a will must concur with the *animus revocandi*, or some act amounting in law to an actual cancellation or revocation. Clark v. Smith, 34 Barb. 140.

If a devise of land be once revoked, whether expressly or by implication, it cannot be restored without a republication of the will. Walton v. Walton, 7 Johns. Ch. 258. An election to take dower in lieu of a provision in the place thereof causes the devise to fail. 5 Paige, 318; 16 Wend. 61, and *ante*, p. 163. An inconsistent devise in the second of two wills, is a revocation of the first, otherwise apparently if they were in the same will, when the devisees might take jointly or in common. Barlow v. Coffin, 24 How. 54; *vide post*, Title IX.

Revocation by Marriage of the Testator.—The Revised Statutes also provide that if, after making a will disposing of the whole estate of the testator, he shall marry, and have issue of his marriage, born either in his lifetime, or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in

such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation shall be received.

1 R. S. p. 64, 1st ed. § 43.

This was also the law before the Revised Statutes. Brush v. Wilkins, 4 Johns. Ch. 506.

The implied revocation might be repelled by circumstances. Havens v. Vanderburgh, 1 Den. 27; Bloomer v. Bloomer, 2 Brad. 339.

A child so born after the making of a will, has equal rights to distribution and to bring partition, and is liable to the claims of creditors in the same manner as are heirs and next of kin, and may recover his proportionate share from devisees and legatees. 2 R. S. 457, 1st ed. §§ 62, 63.

Revocation pro tanto by Birth of a Child.—Whenever a *testator* shall have a child born after the making of his will, either in his lifetime or after his death, and shall die leaving such child, so after born unprovided for by any settlement, and neither provided for, nor in any way mentioned in his will, every such child shall succeed to the same portion of the *father's* real and personal estate, as would have descended or been distributed to such child, if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to, and out of the parts devised and bequeathed to them by such will.

2 R. S. 65, § 49.

Under the above provision all the devisees and legatees must contribute ratably, in proportion to the value of the real and personal estate devised or bequeathed to them respectively, to make up the distributive share of such post testamentary child. Mitchell v. Blain, 5 Pai. 588.

The provision making the birth of a child subsequent to the making of the will, a revocation was held applicable to the case of *married women testatrix*, 51 Barb. 201; but this decision was overruled in Cotheal v. Cotheal, 40 N. Y. 405. By laws of 1869, however, ch. 22, the provision is now made applicable to married women.

Under the above provision of the Statnte, it will be seen how necessary it is, when title is made under a devise to ascertain if children have been born subsequent to the making of the will. See, also, *ante*, p. 388.

Revival of First Will.—Under the former rules of law, if a first will were not actually cancelled or destroyed or expressly revoked, and a second will was afterwards cancelled, the first will was supposed to be revived; but by the Revised Statutes, the destruction, cancellation, or

revocation of a second will does not revive the first, unless there is an expressed intention to revive in the revocation, or a republication of the first will after the destruction of the first. (§ 53.)

Marriage of a Female.—A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage.

2 R. S. p. 64, § 43, 1st. ed.

This was also the law before the Revised Statutes, and has not been revoked by the married woman's act of 1849. *Ante*, p. 79.

The will of a *feme-covert* made during marriage under a power, is held not revoked by her surviving her husband. Mormen v. Thompson, 3 Hagg. Ecc. 289.

TITLE VIII. LAPSE OF THE DEVISE.

Where a devise fails for want of title in the devisor, the devisee cannot be relieved out of other parts of the estate, the gift totally fails. A general rule also is that the devise shall be deemed lapsed, if the devisee is incompetent to take, or die in the lifetime of the testator. The lapsed or void devise, however, passes to the heir, and not the residuary devisee, as a general rule; but not where a different intent is manifested, and a lapse of the devise is apparently contemplated by the testator.

Van Kleeck v. The Ministers, &c., 20 Wend. 457; affirming, 6 Paige, 600; Young v. Young, 45 N. Y. 254; Adams v. Perry, 43 N. Y. 488; Manice v. Manice, 43 N. Y. 305; Downing v. Marshall, 23 N. Y. 366; Beekman v. Bonsor, 27 Barb. 260; 23 N. Y. 298; Craig v. Craig, 3 Barb. Ch. 76.

The same rule would apply if a contingency did not happen upon which a devise was to take effect. Waring v. Waring, 17 Barb. 553.

Otherwise, where the specific devisee is also the residuary devisee, and he takes under the residuary clause. Tucker v. Tucker, 1 Seld. 408. See fully as to the point when the heir takes and when the residuary devisee, *ante*, pp. 362 to 365.

When, by reason of a legal incapacity, but one of the persons of a class can take, that one takes all the estate which the devise by its terms gives to the whole class. Downing v. Marshall, 23 N. Y. 366.

Where the devise is void, the testator is judged to have died intestate as to all the property embraced in the devise.

Where the Devisee leaves a Child or Descendant.—By the Revised Statutes (vol. III, p. 146, § 47), however, in case

the devisee is a child or descendant of a testator, and shall die during the lifetime of the testator and leave a child or other descendant who shall survive such testator, such devise shall not lapse, but the property devised shall vest in the surviving child or other descendant of the devisee, as if the devisee had survived the testator, and had died intestate.

Downing v. Marshall, 23 N. Y. 366; 30 N. Y. 414.

This section applies only where the devise is to a child or lineal descendant of the testator, and does not embrace collateral relations. Van Beuren v. Dash, 30 N. Y. 393; Armstrong v. Moran, 1 Brad. 314.

County Courts.—As to their jurisdiction over wills, *vide* laws of 1847, ch. 280.

TITLE IX. GENERAL RULES OF CONSTRUCTION OF DEVISES.

It will be impossible to more than allude to a few of the leading principles applicable to the construction of wills. The law applicable to the nature, construction, and efficacy of devises involves important principles, and is voluminous and intricate. The construction of devises in a will is much regulated by the context; and the attending circumstances of each case will often govern the construction.

Law of Domicil and Locality.—It may be stated in brief, that the law of the testator's domicil governs the disposition of his personal estate, and that any testamentary disposition of, as well as the succession to his real estate, is controlled by the laws of the locality of such real estate, and the probate in one State or country is of no validity as affecting the title to lands in another.

Vide ante, p. 103, and Wood v. Wood, 5 Paige, 596; Stewart v. McMartin, 5 Barb. 438; McCormick v. Sullivant, 10 Wheat. 192; Knox v. Jones, 47 N. Y. 389; White v. Howard, 52 Barb. 294; 46 N. Y. 144; Bloomer v. Bloomer, 2 Bradf. 339; Monroe v. Douglass, 5 N. Y. 1 Seld. 447; Kerr v. Moon, 9 Wheat. 565.

The law of the testator's domicil controls as to the formal requisites essential to the validity of the will, the capacity of the testator, and the construction of the instrument, so far as the personalty is concerned. Chamberlain v. Chamberlain, 43 N. Y. 424.

What Law Governs as to Time.—The Revised Statutes provide that the provisions of the title (Title i, ch. vi, part ii), shall not affect the validity of the execution or the construction of any will which shall have been made before the chapter takes effect. As a general rule, a will does not take effect until the testator dies; and a statute affecting wills, enacted after the will made, but before the testator's death, takes effect on the will.

Root v. Stuyvesant, 18 Wend. 257; De Peyster v. Clendenning, 8 Paige, 295; 26 Wend. 23; Doubleday v. Newton, 27 Barb. 431; Sherman v. Sherman, 3 Barb. 385.

Changes in the law do not affect wills going into effect before such changes. Stewart v. McMartin, 5 Barb. 438; Tallmadge v. Gill, 21 Barb. 34.

It is held, therefore, that if the will were made before the Revised Statutes, but the testator died after they went into operation, the validity of the trusts and provisions of the will are determined by the law existing at his death.

The validity of the *execution* of a will executed before the Revised Statutes is to be determined by the law in force at the time of execution. Price v. Brown, 1 Bradf. 291; Jauncey v. Thorne, 2 Barb. Ch. 40.

A will executed previous to the Revised Statutes, although attested by only two witnesses, if the testator died after the statute went into effect, is sufficiently attested as a will of real estate. The mode of proof must be according to the law in force at the time of probate. Lawrence v. Hebbard, 1 Bradf. 252; Jauncey v. Thorne, 2 Barb. Ch. 40.

It is held, however, that a will executed before the Revised Statutes of 1830 were passed, devising all the testator's real estate, though the testator died after those statutes took effect, disposes only of such real estate as the testator had at the time of the execution of the will. Subsequently acquired lands would not pass by it. Parker v. Bogardus, 1 Seld. 5 N. Y. 309. *Vide ante*, p. 404, as to this.

As to the time when the provisions as to revocations take effect under the Revised Statutes, *vide ante*, p. 412.

Provisions as to Probate.—The provisions of the Revised Statutes, title I, *ante*, as to the proof and probate of wills thereafter to be had, and the jurisdiction of the surrogate and his proceedings thereon, are to apply to wills made previous as to those made subsequent to the time when the chapter (ch. vi, part ii), takes effect. (§ 68.)

The execution, after the Revised Statutes, of a codicil to a will made before they took effect, renders the construction of the will subject to the provisions of these statutes. Ayres v. The Methodist Church, 3 Sand. 351.

Intention of Testator.—It is also a leading principle, that in the construction of a will, the *intention* of the testator, gathered from the whole will, provided it be not inconsistent with the rules of law, is the first great ob-

ject of inquiry; and to this object technical rules are to a certain extent made subservient; and, as a general rule, those technical words are not required in a devise which in a deed would be necessary. To effectuate the intention, words may have their ordinary or legal meaning changed, sentences be struck out or transposed, and omissions supplied; and provisions are to be construed not only with reference to contexts, but to the entire contents of the instrument.

The rule in Shelley's case even (*ante* p. 222), has been held subservient to the plain intention of the testator. Rogers v. Rogers, 3 Wend. 503.

Parol or external evidence may be also admitted where there is uncertainty as to the devise or thing devised; but not where the ambiguity is apparent from the face of the instrument, and no parol evidence can be received to prove an additional or different subject matter or some other donee. Du Bois v. Ray, 35 N. Y. 162; Hyatt v. Pugsley, 23 Barb. 285; Gardner v. Heyer, 2 Paige, 11. See, also, 1 Paige, 270.

See, also, as to the intention of testator, and how it will be effectuated, and a devise raised by implication, and a devise upheld as valid, if possible, Lasher v. Lasher, 13 Barb. 106; Post v. Hover, 30 Barb. 312; affirmed, 33 N. Y. 593; Campbell v. Rawdon, 18 N. Y. 412; reversing 19 Barb. 494; Mason v. Jones, 2 Barb. 229; Rathbone v. Dyckman, 3 Paige, 9; Parks v. Parks, 9 Paige, 107; De Kay v. Irving, 5 Den. 646; Van Vechten v. Van Vechten, 8 Paige, 104; Butler v. Butler, 3 Barb. Ch. 304; Clark v. Lynch, 46 Barb. 68.

In accordance with the views enunciated in the above cases, it is held to be the duty of the courts to give to the language used by a testator such a construction as will make the instrument or limitation legal or valid, if it can be done in harmony with well settled rules, rather than such construction as will render them illegal and nugatory, or create a virtual intestacy.

Inconsistent Devises.—Another rule is that where the latter part of a will is inconsistent with a prior part, the latter part will prevail; although restrictions totally repugnant to an estate created will be held void; as, for example, one creating a remainder on a fee absolute.

Schermerhorn v. Negus, 1 Den. 448: Jackson v. Robins, 16 Johns. 537; McLean v. McDonald, 2 Barb. 534; Bradstreet v. Clark, 12 Wend. 602; Trustees of Theolog. Seminary v. Kellogg, 16 N. Y. 83; McLean v. McDonald, 2 Barb. 534; Brewster v. Striker, 2 Com. 73; 4 Kent. 131.

This rule, however, that the last clause of a will supersedes prior inconsistent ones, is only applied where

it is impossible to reconcile the two provisions with each other; and never until every attempt to give to the whole a sensible construction has failed. A material qualification, therefore, of an antecedent devise or bequest, which would otherwise be absolute, is often upheld, and an absolute estate in fee simple is frequently cut down to a defeasible interest, in wills.

Morris v. Beyea, 3 Kern. 273; Tyson v. Blake, 22 N. Y. 558; Everitt v. Everitt, 29 N. Y. 39.

As regards powers of sale to executors being inconsistent with the estate devised, *vide, post,* Ch. XVII.

Void Provisions.—A void direction or provision in a will does not invalidate its other provisions, nor defeat a prior devise, and the whole will fail only when the valid and invalid parts are so connected as to not admit of separation without subverting the intention of the testator. The courts will lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid without defeating the general intent of the testator, and constructions will be favored which tend to establish the validity of the will.

See cases *ante,* p. 275.

Post v. Hover, 33 N. Y. 593; affirming 30 Barb. 312: De Kay v. Irving, 5 Den. 646.

Where there is an absolute devise, a subsequent void provision or a lapsed devise will not defeat it. Martin v. Ballou, 13 Barb. 119; Campbell v. Rawdon, 18 N. Y. 412; reversing 19 Barb. 494

Nor where there is a valid devise for life, will it be made invalid by an illegal disposition of the remainder. Williams v. Conrad, 30 Barb. 524.

Lands when charged with Debts.—As to liability of *devised* and descended lands to be charged with the debts of the testator, *vide* "Title by Descent," *ante,* p. 389.

Illegitimate Children would not take under a devise to "children," unless such intention were manifest.

Collins v. Hoxie, 9 Paige, 81; and *ante,* p. 397.

The terms Will and Codicil.—The term "will," as used in the above named chap. vi of the Revised Statutes, is to include all codicils as well as wills.

When Will takes Effect.—A will takes effect from the time of the decease of the testator, and not from its date.

TITLE X. DEVISES TO CORPORATIONS.

Corporations were excepted out of the English statutes of wills. By the Revised Statutes a *devise to a corporation is invalid*, unless it is expressly authorized by its charter or by statute to take by devise.

Vol. III, p. 138.

It must be authorized at the time of the devises taking effect, and the law authorizing it must be a law of this State. White v. Howard, 52 Barb. 294; 46 N. Y. 144.

The right of a corporation to take by purchase does not include the right to take by devise McCartee v. Orphan Asylum, 9 Cow. 437.

Previous to the Rev. Stat. a legacy to a corporation, payable out of real estate directed to be sold, was held valid, although the corporation was not authorized to take by devise. Theo. Sem. v. Childs, 4 Pai. 419.

See *ante*, p. 393, as to the law before the Revised Statutes.

Devises under a Power or Trust.—In the case of Inglis v. The Trustees, &c. 3 Peters, 99, it was held that a devise to trustees of a corporation to be created so as to hold real estate, was good as an executory devise. See also, Miller v. Chittenden, 4 Iowa, 252.

The above prohibition would extend to a devise of any estate and interest in real property discendible to heirs, as well as real estate itself. So also a devise of the rents and profits of lands to them would be void. Wright v. Trustees, &c. 1 Hoff. Ch. 225; Downing v. Marshall, 23 N. Y. 366.

A gift, however, of the proceeds of land would be good. *Ib.*

It has been decided that where a devise made directly to a corporation not authorized to take by devise, is accompanied with a trust, it is void as to the trust as well as the legal estate. Ayres v. Meth. Ch. 3 Sand. 351; Goddard v. Pomeroy, 30 Barb. 546.

Since the Revised Statutes, a devise of real property in trust for a corporation is void, unless the corporation is authorized to take by devise. The Theo. Sem. v. Childs, 4 Pai. 419; and the Rev. Stat. become applicable, as to their restrictions as to devises to corporations, to those in existence as a class before the passage of said statutes. Ayres v. Metho. Ch. 3 Sand. 351; and *vide post*, p. 423.

Devises to Religious Societies formed under the Act of 1784.—Since the Rev. Stat. such societies cannot take by devise; and, *semble*, not before.

Ayres v. Trustees, &c. 3 Sand. 351.

Devises to Religious Societies formed under the Act of 1813.—As to these *vide, ante*, p. 305.

Power to Take.—If the corporation has not power to take at the time of the testator's death, no subsequent power conferred will make valid the

devise. Nor can a devise to an unincorporated association take effect on its subsequent incorporation. Leslie v. Marshall, 31 Barb. 562; White v. Howard, 52 Barb. 294; 46 N. Y. 144.

A foreign corporation not authorized by its charter or statute to take lands, cannot take by devise lands lying within this State. And it is for the courts of this State to construe the charter of such corporation, and determine whether it is authorized to take and hold real estate according to the law of this State. Boyce v. City of St. Louis, 29 Barb. 650.

Charitable Uses.—The history of the law of charitable uses and trusts, and how far they are valid in this State, is fully reviewed, *ante*, Ch. X, Title viii.

Benevolent, Charitable, Literary, Scientific Religious, and Missionary Societies.—Law of Ap. 13, 1860, ch. 360.—By this law, no person having a husband, wife, child, or parent, shall, by will, give to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation, in trust or otherwise, more than one half of his or her estate after payment of debts, and the devise shall be valid to the extent of one half thereof, and no more.

All inconsistent laws are repealed.

The widow's dower and all debts are to be deducted before the one half is computed. Chamberlain v. Chamberlain, 43 N. Y. 424.

Neither can more than one half be given to two or more corporations in the aggregate. *Ib.*

The one half is to be computed with reference to the estate at the time of testator's death; and the statute may be insisted on by any one interested. Harris v. Am. Bib. Soc. 4 Ab. N. S. 421; reversing 46 Barb. 470; and see *ante*, as to this statute, p. 309.

Benevolent, Charitable, Literary, Scientific, Missionary, or Sabbath School Societies.—Such societies "shall be capable of taking, holding, or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars. Provided, no person leaving a *wife*, or *child*, or *parent*, shall devise or bequeath to such institution or corporation more than one fourth of his or her estate, after the payment of his or her debts, and such devise, or bequest shall be valid to the extent of such one fourth, *and no*

such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator.

Law of Ap. 12, 1848, ch. 319; *vide* 27 Barb. 304.
The provisions of the above act were extended to other societies. *Vide post*, ch. XXIV. This act is modified by above law of 1860.

Law of 1855 *relative to Ecclesiastics and Religious Societies and Purposes.*—A law was passed April 9, 1855, ch. 230, entitled "Of Conveyances and Devises of Personal and Real Estate for Religious Purposes," which forbade conveyances and devises to ecclesiastics, and to any but corporations organized under the acts incorporating religious societies and free churches. The said act was repealed by act of April 8, 1862, p. 316.

Devises in Trust for Corporations.—In the case of McCartee v. The Orphan Asylum (9 Cow. 437), although a direct devise to a corporation, was held void (under the Statute of Wills then existing), it was intimated that a devise to a natural person, *in trust* for a corporation, would be good.

See also, Theolog. Sem. v. Childs, 4 Paige, 419; and *ante*, p. 421.

In the case of Downing v. Marshall (23 N. Y. 366), however, in construing the prohibitory clause of the Revised Statutes, the court holds that any devise of any interest in land to a corporation, whether through a trust or power, would be void. The court expresses the view that the technical character of the limitation is immaterial, and that that which the law forbids to be done at all, cannot be accomplished by a mere formal change in the mode of arriving at the result. *The court, however, held, that a direction to sell real estate and pay over* the proceeds to a corporation, would be valid although the question was not free from doubt. As seen above (Ch. X), a devise to a corporation which is invalid from the incapacity to take by devise, cannot be sustained as a charitable or public use to be executed by a court of equity, nor can trusts in favor of corporations be upheld

as for religious or charitable uses if they are in conflict with the general provisions of any statute law.

See further as to devises to corporations in trust, *ante*, pp. 305–317.

A corporation entitled by law to take by purchase or *otherwise*, may take by devise. Downing v. Marshall, 23 N. Y. 366.

As to devises in trust for charitable and educational corporations under the laws of 1840, 1841 and 1864, *vide ante*, pp. 313–315, and law of May 26, 1841.

As to devises in trust for charitable purposes, *vide ante*, Ch. X. Title viii.

As to devises to the Federal or a State government, *vide ante*, Title ii, p. 398.

CHAPTER XVI.

PROOF AND RECORD OF WILLS.

To make a full title of record to real estate, under a devise, the will creating it should be proved before the surrogate having jurisdiction (or the Supreme Court if so provided), and recorded in the county where the real estate is situated.

Title to land by devise can be acquired only under a will duly executed and proved according to the laws of the State or country where the land lies.

As to the law of the *lex loci* governing, see the cases quoted, *ante*, pp. 102, 103; and McCormick v. Sullivant, 10 Wheat. 192; Darby v. The Mayor, 10 Wheat. 465; Mills v. Fogal, 4 Ed. Ch. 559; *in re* Stewart, 11 Paige, 398.

Necessity of proving Wills by Devisees.—By Laws of 1830, ch. 320, § 12, it is enacted as follows:

"§ 3. The title of a *purchaser in good faith*, and for a *valuable consideration*, from the *heirs* at law of any person who shall have died seized of real estate, shall not be defeated or impaired by virtue of any devise made by such person of the real estate so purchased, unless the will or codicil containing such devise shall have been duly proved as a will of real estate, and recorded in the office of the surrogate having jurisdiction, or of the register of the court of chancery where the jurisdiction shall belong to that court, within *four* years after the death of the testator, *except*,

"1. Where the devisee shall have been within the

age of twenty-one years, or insane, or imprisoned, or a married woman, or out of the State *at the time of the death of such testator;* or,

"2. Where it shall appear that the *will or codicil* containing such devise shall have been *concealed by the heirs* of such testator, or some one of them;

"In which several cases the limitation contained in this section shall not commence until after the expiration of one year from the time when such disability shall have been removed, or such will or codicil shall have been delivered to the devisee or his representative, or to the proper surrogate."

TITLE I. WILLS PROVED BEFORE THE REVISED STATUTES.

The following provisions of the earlier statutes it may be desirable to refer to:

The probate of last wills and testaments, and granting of administration of intestates' estates, was declared, by an act of the General Assembly of the colony, of the 11th of November, 1692, to be vested in the governor, "or in such persons as he should delegate under the seal of the prerogative court." 1 Brad. 14, 16.

This right continued down to the revolution, and on the 16th of March, 1778, an act declared the powers of the judge of probate nearly in the language adopted in the first section of the revised act of 1813, Vol. I, p. 444, 1 Green. 18.

Surrogates were first recognized under the State government March 16, 1778, 1 Gr. 18, § 3. Before that time the governor of the colony delegated persons in the different counties with similar powers.

Proof and Record of Wills under Law of 1801.—The act of Feb. 20, 1801, 1 Web. 178, made provision for the proof of wills concerning land, on notice to heirs, before the Court of Common Pleas of the county where the real estate was situated; and the will, when proved, was to be recorded in a book by the clerk thereof, and the record is to be evidence in certain cases.

If the lands are in several counties, the will is to be proved before the Supreme Court, and recorded by the clerk thereof.

By the Revised Laws of 1813, ch. 79, § 1, Vol. I, p. 444, the judge of the court of probates of the State is to have same powers and jurisdiction in testamentary matters as theretofore exercised by the governor of the late colony, except as modified in the act, and except that surrogates were to be appointed by the governor.

Before the Revised Statutes of 1830, the jurisdiction of the surrogates' courts was limited to the probate of wills of personal property.

Wills devising *real estate* were, by law of April 4th, 1786, ch. 27 (re-

pealing ch. 51 of 13th session), 1 Green. 236; also act of April 5, 1790, ch. 51, 2 Green. 325, to be proved, if thought desirable, in the Court of Common Pleas, where the land was situated, and recorded therein; if in several counties, then to be proved in the Supreme Court, on notice to heirs, &c. By act of February 20th, 1801, wills may be proved before the Court of Common Pleas of different counties, or in the Supreme Court, on notice to heirs. By law of April, 1813, 1 Rev. Laws, p. 444, embracing previous laws, surrogates' courts for each county were appointed, and were directed to record in books to be provided by them, all wills proved before them respectively. An act of Feb. 20, 1787, ch. 38, had made similar provisions. Surrogates were also empowered to issue letters testamentary, &c., by said acts. See, also, the act of March 3, 1787, 1 Green. 385, as to various provisions relating to wills and their probate, &c.

By law of 1829, p. 279, ch. 180, all probate records in the secretary of State's office, deposited under the act of March 21, 1823, are to be deposited with the register in chancery.

Lost or destroyed wills may be proved by the Supreme Court, and the decree establishing them recorded with the surrogate. 1 R. L. p. 153.

Exemplified copies of record of wills proved before judges of probate, and recorded in their offices before January 1, 1785, are made evidence if the will cannot be found. 1 R. L. 1813, 168.

In the Revised Laws of 1813, April 8, 1813, ch. 79, Vol. I, p. 444, will be found embodied all the laws then in force relative to the court of probates, the office of surrogate, and the granting of administration, and as to the sale of real estate of intestates for the payment of debts, also as to the appointment of guardians for infants. Under these laws, and up to 1830, when the Revised Statutes went into effect, the jurisdiction of surrogates' courts was confined to the probate of wills of personal property.

Transfer of Records of Court of Probates.—March 21, 1823, ch. 70.—This act abolished the Court of Probates, and all its writings, records, and proceedings were ordered to be deposited in the office of the secretary of this State, also copies of wills of non-residents; appeals were to be taken to the court of chancery, and provision was made as to the appointments of surrogates. This act was abolished by the general repealing act of 1828.

By act of April 18, 1829, ch. 180, all papers and records deposited with the Secretary of State, under the above act, were transferred by him to the office of the register in chancery.

Rule of the United States Supreme Court.—The Supreme Court of the United States have held that the probate of a will, duly received to probate by a State court of competent jurisdiction, is conclusive of the validity and contents of the will in that court. Gaines v. New Orleans, 6 Wall. 642.

TITLE II. WILLS PROVED SINCE THE REVISED STATUTES.

By the Revised Statutes, the will may be proved before the surrogate of the county having jurisdiction as respects personal property, and if there be no such surrogate, then to the surrogate of the county where any real

estate devised may be situated, and if it shall appear upon the proof taken that such will was duly executed, that the testator at the time of executing the same was in all respects competent to devise real estate, and not under restraint, the said will and the proofs and examinations so taken shall be *recorded* in a book to be provided by the surrogate, and the record thereof shall be signed and certified by him. The will, proved and certified, the record, or an exemplification of the record, are made evidence, but may be repelled by proof. By the Revised Statutes, the provisions thereof, relative to the probate of wills thereafter to be had, and the jurisdiction of the surrogate and his proceedings thereon, are to apply to wills already made, as to those thereafter to be made.

2 R. S. 1 ed. p. 58, §§ 14 and 15; p. 68, § 68.

As to the above provisions, the following cases have a bearing. 2 Barb. Ch. 40; 7 Pai. 552; 3 Abb. 124; 6 N. Y. 198; 1 How. 542.

The Revised Statutes of 1830, relative to the jurisdiction of surrogates and the proof of wills, were extensively modified by the law of May 16, 1837.

By said law of May 16, 1837, ch. 460, the surrogate of a county has jurisdiction to prove wills: 1st. Where the testator at, or immediately previous to his death, was an inhabitant of the county; or 2d, where, not being an inhabitant of the State, he died in the county, leaving assets therein; or 3d, where he shall, not being such inhabitant, die out of the State, leaving assets in the county; or 4th, where, not being such inhabitant, he shall die out of the State, not leaving assets therein, but assets of such testator shall thereafter come into the county of such surrogate; or 5th, where any *real estate* devised by the testator shall be situated in in the county of such surrogate.

This act repeals § 7, Title I, ch. vi, of the Revised Statutes, as to the jurisdiction of surrogates in the proof of wills of real estate, also sections 8 and 9.

Those sections provided for the proof of wills of real estate before the surrogate to whom the probate of the will would belong in respect of personal property, under Art. II, of the title, and if there were no such surrogate, then before the surrogate of the county where the real estate was situated. Amended law of 1830, ch. 320. Notice was to be given to the heirs personally or by publication, and on guardians of minors. Where there was no guardian, the surrogate to appoint one. 1 R. L. p. 365.

The law of 1837, ch. 460, §§ 4, 5, 6, 7, 8, provides that the executors, devisees, legatees, or any person interested in the estate, may have the will, if of real estate, proved on a citation to heirs and the widow, as provided therein; special guardians being appointed for minors, who have no general guardians. § 6, as to minors was repealed by law of May 2, 1863, ch. 362, and § 8 amended as to service on minors, and service by publication.

The 3d subdivision of said section was amended by law of 1840, ch. 384, as to the publication of the citation.

The details of these statutes cannot be here considered more fully.

Citations to Lunatics and Idiots.—By law of May 14, 1872, ch. 693, on any proceeding before surrogates, citations are to be served both on the lunatic, &c., and his committee, or, if he have none, on the person in whose care he is, and a special guardian shall be appointed for him.

Where the Surrogate is Interested.—As to the provisions of statute authorizing a county judge or the district attorney of a county to act when the surrogate is interested, and to record wills so proved under his hand, in the surrogate's books, *vide* laws of 1830, ch. 320; also, law of May 6, 1834, ch. 305; also as to county courts generally, law 1847, ch. 280.

As to the general powers of surrogates and county courts, see also the Code, § 37; also laws of 1847, ch. 470, as to the county judge or district attorney, acting in place of the surrogate; also, law of April 13, 1843, ch. 121, amending § 49, art. iii, Tit. ii, ch. vi, Part II, of R. S.; also, law of April 28, 1870, ch. 467. See, also, as to the election of a separate officer to perform the duties of surrogate in certain counties. Act of April 15, 1851, ch. 175; act of 1834, ch. 308; 1837, ch. 465.

The Testimony.—By said law of May 16, 1837, ch. 460, § 17, no written will of real or personal estate, or both, shall be deemed proved, until the witnesses to the same, residing within this State, at the time of such proof, of sound mind and competent to testify, shall have been examined as prescribed in said act. And, in all cases the oath of the person who received the will from the testator, if he can be produced, together with the oath of the person presenting the same for probate, stating the circumstances of the execution, the delivery and the possession thereof, may be required; and before recording any will or admitting the same to probate, the surrogate shall be satisfied of its genuineness and validity.

This act of 1837, also makes the 10th, 11th, 14th, and 15th sections of Title i, ch. vi, of Part II, of Revised Statutes, applicable to wills of real and personal estate or either; and the 10th section is also to apply to proceedings on citations, as well as notice. These sections 10 and 11 applied to the summoning of witnesses; §§ 14 and 15 are referred to above, and apply to the proof and record.

By law of 1837, ch. 460, §§ 10–16, two, *at least*, of the witnesses, if living in the State, *must* be examined, if of sound mind, and not disabled by age, sickness or infirmity, or their absence must be satisfactorily accounted for; but, on request of parties interested, all the witnesses are to be examined. Provision is made as to such examinations where the witnesses are disabled, absent, &c.

If one or more of the witnesses be deceased, out of the State, or incompetent, proof may be taken of the handwriting of the testator, and witnesses so dead, absent, or insane. *Vide* 2 B. Ch. 52; 1 Wend. 406; 45 Barb. 450; 30 How. 234.

Similar provisions were in the Revised Statutes, I, 1st ed. p. 58, § 13.

When all the Witnesses are Deceased.—It is also provided by the Revised Statutes, &c., § 16, that if it appear to the satisfaction of the surrogate, that all the subscribing witnesses are dead, insane, or reside out of the State, the surrogate shall take such proof of the handwriting of the testator, and of either or all of the subscribing witnesses, and of other facts as would be proper to prove the will at law. 1 R. L. 365.

By law of May 16, 1837, ch. 460, § 20, if all the witnesses are dead,

insane, out of the State, or incompetent, proof of the handwriting of the testator and witnesses may be taken, and any other proper facts, and, if the same be satisfactory to the surrogate, he may admit the will to probate and record, as a will of personal estate only, and so as to affect only the personal estate of the testator.

As to the proof in the above case, *vide* Lawrence v. Norton, 45 Barb. 450; *Ib.* 30 How. 232.

By law of 1841, ch. 129, certain sections of the law 1837, as to the examination of witnesses were made applicable to all witnesses whether subscribers to the will or not.

By the Revised Statutes, the record or exemplification of the proof of any will proved, *where all the subscribing witnesses are dead*, shall be evidence in an action, &c., concerning the will after it shall have been proved that the lands therein mentioned have been uninterruptedly held under such will for twenty years before the commencement of the action, and such record shall have the same effect as if taken in open court in such action or controversy. Modified from law of April 5th, 1790. 2 R. S. 1st ed. p. 60, § 18.

Proof of Lost or Destroyed Wills.—If a will of real or personal estate be lost or destroyed, the Supreme Court may take proof of the execution and validity of the same, and if established, the will may be recorded with the surrogate, and letters issued thereon, and prior executors or administrators be restrained. The law is made applicable to past and future wills alike. But no will of any testator dying after the law takes effect shall be proved as lost or destroyed, unless it be proved to have been in existence at the time of the decease of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions can be clearly proved by two credible witnesses, a correct copy or draft being equivalent to one witness. 2 R. S. 1st edit. p. 68, §§ 63–67. As to proof of lost will, *vide* Grant v. Grant, 1 Sand. Ch. 235.

The following cases may be also consulted as to the above provisions relative to lost or destroyed wills, viz.: 26 Barb. 253; 6 Pai. 184; 2 Brad. 181; 35 N. Y. 654; 36 Barb. 95; 5 N. Y. 311; 2 Brad. 334; 10 N. Y. 278; 10 Wend. 44; 20 N. Y. 120; 18 How. 208.

By law of April 22, 1870, the surrogate of New York county may have the same power to take proof of lost or destroyed wills, in cases within his jurisdiction, as is vested in the Supreme Court.

Wills Proved by Commission.—Where witnesses are out of the State, a will duly executed by the laws of this State, or a duly exemplified or authenticated copy thereof (when the original is in the possession of a court in another State or country, and cannot be obtained), may be proved in the Supreme Court (formerly chancery) by *commission*, according to a notice to be directed by the court. The will or copy is to be recorded with the clerk, and the will or record or exemplification is made evidence. Laws of 1829, ch. 300; Laws of 1830, ch. 320; 2 R. S. p. 67, 1st edit.

By law of 1837, ch. 460, § 77, also, it is provided that on any proceeding or matter in controversy before a surrogate, he may issue a commission to take testimony of witnesses in any other State, territory, or foreign place, as is done in courts of record.

Provision is also made in the Revised Statutes as to the proof by commission of wills of personal estate, by persons out of the State, and the issuing of letters thereon. 2 R. S. 1st edit. pp. 67, 68.

Other Statutes as to Probate.—The following acts it may also be desirable to refer to as to the proof of wills, &c.

An act concerning the proof of wills, March 18, 1834, ch. 38, as to the testimony of sick and infirm witnesses. Repealed by act of May 16, 1837, ch. 460.

An act concerning the proof of wills, executors and administrators, guardians and wards, and surrogates' courts. May 16, 1837, ch. 460. The provisions of this act amend the Revised Statutes in many particulars, and most of them are especially alluded to in this chapter.

An act to regulate the powers, &c. of public administrators and surrogates relative to the property and effects of foreigners. April 21, 1837, ch. 234. Repealed May 14, 1840, ch. 348.

Citations, and as to Foreign Wills.—Act of May 14, 1840, ch. 384, amending the 3d sub. of the 8th section of the act of 1837, ch. 460, as to the service of citations on taking proof of wills. This act also provides as to the issuing of letters by a surrogate in this State, on the proof of a duly authenticated or exemplified copy of a will of personal estate admitted to probate in a court of a foreign State or country.

Witnesses.—Act of April 22, 1841, ch. 129, making §§ 11–16, of the above act of 1837, ch. 460, applicable to all witnesses giving testimony on the probate; and applies the first section to all wills; and provides as to notice of examination of witnesses.

Creditors.—Act of April 18, 1843, ch. 172, amending § 72 of the above act of 1837, ch. 460, so as to allow creditors to obtain orders for the mortgaging, leasing, or selling of the real estate of decedents, and as to judgments or decrees obtained against the executor, &c.

Repeal of Parts of the Revised Statutes.—The law of 1837, ch. 460, § 71, repeals the 7th, 8th, 9th, 12th, 23d, 24th, 25th, 26th, and 27th sections of Title i, ch. vi, 2d part of Rev. Stat. These sections applied to the jurisdiction of surrogates, citation to heirs, &c. and minors, examination of witnesses, and as to proof of wills of personalty.

Also the 2d, 38th, and 39th sections of Title ii, of said ch. vi, that letters should not be granted within 30 days after proof of will; and as to appointment of a collector by special letters.

Also the 56th section of Title iv, of said ch. vi, which required sales by executors to be public or private, except in the city of New York.

Also so much of the 1st section of Title i, ch. ii, of the 3d Part of the Revised Statutes as states that the surrogate shall not exercise any jurisdiction not expressly given by statute.

This law of 1837, ch. 460, § 74, also repeals § 48, Title iv, Part ii, ch. vi, of the Revised Statutes, as to application by creditors for sales of realty; and § 42, Title iii, Part iii, ch. viii, that heirs shall not be liable at law, but only jointly in equity.

Act of May 13, 1846, ch. 288, providing for the revocation of the letters of non-resident or absent executors or administrators who refuse to attend on citation.

Act of Sept. 21, 1847, ch. 298, amending act of 1837, ch. 460, by substituting "Title Third" for Title iv, in § 72 of said act as amended.

Law of May 2, 1863, ch. 362. By this act, § 6 of said law of 1837, ch. 460, is repealed, and § 8 amended as to service on minors and by publication; also amending § 7, as to minors; also amending § 27, of Title II, ch. vi, Part ii, of the Revised Statutes, as to administration: also amending § 62, of Title III, as to service by publication on creditors. Provision is also made as to the service of minors in proceedings to sell real estate, and as to orders in such proceedings, and as to fees and compensation of sur-

rogates and administrators. *Vide post*, ch. XVIII, as to Surrogates' Sales.

Surrogate's Decision.—By the law of 1837, ch. 460, § 21, the surrogate is to enter in his minutes the decision which he may make concerning the sufficiency of the proof or validity of any will, and the grounds thereof if required.

New Counties.—By law of Feb. 18, 1870, ch. 20, amending act of April 18, 1843, it is provided that where a new county is created, the surrogate of such county may take proof of wills, and grant letters, where the deceased at his death resided in the territory of the new county; and where, before the erection of the new county, any will of such deceased person shall have been proved, or letters granted, but the accounts have not been settled, the surrogate of the new county shall have exclusive jurisdiction thereafter of all questions thereafter arising upon any such will or estate, including the settlement thereof.

The surrogate of any county in which such will shall have been proved is required to make certified copies of proceedings or records in his office, and on being filed in the new county, they shall have the same effect as originals.

The law of April 18, 1843, ch. 177, also provided that in all cases of the erection of a new county thereafter, the surrogate thereof might take proof of wills and grant letters in cases where the deceased, at the time of his death, resided in the territory embraced therein.

Wills Evidence under the United States Constitution.—As to the probate being evidence as between the several States, under Art. IV, § 1, of the Constitution of the United States, *vide* Darby v. Mayor, 10 Wheat. 465.

Provisions of the Revised Statutes how far applicable.—By the Revised Statutes, the provisions of the Title i, art. iii, ch. vi, Part II, relative to the proof and probate of wills, thereafter to be had, and the jurisdiction of the surrogate and his proceedings thereon, are to apply as well to wills made previous as to those made subsequent to the time when the chapter takes effect. The provisions as to the *revocation* of wills are to apply to those made by a testator at the end of one year from such time. The provisions of the title are not to affect or apply to the validity of the execution of wills or their construction, if made before the chapter took effect.

The term "will," as used in the chapter is to include codicils as well as wills. 1 R. L. 368; 2 R. S. 1st ed. p. 68, §§ 68–71.

Generally as to the above provisions, *vide* 8 Pai. 446, 304; 4 How. 139; 20 N. Y. 120; 41 Barb. 392; 11 Barb. 332; 18 How. P. 200; 5 N. Y. 312; 2 Barb. Ch. 40.

TITLE III. VALIDITY OF WILL, HOW ESTABLISHED.

The determination by the surrogate of the validity of a will of real estate merely establishes it as *presumptive* evidence of its execution, existence, and validity. Its validity, or that of a devise thereunder, can only be judicially set at rest by an issue and trial at law.

Even where a surrogate has jurisdiction, and the probate of the will is valid, it is questionable whether the probate is more than *prima facie* evidence of the due execution and validity of the will. See Bolton v. Jacks, 6 Robert, 164; Clemens v. Clemens, 37 N. Y. 59; Bogardus v. Clarke, 1 Ed. 266; 4 Pai. 623.

Appeals from the surrogate's decision may be had within three months after his decision to the circuit judge, (Supreme court), and issues may then be framed to try its validity, and the will shall not be recorded until the appeal is determined, on such appeal being filed with the surrogate. Laws of 1830, ch. 460, and 1847, ch. 280; law 1848, ch. 185. The appeal also stays all proceedings of the executor or administrator, and feigned issues may be ordered to try the questions arising.

The final determination of such issue shall be conclusive as to the facts therein controverted, in respect to wills of personal estate only, upon the parties to the proceedings. If such determination be in favor of the validity of such will, either of real or personal estate, or in favor of the sufficiency of the proof thereof, the surrogate to whom such determination shall be certified shall record such will, or admit the same to probate, as the case may be. If the determination be *against* the validity of the will, or against the competency of the proof thereof, the surrogate shall *annul and revoke* the record or probate thereof, if any shall have been made. 1 Rev. Stat. p. 66, 1st ed.

By act of April 15, 1853, ch. 238, the validity of a devise may be determined in the supreme court, in an action to be brought for that purpose; and thereupon any party may be enjoined from setting up or from impeaching such devise, as justice may require. Issues of fact are to be framed and tried as the court may direct.

By said law, also, heirs claiming lands by descent, may prosecute for the partition thereof, notwithstanding any apparent devise by the ancestor, and any possession held thereunder, provided the heirs allege and establish the devise to be void.

As to new trials under this provision, *vide* Marvin v. Marvin, 11 Ab. N. S. 102. See, also, as to when the action may be brought, Woodruff v. Cook, 47 B. 305.

By law April 19, 1871, ch. 603, appeals from the surrogate are to have preference in the supreme court and court of appeals; and letters may be issued during the appeal, but shall not confer on the executors power to sell real estate, pay legacies, or distribute, until the final determination of the appeal.

New York County.—By law of April 22, 1870, ch. 359, the surrogate of New York County, has the same power to construe and pass upon the validity of dispositions by will as is vested in the supreme court, and appeals may be taken therefrom as is provided in cases of probate of wills.

This act repeals act of April 18, 1869, ch. 246.

In the cases of Fouke et al. against Zimmerman et al. and Fouke et al. against Hubert et al., decided in 1872, the Supreme Court of the United States holds that, a probate in Louisiana of the will of a person who died domiciled in New York is valid until set aside in the Louisiana court, though the order of the surrogate in New York has been reversed in the Supreme Court of that State, on which the Louisiana probate was founded; that a purchaser from the devisee of such will of real estate in Louisiana, while the order of the Louisiana court establishing the will remains in force, is an innocent purchaser, and is not affected by a subsequent order setting aside the will, to which he is not a party, and that such an order, founded on a verdict and judgment in New York declaring the will void, obtained by collusion between the devisee under the will and the heirs-at-law, cannot affect the purchaser from the devisee, made in good faith before such verdict and judgment.

The word "Will."—The word *will*, when used in the Revised Statutes, includes codicils as well as wills. 3 R. S. 158, § 94.

Receivers in New York County.—The law of April 22, 1870, ch. 359, as regards surrogates in New York county, allows the appointment of a receiver during contests relative to a will of realty.

This act repeals § 3 of an act of 19th April, 1869, ch. 246.

Where a claimant under a will produces such will, duly proven and presumptively valid, the adverse party has no right to frame issues to be tried by a jury, for the purpose of contesting the validity of the will, if such party had previously contested the will unsuccessfully before a jury. Nichols v. Romaine, 3 Ab. 122.

TITLE IV. RECORD AND EXEMPLIFICATION OF WILLS.

By the Revised Statutes, as seen above (title ii), the will and the proofs and examinations taken are to be recorded in books to be provided by the surrogate, and the record thereof is to be signed and certified by him; and the will as proved, or the record or an exemplification of the record, is made evidence.

The Testimony.—Testimony taken on the proof of wills, or as to letters testamentary, or of administration, or revoking the same, are entered in books by the surrogate, and also all wills and letters as above. *Certified* copies under seal are to be evidence in courts as to wills of personal estate. 1 R. S. 1st edit. §§ 57, 58, p. 80.

The proofs and examinations taken under § 16 (*ante*, title ii), where the witnesses are deceased, are to be signed, certified, and recorded by the surrogate, as provided, and the will shall be deposited with him. § 17, 1 R. S. 1st ed. p. 50.

The record of proofs and examinations taken under §§ 16 and 17, where all the subscribing witnesses are deceased, absent, &c. and the exemplification thereof by the surrogate having custody thereof, shall be received as evidence on any trial, &c. concerning the will, after proof on such trial, &c., that the lands devised have been uninterruptedly held under the will for twenty years before suit brought; and shall have the same effect as if taken in open court.

Wills Proved before 1785.—Exemplifications of records of wills proved and recorded with the former court of probates before Jan. 1, 1785, and certified under the seal of the officer having custody, shall be evidence, after proof of diligent and fruitless search for the will. P. 60, *Ib.* § 20.

Further Record of Exemplified Copies of Records of Wills.—By law of 1837, ch. 460, § 68, clerks of Supreme Court and surrogates may make exemplified copies of wills of real estate, and notices, citations, and proofs concerning the same, and they may be recorded with the wills of real estate by the surrogate where the lands lie.

Record in other Counties.—By law of May 11, 1846, ch. 182, any will of real estate duly proved in the State, with (the proofs taken on the proof thereof, and) the certificate of probate may be recorded in the clerk's office of any county as are conveyances of real estate. Any exemplification of the record of such will may also be so recorded, and the record or exemplification may be read in evidence. Such will is to be indexed by the clerk with *deeds.*

The words within parentheses above were stricken out by law of May 8, 1869, ch. 748.

By law of June 24, 1851, ch. 277, the provisions of the above act are extended to apply to the register of New York county.

Wills Proved before 1830.—By laws of March 25, 1850, ch. 94, and March 24, 1857, ch. 173, exemplifications of records of wills proved before Jan. 1st, 1830, before surrogates in the State, or a surrogate or judge of probate of any other State, certified under seal of the officer having custody, are made evidence.

Record of Will here when the Testator Lived out of the State.—By Laws of 1864, ch. 311, as amended by law of May 14, 1872, ch. 680, where real estate situated in this State has been or shall be devised by any person residing *out of the State, and within any other State or Territory of the United States*, and the will has been proved and filed *therein*, an exemplified copy there of the will, or of the record, and of the proofs may be recorded with the surrogate of the county where such real estate is *situated*, which record in said surrogate's office, or an exemplified copy, *where the original cannot be produced*, shall be presumptive evidence of said will and its due execution, in all actions or proceedings relating to the lands so devised. This statute, however, would not dispense with the necessity of the will being made and proved in accordance with the laws of this State, if the real estate is situated therein.

Therefore a will passing real estate here should appear not only to have been attested but proved by at least two witnesses (unless the decease or disqualification of the witnesses, or some or one of them, is shown), before it can become here a valid instrument of record transferring real estate; and the other requisites connected with the execution of the instrument by the laws of this State must also appear to have been complied with, whether the testator was an inhabitant of the State or not. See *ante*, p. 102, as to the *lex loci.*

Previous Records may be Signed.—By law of March 16, 1870, ch. 74, acts of surrogates thitherto, and officers acting as such, in completing, by signing in their own names, the unsigned and uncertified records of wills, and of the proofs and examinations taken in the proceedings of probate thereof before their predecessors in office, are confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements.

This act also makes it lawful for any surrogate or officer acting as such hereafter, in like manner and under like circumstances, in his own name to sign, certify, and complete all unfinished records of wills, and of proofs and examinations taken by and before his predecessor in office, adding to his signature the date of so doing, and which shall have the like effect as in the preceding section mentioned.

Former records in Rensselaer county, *vide* law of April 12, 1871, ch. 424, which legalizes them, and authorizes signature of surrogate to past records of Surrogate Romeyn.

Exemplified Copies, Wills Proved before 1830.—By law of April 7, 1871, ch. 361, exemplified copies of wills proved and recorded with a surrogate before January 1, 1830, are made evidence without the proofs taken, and whether such proofs are recorded or not, and the recording of such will shall be evidence of its probate.

See also as to record and exemplification of wills, both before and after the Revised Statutes; *ante*, titles i, ii, pp. 427, 430, 432.

CHAPTER XVII.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS OVER THE REALTY.

TITLE I. THE APPOINTMENT OF THE EXECUTORS AND ADMINISTRATORS.

LETTERS testamentary are granted by the surrogate to the persons named in the will, if competent by law to serve, and they elect to qualify, (*i. e.*, take the requisite oath to act faithfully) and take upon themselves the execution of the will.

1 R. L. 445; 2 R. S. 1st ed. p. 69, as amended law of 1837, ch. 460.
As to who may act when the surrogate is disqualified, *vide ante*, c. xvi.

The following are some of the most important statutory provisions relating to executors.

Disqualification as Executor.—Those incapable, in law, of making a contract (except married women), infants, aliens not inhabitants of the State, those convicted of an infamous crime, those incompetent by reason of drunkenness, improvidence, or want of understanding, are incompetent to serve as executors, if they are so disqualified when the will is proved. If the disability is removed as to infants, aliens and married women, supplementary letters may be granted to them. Laws of 1830, ch. 320, § 17; 2 R. S. 1st ed. p. 69; amended laws, 1873, ch. 79.

By law of Ap. 25, 1867, ch. 782, the surrogate may refuse letters to those unable to read and write the English language.

The following cases may be referred to as to the qualification for executors, &c., and applications for their removal: 19 Barb. 653; 14 N. Y. 449; 14 Barb. 660; 43 Barb. 418; 9 Barb. 446; 2 Brad. 32; 4 Barb. 242.

Alien Executor.—The disabilities of aliens under the statute, apply only to those who are both alien and non-resident. Such disability does not attach to a non-resident citizen of the United States. McGregor v. McGregor, 1 Keyes, 133.

Married Women.—By the Revised Statutes of 1830, no married woman could act unless her husband consented in writing; he then became jointly responsible for her acts. 1 R. S. 1st ed. 70.

By law of Ap. 25, 1867, ch. 782, married women were enabled to be executrixes, administratrixes and guardians, and to give bonds for security, as if *sole*. See also law of 1863, ch. 362.

Removal, &c. of Executors.—Provision is also made for the removal of executors on they or their sureties becoming insolvent or removing from the State. Laws of 1837, ch. 460; 1862, ch. 229. Also in cases of improvidence, drunkenness or want of understanding, or in case of marriage of an executrix. *Ib.* Amend law, 1862, ch. 229.

Also law of Ap. 13, 1871, ch. 482, as to security and removal. *Vide*, also, 9 Paige, 203.

Also law of May 19, 1846, ch. 288, as to removal of non-resident and other executors, who refuse to obey citations.

See, also, laws of 1837, ch. 460, as to removal on the ground of incompetency, or for not giving security. Also law of 1862, ch. 229.

Renunciation.—If the executor named RENOUNCE, he shall do so in writing, attested by two witnesses; or if he do not qualify within thirty days after proof of will, he shall be held to have renounced, unless he give excuse after a notice served.

1 R. L. 449; 2 R. S., 1st ed. 70.

To have no Power until Letters Granted.—Every person named in a will as executor, and not named as such in the *letters testamentary*, or in letters of *administration* with the will annexed, shall be deemed to be *superseded* thereby, and shall have no *power* or *authority* whatever, as such executor, until he shall appear and qualify; and no executor named in a will *shall, before the letters testamentary are granted, have any power to dispose of any part of the estate of the testator*, except to pay funeral charges, and to protect the estate.

2 R. S. § 15, 1st ed.

Administrators with Will Annexed.—Administrators with the will annexed have the same rights and powers, and are subject to the same duties as if named executors in the will. They are appointed in default of the executors who may not qualify or who may renounce; or on the decease of the executors or their removal. No executor of an executor shall, as such, be authorized to

administer on the estate of the first testator. (*Ib.* §§ 14, 17, 22, 45.) Letters with the will annexed supersede the letters testamentary, &c., § 45.

As to the powers of such administrators to make sales under powers in the will, *vide post*, Title iii.

Incapacity or Removal of one Executor.—In case one of several executors or administrators shall die, become lunatic, convict of an infamous offence, or otherwise become incapable, or if letters are revoked as to him, then the remaining executors, &c., shall act and com plete the execution of the will.

2 R. S. p. 78, 1st ed.
As to when executors may be removed, *vide supra*, p. 438.
See also 19 Barb. 663; 37 Barb. 194.

County of New York.—See a special act relative to the surrogate of said county as to appointment and removal of executors, guardians and trustees by him, and the appointment of successors, as to the accounting by trustees, guardians, &c., the construction of the validity of wills by him, and as to the appointment of receivers during a contest over a will of real estate. Laws of 1870, ch. 359.

Acts done by Superseded Executor, &c.—By the Revised Statutes, all *sales made in good faith*, and all lawful acts done by *administrators* before notice of a will, or by executors or administrators who may be *removed or superseded*, or who may become *incapable*, shall remain valid, and shall not be impeached on any will afterwards appearing; nor by any subsequent revocation or superseding of the authority of such executors or administrators. § 59.

Letters Conclusive.—The letters, testamentary, or of administration granted by the officer having jurisdiction shall be *conclusive evidence* of the authority of the executors, &c., until reversed or revoked. § 74.

Letters on Estates of Non-Residents.—Whenever the will of a person *domiciled* without this State, has been admitted to probate here, on the production of the exemplification of the foreign record or otherwise, and whenever administration shall have been granted by competent authority in the State or county of domicil,

letters may be granted by the surrogate in this State, who has proved the will, or by any other surrogate having jurisdiction, to the executors or administrators or other persons entitled to take the personal estate, in the State or county of domicil, or to any persons authorized by him or them to receive the same, on security to be fixed; and after six months' notice in the State paper and in a paper of the surrogate's county; creditors are to be cited as on proof of wills by a thirty day notice.

Act of May 4, 1863, ch. 403.

The Joint Estate of Executors in Land.—The Revised Statutes provide "Every estate vested in executors or trustees, as such, shall be held by them in *joint tenancy*."

Receivers in place of Executors.—Where, in an action of partition, or for the construction of a will, an estate has been brought within the possession, direction, or control of the Supreme Court, and all the executors are deceased, the court may, during the proceedings, and until they are carried into effect, appoint a receiver of the estate. Such receiver is to carry into effect the orders and decrees of the court in relation to the estate, and be the successor in interest of the surviving executor; and shall have the same power and authority as have administrators with the will annexed, but subject to the orders of the Supreme Court.

2 R. S. 1st ed. p. 79, as amended laws of 1863, ch. 466.

See, also, *ante*, ch. xvi, as to the other provisions affecting executors in connection with the probate of wills.

Title II. Assets Savoring of Realty.

As regards what *assets* savoring of the realty go to executors and administrators, the Revised Statutes prescribe that they shall take as *personal* estate to be distributed as applied as such:

1. *Leases* for years; lands held by the deceased from year to year; and estates held by him for the life of *another person.*

1 R. L. 365, § 4.

2. The interest which may remain in the deceased, at the time of his death, in a term for years, after the expiration of any estate for years therein granted by him or any other person.

3. The interest in lands devised to an executor for a term of years for the payment of debts.

4. Things annexed to the freehold or to any building for trade or manufacture, and not fixed into the wall of a house so as to be essential for its support.

5. The crops growing on the land of the deceased at the time of his death.

6. Every kind of produce raised annually by labor and cultivation, except grass growing, and fruit not gathered.

7. Rent reserved to the deceased, which had accrued at the time of his death.

1 R. L. 365, 439, 443.

Subdivisions 8 and 9 relate purely to personal property. § 6.

§ 7. Things annexed to the freehold, or to any building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned, *supra*, in subdivision 4th.

As to the interpretation of this provision, § 7, *vide*, 18 N. Y. 28; 20 *Id.* 344; 40 *Id.* 287; 1 Barb. 372, and *ante*, pp. 107, 208, 366.

By §§ 9, 10, certain other exceptions are made with reference to personal property, which have no application to the realty.

Crops.—Notwithstanding the above provisions of statute, the devise of a *farm*, without modifying words, would carry to the devisee crops growing on the farm, instead of their passing to the executors, &c. Bradner v. Faulkner, 34 N. Y. 347. See also Sherman v. Willet, 42 N. Y. 146.

See, also, as to crops, *ante*, pp. 347, and 368, showing what kind of crops go to the executor and what to the heir, and *post*, ch. xix.

By § 8, the right of an heir to any property not enumerated in said 6th section, which by the common law would descend to him, shall not be impaired by the general terms of that section.

Rents Collected.—Must be applied to pay rent due. 48 N. Y. 232.

Title III. Powers of Sale to Executors.

Unless a *special power* be given to executors to mortgage, lease, or make sales of land, by the will, they have no authority so to do. As a general rule, they have nothing to do with the *realty*, and an unauthorized sale of real estate by them is a nullity.

Barker v. Crosby, 32 Barb. 184; Lahens v. Dupassent, 56 Barb. 266.

Implied Power.—A power will sometimes be implied, from the terms of a will, and the apparent intention of the testator, where a sale of the real estate would be necessary to carry out that intention. Thus, a devise of realty to executors, with direction to pay debts out of it, or to invest, and to accumulate or pay over the proceeds or income, would carry with it a power to sell. So, also, if a will be silent as to the persons who should sell lands directed to be sold, a power of sale is implied in the executors who qualify to make the sale.

Dominick v. Michael, 4 Sand. 374; Davoue v. Fanning, 2 Johns. Ch. 2; Dorland v. Dorland, 1 Barb. 63; Bogert v. Hertell, 4 Hill, 492; Meakings v. Cromwell, 5 Pai. 136; Morton v. Morton, 8 Barb. 18; 2 Sand. 512; affirmed 5 N.Y. (1 Seld.) 136; Livingston v. Murray, 39 How. 102. As to when heirs are estopped under a void power, *vide* Favill v. Roberts, 3 Lans. 14.

The above implication of a power to sell, in the executors, results from the apparent necessity of the case, and in order to effectuate the intention of the testator, which is generally held to have a controlling effect in the interpretation of wills.

Where there is a power to sell in order to distribute among heirs, the heirs may elect to take the estate in land notwithstanding the power. Reed v. Van Wart, 12 Barb. 113; and see *ante*, p. 368, as to equitable conversion under a power. Also, p. 443.

The Estate of the Executors or Trustees.—Under the common law, a devise of lands to executors to sell, passed the interest in them; a devise, on the contrary, that executors should sell, or that the lands should be sold by them, gave them but a power, and the lands descended subject to the power.

Vide Patton v. Crow, 26 Ala. 426; Fontain v. Ravenel, 17 How. U. S. 369; 4 Kent, 320.

By the Revised Statutes, where lands are devised to executors to be sold or mortgaged, *without authority to receive the rents and profits, no estate vests in them*, but the trust is valid as a power, and the lands descend to heirs or pass to devisees, subject to the execution of the power. If there is a trust estate, the *cestui* has no estate.

3 Rev. Stat. p. 20, § 75; Reed v. Van Wart, 12 Barb. 113; Boynton v. Hoyt, 1 Den. 53; Quin v. Skinner, 49 Barb. 128; 43 N. Y. 99; Tucker v. Tucker, 5 N. Y. 408; Hutchins v. Baldwin, 7 Bos. 236; Germond v. Jones, 2 Hill, 569; *in re* McLaughlin, 2 Bradf. 107; Jackson v. Jansen, 6 John. 73; Sharpsteen v. Tillou, 3 Cow. 651; Noyes v. Blakeman, 2 Seld. 567.

If they might be entitled to the rents, &c., under a contingency which never occurs, the authority remains a mere power in trust. Reed v. Van Wart, 12 Barb. 113. When the executors have merely a naked power, not coupled with any interest or trust, on the decease of the executors, the power does not survive, but the estate vests in the heirs absolutely. And the court will not interpret powers as in trust unless necessary. Catton v. Taylor, 42 Barb. 578; Martin v. Martin, 43 Barb. 172; see, also as to the estate of trustees of, *ante*, pp. 257, 258, 259, 260, 263, 266, 267 to 274.

If not exercised, the fee descends to the heirs. The powers should be exercised within a *reasonable time*, otherwise it may become inoperative. See *ante*, p. 270.

As to when an estate in the executors will be implied, *vide* Brewster v. Striker, 2 Com. 19; Striker v. Mott, 28 N. Y. 82.

Courts have power to control the exercise of the power in behalf of infant devisees. Martin v. Martin, 43 Barb. 172.

It has also been seen, under the chapter on Powers (*ante*, p. 346, 351), that when the object of a power is illegal, the power is void; and when it is void, or the objects of the power fail, or no appointment is made, the future estates limited take effect, as if the power had not been given. And where no estate is given to the executors, the estates limited are held to be vested, subject to the execution of the power, if valid.

Power Inconsistent with Devise.—Where a power to sell land by executors is given after a direct and *absolute*

devise in fee, the *power of sale is null, and the executors can convey no estate.*

The general rule is, that a power shall not be exercised in derogation of a prior grant by the appointor. It is held, however, that a power of sale may be exercised, notwithstanding a prior devise of the land in question, in case the power appears necessary *to carry out the intention of the testator.* The following is a review of the latest cases on the subject in the courts of this State.

In the case of Quin v. Skinner (49 Barb. 128), on the construction of a will, the court held that the power of sale under consideration was a general power in trust, and was repugnant to a direct and absolute prior devise, and that such a general power could not be allowed to operate to defeat the apparent intention of the testator. This case was reviewed in 43 N. Y. p. 99, and reversed; the court holding that the power to sell given to the executor was legal and valid as a power in trust, and not inconsistent with or repugnant to the residuary devise. The court put its decision on the ground that the intention of the testator, as apparent from the will, was to give to the so-called devisee a pecuniary legacy consisting of the *proceeds* of the estate, and not to devise the real estate at all.

In the case of Kinnier v. Rogers (55 Barb. 85) it was determined that a general power of sale could be exercised by the executors after a specific devise of the residuum of the testator's estate. The court held that the power under review was good, as imposing a duty upon the executors to pay debts and legacies, and, on a certain contingency, to pay money to the testator's daughters; the dissenting opinion claimed the power to be repugnant to the estate granted, relying upon the case of Lovett v. Gilender, 35 N. Y. 617.

In the latter case it had been held that, after a devise of a residuum absolutely, certain restrictions upon the apportionment of the property were inoperative and void, as repugnant to the absolute and unqualified gift.

A general power to sell had been given at the end of the will. It was considered that the only authority given to the executors to sell was for the purpose of effecting a division of the estate upon the death of the testator's daughters, and that as the law made that division upon the death of the testator, the provision was inoperative and had nothing to support it. That, in any event it was a mere passive trust, and the estate vested in the devisees, without the necessity of a conveyance by the executors. The above case of Kinnier v. Rogers was affirmed, as below stated.

In the case of Conover v. Hoffman (Court of Appeals), reported in 15 Abbott, 100, a general power had been given by the will, the residuum of of the estate to be distributed according to law. By a codicil the residuum was given, in trust, for certain purposes. It was claimed that the codicil was a revocation of the discretionary power of sale given by the will.

The court held that there was nothing inconsistent in the will and codicil with the continuance of the power. That the continuance of the power was obviously important with reference to the payment of the debts and legacies, and the carrying out the other parts of the codicil,

and that it was clearly the intention of the testator that it should remain.

In the case of Crittenden v. Fairchild (41 N. Y. 289), question arose as to the construction of a will, where, after certain bequests, the residuum, real and personal, was to be divided into portions, and was so devised and bequeathed specifically.

A general power to sell was given to the executors, except that certain real estate was not to be sold without writtten consent of testatrix's husband.

In its decision, the court held the power to be valid, as a power in trust, to enable executors to make a division; and that its exercise was absolutely necessary to make distribution; the purposes of the testatrix being so clearly expressed as to leave no reasonable doubt of her wishes; that it was evident that she did not intend that her residuary estate should vest immediately and absolutely in the devisees without a division, and that there was no objection to the power in trust taking effect, as such, leaving the title in the heirs subject to the execution of the power.

In the above case of Kinnier v. Rogers, reported on appeal in 42 N. Y. 531, the court holds that the testator probably acted in giving the power of sale in reference to the facts and circumstances, connected with his family, and the ages of his children, and that the exercise of the power would secure a division of the avails among parties in interest, without the delay and expense of an action in partition or other judicial proceedings, and that the devise was subject to the power; and until it was exercised, the title to the land vested in the children, and after its exercise they would take it in its substituted form.

The power of sale was also held necessary, inasmuch that there was a lien upon the residuary estate for the payment of debts, legacies, and annuities (quoting Reynolds v. Reynolds, 16 N. Y. 261; Tracey v. Tracey, 15 Barb. 503; Brudenell v. Boughton, 2 Aitkens, 268).

The court also held, that it was evidently the intention of the testator to authorize his executors to sell his real estate, to enable them to discharge the duties and trusts imposed by the will, and thereby facilitate the settlement of the estate.

See also Lovett v. Kingsland, 44 Barb. 560, holding a power of sale void when inconsistent with a direct present absolute gift.

A power to divide given in a codicil would not revoke a power to sell given in the will. Conover v. Hoffman, 1 Bos. 214; 15 Abb. 100; see also *infra*, as to cessation of such powers of sale.

Who may Execute.—As to trustees generally, and their powers and duties in the execution of trusts, also as to their removal, decease, &c., and the appointment of their successors, see title vii, ch. x, *ante*, pp. 286 to 288; also p. 289, as to executors as trustees.

Powers of sale cannot be delegated by an executor having a power such as is above referred to, and an agent cannot make even a valid contract of sale; and the sale cannot be made through attorney. It may be made valid, however, by a subsequent ratification.

Berger v. Duff, 4 Johns. Ch. 368; Newton v. Bronson, 3 Ker. (13 N. Y.) 587; Hawley v. James, 5 Pai. 318; 16 Wend. 61; Sinclair v. Jackson, 8

Cow. 543; and see *ante*, p. 291, as to delegation of powers in trust, and the transfer of such powers; and see *post*, ch. xix, as to contracts of sale made by *Agents*.

As seen above (p. 291), where there are several executors, one has the power of the whole number, to dispose of property which they take as executors, and the act of one is effectual. This is not so when they act as trustees, they then have but a joint interest, and must act together in a sale, receipt, or release. It is a general rule of law, also, that where a power is confided to several for a private purpose, all must unite and concur in its exercise.

Sales by Qualifying Executors.—Where a will gives power to executors, *ratione officii*, and only by their official name, it has been doubted whether its exercise should not be limited to those who prove the will; but a power to executors by their individual names, or to executors named, is a joint power, and the executors take by force of the will, and not by the probate; and they would take whether they proved the will or not, and might act even after renunciation.

Dominick v. Michael, 4 Sandf. 374. See, however, the cases cited on p. 447, and p. 341.

It has been considered, therefore, that a *trustee* in a testamentary power may execute it, though he has not qualified as *executor;* and the court will not appoint another in his place until he refuses to do so.

Williams v. Conrad, 30 Barb. 524; Edgerton v. Conklin, 25 Wend. 224; Ogden v. Smith, 2 Pai. 195.

By Revised Statutes, where any real estate or any interest therein is, in any valid will, given or devised to the executors *therein named*, or *any of them*, to be sold by them or *any of them*, or where such real estate is ordered to be sold by the *executors*, and any executor shall *neglect* or *refuse* to take upon him the execution of such will, then all sales made by the executor or executors, who shall take upon them the execution of such will, shall be

equally valid as if the other executors had joined in such sale.

3 R. S. 5th ed. p. 107.

The Revised Statutes, as seen above (p. 439), also provide that in case one of several executors or administrators shall die, become lunatic, convict of an infamous offense, or otherwise become incapable, or if letters are revoked as to him, then the remaining executors shall act, and complete the execution of the will.

The above provision as to the action by the executors taking upon themselves the execution of the will was also contained in Laws of March 3d, 1787, 1 Green. 387; Feb. 20th, 1801, 1 Web. 178; March 5th, 1813, 1 R. L. p. 364; Niles v. Stevens, 4 Den. 399; see as to this provision also, *ante*, p. 289.

The above provision applies even where one only out of several executors qualifies. Meakings v. Cromwell, 2 Sand. 512; affi'd, 5 N. Y. 136; Ogden v. Smith, 2 Pai. 195; Roseboom v. Mosher, 2 Den. 61.

This provision of the statute has not been held to divest the estate, or power of an executor who has not qualified; nor is it applicable at all when the only surviving executor is the one who has neglected or refused. In such case, the rule of the common law has been held to govern. Dominick v. Michael, 4 Sand. 374.

A general power given to the executors, as such, and not by their names as individuals, is not revoked by the refusal of one of them to act, but survives to and vests in those who qualify. Conover v. Hoffman, 1 Bos. 214.

The "neglect or refusal" need not be in writing, nor by matter of record, in order to enable the others to execute a conveyance pursuant to a power in the will to all the executors to sell real estate. Nor is it essential that the executor who does not join in a conveyance should have formally renounced, or have refused, after a citation for that purpose, to take the administration. It seems that any evidence legitimately tending to establish the fact of such neglect or refusal is competent. Roseboom v. Mosher, 2 Denio, 61; see also Sharp v. Platt, 15 Wend. 610.

The above provision of statute applies as well to *discretionary* as to peremptory powers of sale. Leggett v. Hunter, 19 N. Y. 445; Niles v. Stevens, 4 Den. 399; Taylor v. Morris, 1 Com. 341; Sharp v. Pratt, 16 Wend. 610.

Where two out of three executors and trustees, who had all qualified, make the conveyance, it was held sufficient, the other having been removed as executor and declining to sign. The rule that where a trustee is removed, the estate is vested in the others, would apply to a trustee removed by the surrogate as executor. *In re* Bull, 31 How. P. 69; 45 Barb. 334.

And an act of the Legislature may direct two out of three trustees to act, and give a substituted testamentary trustee all the powers of the original ones. Leggett v. Hunter, 19 N. Y. 445; *in re* Bull, 45 Barb. 334; and *ante*, p. 310.

An executor who renounces his office, the renunciation being followed by many years of total non-interference with the estate, is deemed also to

have renounced the trusts conferred by the will, which are personal and discretionary. *In re* Stevenson, 3 Pa. 420; Beekman v. Bonsor, 23 N. Y. 299; Leggett v. Hunter, 25 Barb. 82; 19 N. Y. 445.

In the matter of Van Wyck, it was held that if a trustee who has qualified, subsequently resigns, or is removed or discharged, a new one must be appointed in his place, so as to join with the others in order to make a valid sale. 1 Barb. Ch. 565.

Executors who qualify alone have power under the will. Executors who do not prove the will, are superseded by the grant of letters testamentary or of administration to others; and they cannot dispose of any part of the estate until they appear and qualify as executors. Ogden v. Smith, 2 Paige, 195; Meakings v. Cromwell, 5 Paige, 136.

The court cannot remove a trustee and appoint a new one, unless the former had accepted the trust. *In re* Stevenson, 3 Paige, 420.

See, also, as to survivorship and removal, and substitution of trustees, *ante*, pp. 288 to 291, and as to surviversh ip of powers, *ante*, pp. 341, 342.

A power in trust to executors survives on the death of one or more of the executors, and may be executed by the survivor. Niles v. Stevens, 4 Den. 399.

Survivorship of the Power.—As seen above (p. 341), an express power to dispose of lands, when not clothed with an estate or interest, is not descendible or transmissible, but terminates with the lives, or according to the terms of its creation, with the life of the survivor of those in whom it is vested.

See, also, Catton v. Taylor, 42 Barb. 578; Martin v. Martin, 43 Barb. 172.

It has been seen above (p. 341) that it is provided by the Revised Statutes, that all persons vested with a power, must unite in its execution, but that, in case of death, the survivor or survivors can act, and that this provision is applicable as well to powers that are discretionary as to those that are imperative.

It is also seen above (p. 439), that where one of several executors or administrators shall die, &c., then the remaining executors shall act and complete the execution of the will.

Decisions of our courts have also been referred to (*ante*, p. 341), showing that a testamentary power in trust would survive to executors living; and that if the power were a naked one, the power ceases on the death of those qualified to exercise it.

By the law of 1813, also, when one executor died the survivor might execute the power. 1 R. L. 366.

See as to decisions under this law, holding that the power would survive only in case the executors had a legal or equitable interest. Osgood v. Franklin, 2 Johns. Ch. 1; 14 Johns. 527; Davoue v. Fanning, 2 Johns. Ch. 252; Jackson v. Burtis, 14 Johns. 391; 16 Johns. 167.

The Supreme Court may appoint a trustee to execute the power. The heir is a necessary party to any proceeding therefor. Roome v. Phillips, 27 N. Y. 357.

See, also, as to powers surviving, *ante*, p. 341; and as to substitution of trustees, *ante*, pp. 288 to 291.

Administrators with the will Annexed.—An administrator with the will annexed is not authorized by the statute (2 R. S. p. 72, § 22, 1st ed.) to execute a power to sell land conferred by the testator upon his executor. His succession of the powers given by the Revised Statutes to the executors, only applies to personalty. Roome v. Phillips, 27 N. Y. 357; Dominick v. Michael, 4 Sand. 375; Conklin v. Edgerton, 21 Wend. 430; Edgerton v. Conklin, 25 *Ib.* 224; Beekman v. Bonsor, 23 N. Y. 298; Dunning v. The Ocean Nat. Bank, 6 Lans. 296.

Authority to Mortgage.—An order of court authorizing an executor or trustee to mortgage is inoperative, as against *cestuis que trust* then living, who were not made parties to the proceedings. The mortgage would be void, as against them. So held in a case where the executors were empowered to hold and apply rents and subsequently divide.

Horspool v. Davis, 6 Bos. 581.

Power to Divide.—A power to *divide* gives executors no power to sell.

Craig v. Craig, 3 Barb. Ch. 76; and see, *ante*, Powers, pp. 345, 346, as to when a power is implied to be included in another power.

Sales, how Made.—The Revised Statutes of 1830, required sales of real estate by an executor to be made on notice, and to be conducted as sales made by order of a surrogate, *i. e.*, *by auction.*

This was repealed by ch. 264 of Law of May 9, 1835, by which, as regards both wills theretofore made, and thereafter to be made, it was provided, that such sales, unless when otherwise directed in the will, and except for real estate in the city of New York, might be *public* or *private*, on such terms as might seem most advan-

tageous to the executor, and in the same manner as sales directed by order of surrogates.

In the city of New York they were still to be *public.* By Laws of 1837, ch. 460, however, it is provided that sales of real estate made by executors pursuant to an authority given in the will, unless otherwise directed in such will, may be *public* or *private*, and on such terms as in the opinion of the executor shall be most advantageous to those interested therein.

The provisions to sell by auction or other statutory regulations, have no application where the executors have a discretionary power as to manner of sale (McDermut v. Lorillard, 1 Edw. 273), and if the will direct a sale in a particular manner, it must be followed. (Pendleton v. Fay, 2 Paige, 202.) Under a power to sell within a limited time, a sale after that time will not give title.

As to the necessity of strictly following the *intent* or directions in the will, *vide* 1 Hill, 111; 7 *Id.* 335; 3 *Id.* 373; 25 Wend. 224; 29 Barb. 222; and *ante*, p. 348, as to formalities requisite in the execution of powers. See also, Pendleton v. Fay, 2 Pai. 202.

Time of Sale.—If a time is fixed by the will, the sale must be made within the prescribed time to be valid.

Richardson v. Sharp, 29 Barb. 222, and see *ante*, p. 349.

If a statute require a sale to be public, it cannot be made privately. Edgerton v. Conklin, 25 Wend. 224.

The power of sale may be exercised as well by making an executory contract of sale as by deed. Demarest v. Ray, 29 Barb. 563. But see 3 Hill, 373.

Exercise of Discretion.—The exercise of the discretion of executors in making a sale cannot be questioned as to its necessity.

2 Den. 61; 3 Edw. 571.

Conveyance of Land in another State.—Although an executor appointed in this State cannot act as such beyond the State jurisdiction, he may convey land situate in another State, where the power to do so is contained in the will.

Newton v. Bronson, 3 Ker. 587.

Legislative Acts. As to legislative acts with reference to changes of testamentary trustees, vide *ante*, pp. 293, 310.

When Purchaser is Bound to Ascertain Grounds of Sale.—Where a power is given by will to executors to sell land in case of a deficiency of personal assets to pay debts, &c., and no *estate* is devised to the executors, it seems, that the purchaser, to sustain his title, must show the fact of such deficiency, but not where their *opinion* or discretion is to be exercised.

Roseboom v. Mosher, 2 Den. 61. See also, Allen v. De Witt, 3 Com. 276.

Power to be Strictly Exercised.—If a power is conferred to be exercised for a special purpose, any deviation so as to defeat the object contemplated by the testator, would prevent any title from being transferred. Thus, if a power of sale were given for the payment of legacies, a transfer in satisfaction of a precedent *debt* would not pass any title. Hence the purchaser must look to the strict exercise of the power, not only in its details, but in its general scope and effect, and it is a principal of equity law that the vested interests of *cestuis que trust* cannot be impaired or destroyed by the voluntary act of the trustee, in breach of the trust, but will follow the land in the hands of persons, to whom it has been conveyed by the trustee, with knowledge of the trust.

Vide Allen v. DeWitt, 3 Com. 276; Briggs v. Davis, 20 N. Y. 15; Roome v. Phillips, 27 N. Y. 357; Russel v. Russel, 36 N. Y. 581; Smith v. Bowen, 35 N. Y. 83; Waldron v. Macomb, 1 Hill, 111; reversed 7 Hill, 335.

So stringent is the rule on this subject that even legislative action cannot avoid its effect, except in cases of necessity arising from the infancy, insanity, or other incompetency of those in whose behalf it acts. Powers v. Bergen, 2 Seld. 359; Legget v. Hunter, 19 N. Y. 445; and see *ante*, p. 310.

And a purchaser is presumed to have full knowledge of every prior right of which he has sufficient notice to put him upon inquiry. Williamson v. Brown, 15 N. Y. 354.

See fully, *ante*, pp. 285, 310, as to notice of the terms of a trust.

If the direction be for a sale to pay debts, and after that, a division of *avails* among devisees, a conveyance to one of the devisees before payment of debts would be invalid; and likewise a distribution before such pay-

ment. Under such a provision there is no equitable conversion of realty into personalty, and the real estate descends subject to the power. Allen v. DeWitt, 3 Com. 276.

See also, *ante*, pp. 345 to 353, as to valid execution of powers, and as to the prescribed formalities.

Power given for several Purposes.—A power of sale given for several purposes does not fail because among them is one that is void or has lapsed.

Wilson v. Lynt, 30 Barb. 124; *vide*, also, *ante*, p. 275, and cases cited.

Cessation of the Power.—It is also a rule of construction of testamentary powers, that, where it appears that the intention of a testator in creating a *power* has been answered, the power itself will cease. The purposes of the testator in giving the power must be ascertained from all the provisions of the will; and the objects of the power must be considered in connection with the power itself; and the power is considered to fail when the intentions of the testator are defeated or are unattainable.

As for example, where a power of sale is given to make provision for the support of a person who has since died, it would cease at his death, and the lands would descend free from the power. The power would thereupon become extinguished, by operation of law.

It will be remembered that the Revised Statutes provide that where the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease.

Dominick v. Michael, 4 Sand. 374; Edgerton v. Conklin, 25 Wend. 224; Jackson v. Jansen, 6 Johns. 72; Hutchins v. Jones, 7 Bos. 236; Hotchkiss v. Elting, 36 Barb. 38; Jackson v. Ellsworth, 6 John. 72; Sharpsteen v. Tillou, 3 Cow. 651; Slocum v. Slocumb, 3 Eds. Ch. 613. See, also, *ante*; pp. 308, 356, as to the cessation of powers in trust.

Surplus.—The residue of proceeds of sales, after payment of debts and legacies as directed, belong to the residuary devisees.

Erwin v. Loper, 43 N. Y. 521.

Account of Proceeds of Sale.—Where a sale is directed to be made in a will, either for the payment of debts or legacies, the surrogate may compel the executors to account for the proceeds, as if the same were personal assets.

Laws of 1822, 283; 1 R. S. 1st ed. p. 110.

By law of 1837, ch. 460, the proceeds of sales of real estate under an authority by will, may be brought into the office of the surrogate where the will was proved, for distribution; and the surrogate shall proceed to distribute the same, in like manner and upon like notice, as if such proceeds had been paid into his office, in pursuance of an order of sale of real estate, for the payment of debts. Bloodgood v. Buen, 2 Brad. 8; *in re* McLaughlin, 2 Brad. 107; Stagg v. Jackson, 1 Com. 206; also 2 Barb. Ch. 86; 8 Paige, 157.

TITLE IV. MISCELLANEOUS PROVISIONS AS TO EXECUTORS, &c.

The following miscellaneous provisions it may be desirable to refer to.

Waste and Trespass.—Executors and administrators may have actions for trespass committed on the real estate of deceased, in his lifetime, and shall be liable for trespass on lands, committed by him. 2 R. S. 1st edit. 114.

As to proceedings for waste, *vide ante*, p. 154.

Judgments against Executors, &c.—The real estate which belonged to any deceased person, shall not be bound, or in any way affected by any judgment against his executors or administrators; nor shall it be liable to be sold, by virtue of any execution issued upon such judgment. 1 R. L. 313; 2 R. S. 1st edit. p. 449.

Actions by and against.—In actions brought by or against executors, it shall not be necessary to join those, as parties, to whom letters testamentary shall not have been issued, and who have not qualified. Law of Apr. 2, 1838, ch. 149.

See, also, as to actions by executors, &c. Code, §§ 113, 317; 5 Wend. 513; 12 Barb. 21.

Powers of Executors, &c. to protect against Fraud.—By law of Apr. 17, 1858, ch. 314, executors, administrators, receivers, assignees, or other trustees of an estate or the property and effects of an insolvent estate, corporation, association, partnership, or individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void, and resist all acts done, and transfers and agreements made, in fraud of the rights of any creditor, including themselves and others, interested in any estate or property held by, or of right belonging to any such trustee or estate.

Actions may be maintained by such persons to recover any property taken or its value.

Indorsers, sureties, and the above persons may also be allowed their costs and expenses in prosecuting or defending actions as above, done in good faith.

Application for Surplus Moneys on a Mortgage Sale.—By law of Apr. 23, 1867, ch. 658, amended and added to by law of Apr. 11, 1870, ch. 170, provision is made as to the obtaining and distribution, through the surrogate's office, of the surplus moneys arising from the sale of any lands or real estate, of which any deceased person died seized, by virtue of any lien thereon. The act was further amended by an act of Apr. 28, 1871, ch. 834.

Preference to Rents.—By the Revised Statutes preference may be given by the surrogate to rents due or accruing upon leases held by the testator or intestate over certain other debts, if such preference will benefit the estate. 2 R. S. 1st ed. 88.

Testamentary Guardians or Trustees to Account.—By law of 1867, ch. 782, and law of Apr. 13, 1871, ch. 482, testamentary guardians and trustees may be compelled to account and to give security or be removed on default.

Testamentary Trustees, Guardians and Executors in the County of New York.—Special provisions are enacted by law of Apr. 22 1870, ch. 359, as to letters granted in the county of New York, and as to revocation thereof and the appointment of successors and trustees of those removed by the surrogate of said county, and as to the accounting of those removed, and as to release of sureties of guardians, and proof of last wills, and as to the construction of wills, and as to the appointment of receivers during a contest over a will of real estate.

CHAPTER XVIII.

SALE, &c. OF REAL ESTATE BY ORDER OF SURROGATES.

Provision has been made by law, for the sale, or other disposition, through proceedings before the surrogates of counties, of the real estate of a deceased person, if the personal estate is insufficient to pay his debts. These proceedings being founded on statute authority, must be strictly pursued, or they are void. The general statutory provisions relative to such proceedings, so far as titles to real estate are affected under or by them are below given; for the special details thereof, reference will have to be made to the statutes indicated.

Former Laws.—Sales by order of courts of probate of real estate, in case of insufficient personalty, were provided for by statute of April 4, 1786 (1 Green. 326), and of March 27, 1801 (1 Webs. 319); also 1 Revised Laws of 1813, p. 450; law of April 12, 1819, and law of April 17, 1822, which laws were repealed by the repealing act of Revised Statutes, December 10, 1828. For a history of the remedy allowing sales of real property to pay creditors, *vide* Ferguson v. Broome, 1 Bradf. 10.

As to proceedings under the law of 1813 and 1819, *vide* Sheldon v. Wright, 5 N. Y. 497; affirming 7 Barb. 29; Jackson v. Irwin, 10 Wend. 442; Fox v. Lipe, 24 Wend. 165.

The filing of the inventory was not necessary to give the surrogate jurisdiction under the law of 1813, but an account of the assets and debts was necessary. Schneider v. McFarland, 4 Barb. 139; 2 N. Y. 459.

TITLE I. THE APPLICATION TO THE SURROGATE.

Provisions of the Revised Statutes.—In part 2, ch. 6, title iv, provisions respecting these proceedings are

collected. The executors or administrators may make an application, within three years after obtaining their letters, for authority to mortgage, lease, or sell so much of the real estate as shall be necessary to pay debts, if the personalty is found insufficient, and after the filing of their inventory.

Formerly the time for application was not limited.

By law of May 16, 1837, *ch.* 460, §§ 40, 41, 42, it is provided, that the executors, &c., may apply, as above, to mortgage, sell, or lease the real estate of the testator or intestate, and for the sale of the interest of such testator or intestate, in any land held under a contract for the purchase thereof, whenever the personal estate is insufficient to pay debts. It is provided that such application may be made and an order directed thereon, although the whole of the personal property of the deceased has not been applied to the payment of debts. But there must be satisfactory evidence to the surrogate that the executor or administrator has proceeded with reasonable diligence in converting the personal property of the deceased into money, and applying the same to the payment of debts. The sale may be ordered as well where the deceased was the assignee of a contract as when he was a purchaser. The sale to be made subject to all payments due or to become due on the contract; and the bond is to be so conditioned, and must be taken, where payments are due or to become due.

If the surrogate acquire jurisdiction, subsequent error will not render his decree void, nor can it be impeached collaterally. Atkins v. Kinnan, 20 Wend. 241; Jackson v. Crawford, 12 *Id.* 533; Rigney v. Coles, 6 Bos. 479.

If there are more than one petition, they may be construed together. Richmond v. Foote, 3 Lans. 244.

The Petition.—The application is to be by sworn petition, setting forth the personal property, its application, debts due, description, value and occupation of the real estate, and names and ages of devisees and heirs.

The petition and account are necessary to the surrogate's jurisdiction. 15 Wend. 449; 1 Hill, 130; 3 Barb. 341; 20 Wend. 241; and recitals in the order are not sufficient. *Ib.*

The account must have been rendered by all the executors or administrators before a judgment creditor can apply. 12 Barb. 392. But all need

not have united in the inventory. 40 Barb. 417. But all should join in the application. Fitch v. Witbeck, 2 Barb. Ch. 161.

If there is no petition or order to show cause or inventory, or they are defective in substance, the order of sale is void. Ackley v. Dygert, 33 Barb. 177; Corwin v. Merritt, 3 Barb. 341.

The omission to file an inventory does not prevent jurisdiction. An inventory presented with the petition may be deemed the account. Bloom v. Burdick, 1 Hill, 130; Bostwick v. Atkins, 3 N. Y. 3 Com. 53.

The petition should state that the inventory has been filed to give jurisdiction. Ackley v. Dygert, 33 Barb. 177.

Also, that there are debts for which the personalty is insufficient. *Ib.*

The account must give the names of creditors, and the amounts and consideration of indebtedness. Atkins v. Caywood, 20 Wend. 241.

It need not show all details, nor the character of the debts. Sheldon v. Wright, 7 Barb. 49; 5 N. Y. 487.

It may be verified before a justice of the peace. Richmond v. Foote, 3 Lans. 244.

A previous sale in partition by the heirs, does not divest the surrogate of his power to decree a sale within the three years. Hall v. Partridge, 10 How. 189.

The surrogate has no authority to pass upon the question of the decedent's title to the lands. Hewitt v. Hewitt, 3 Brad. 265.

The Debts.—A second sale cannot be had on debts newly discovered, except on a new application and petition. Nor can an administrator pay outlawed debts, and then have a sale to reimburse himself. Gilchrist v. Rea, 9 Pai. 66.

The surrogate must be convinced that the debts are justly due. Baker v. Kingsland, 10 Pai. 366.

Assets Insufficient.—In determining whether the assets are sufficient, the surrogate acts judicially, and his error cannot affect his jurisdiction (Atkins v. Kinner, 20 Wend. 241; Jackson v. Crawford, 12 Wend. 533), and can only be corrected on appeal. *Ib.*

Appointment of Guardians.—Guardians are to be appointed for any heirs or devisees who are minors, and the minors are now to be served in the same manner as on proof of wills. This changes the former mode under the Revised Statutes, and the law of 1837, ch. 460, § 6. *Vide* Laws of 1863, ch. 362.

Under the Laws of 1863, *ch.* 362, they are to be served in the same manner, and special guardians appointed as in the case of the proof of wills, *i. e.*, if the minor is under fourteen, residing in the State, a copy is to be delivered to him personally, and to his father, mother, or guardian; if none within the State, then to the person having care or control of the minor, or with whom he shall reside or be employed. If there is no general guardian who shall have been served with the order, the surrogate shall appoint a special guardian for the minor on such person's written consent. A *testamentary* guardian shall not be deemed a general guardian. Infant heirs are not bound by a sale unless guardians are appointed where necessary. 2 N. Y. 459; 1 Hill, 130; 3 Barb. 341; 33 Barb. 17. And the Statutes must be strictly complied with. Havens v. Sherman, 42 Barb. 636.

A guardian need not be appointed under a final application, where a guardian has been appointed under a former application in the same matter. Richmond v. Foote, 3 Lans. 244.

The presumption will be that the guardian was appointed within the proper time. Sheldon v. Wright, *infra*.

The guardian should be appointed six weeks before the return of the order to show cause. So held under the earlier laws. Sheldon v. Wright, 7 Barb. 39; affirmed 5 N. Y. 497. See also 21 N. Y. 150.

The heirs or devisees must be represented, or the surrogate has no jurisdiction as to their shares, and minors must have guardians as provided. Ackerly v. Dygert, 33 Barb. 176, and *supra*. *Vide* also *post*, p. 464.

Creditor's Application.—By Laws of 1837, ch. 460 (as amended 1843, ch. 172, and 1847, ch. 298,) any creditor, after the accounting of the estate, *at any time after letters granted*, if there is not enough personal estate to pay debts, may institute similar proceedings against the executor or administrator to force a sale, or lease, or mortgage of the real estate. The order to show cause is to be served fourteen days before return day on him; and after notices served and published in the same manner as under above proceedings, the surrogate may direct a mortgage, lease, or sale, by the executor or administrator, or freeholder, under similar provisions above given.

A creditor who has assigned his debt cannot apply, but the assignee thereof. Bulter v. Emmett, 8 Pai. 12.

There is no bar as to the time for the application by the creditors.

If there were an unreasonable delay, however, the application would be refused. Ferguson v. Broome; 1 Brad. 10.

Widow.—The widow who has had her dower assigned her is not a necessary party to these proceedings.

Rigney v. Coles, 6 Bos. 179.

Order to Show Cause.—If it appear that the personalty has been exhausted, and that there are still debts unpaid, the court may order all persons interested to appear in not less than six nor more than ten weeks from date of the order, to show cause why authority should not be given to mortgage, lease, or sell so much of the real estate of the testator, or intestate, as may be necessary to pay debts.

Service and Publication.—The order is to be published for four weeks in a county newspaper, and a copy served personally on *every one* in *occu-*

pation of the premises, and on the widow, heirs, and devisees of the deceased, resident in the county of the surrogate, fourteen days before the day to show cause. If they reside out of the county, but in the State, or if such personal service cannot be made, then a copy may be served personally forty days before return day, or by publishing once a week for four consecutive weeks in the State paper. If the heirs, &c. do not reside within the State, or cannot be found therein, then the like publication is to be made once a week, for six weeks, successively, in the State paper, or there may be personal service forty days before return day of a copy of the order. It is doubtful if publication in each of the four weeks, once in each week, is sufficient. Sheldon v. Wright, 7 Barb. 39; 5 N. Y. 497.

The publication must be strictly made, Sibley v. Waffle, 16 N. Y. 180, or there is no jurisdiction, Sheldon v. Wright, *supra*; and recitals in the order of sale are not sufficient, Sibley v. Waffle, 16 N. Y. 180; Corwin v. Merrit, 3 Barb. 341; Schneider v. McFarland, 2 Com. 459.

The order cannot be published until made. Sibley v. Waffle, 16 N. Y. 180.

The order is to be published as soon as may be. The act does not require the first of the four successive publications to be four weeks before the day of showing cause. The requirement is satisfied by four successive weekly publications previous to the day. Sheldon v. Wright, 7 Barb. 39; affi'd 5 N. Y. 97. See also Rigney v. Coles, 6 Bos. 479.

TITLE II. THE ORDER FOR SELLING, LEASING, &c.

The surrogate is to hear and examine the allegations and proof, and may order issues tried.

The surrogate shall make no order of sale, &c., unless he finds: 1. That the executors have complied with the provisions of the title. 2. That the debts are justly due and owing, and are not secured by judgment or mortgage on or expressly charged on the real estate of the deceased, and if so mortgaged or charged on a portion of the estate, then that the remedies thereby have been exhausted. 3. That the personal estate is insufficient to pay debts, and that the whole of such estate applicable to pay debts has been so applied.

If the purchaser knew that the debt was fictitious, the sale will be void. 16 N. Y. 180.

The evidence necessary to confer jurisdiction upon the surrogate, discussed in Forbes v. Halsey, 26 N. Y. 53.

By law of 1863, ch. 362, the surrogate may order a sale of a portion, and a mortgage or lease of another portion; only one order is necessary to show cause in any proceeding.

The order is considered incontrovertible evidence of the facts adjudicated on. Bloom v. Burdick, 1 Hill, 130; Thomas v. Whallon, 31 Barb. 178; Sheldon v. Wright, 5 N. Y. 497; *in re* King, 1 Brad. 182.

An order of sale would be void where the personal property had been applied to the payment of general legacies instead of debts. 3 Barb. 341.

The order cannot be made unless all the personal property has been applied. Corwin v. Merritt, 3 Barb. 341.

Under a petition for a sale, a leasing or mortgaging may be directed. Sibley v. Waffle, 16 N. Y. 180.

Sale, Leasing and Mortgaging.—A sale, mortgage or lease, may be ordered by the surrogate, in his discretion, if the personalty is insufficient, even if the personal estate has *not* been applied to pay debts. Laws of 1837, ch. 460, § 40, *supra.* No lease can be made for a longer time than until the youngest person interested in the estate shall come of age. Any lease or mortgage so made shall be as valid as if made by the testator.

Order for Sale.—If the moneys cannot be raised by *lease* or *mortgage*, the surrogate may, from time to time, order a sale for enough to pay valid and subsisting debts, as entered as such in the surrogate's books.

What Lands or Interests are to be Sold.—The order is to direct which lands are to be sold. The part descended to heirs is to be sold before that devised, unless the latter is specially charged. Lands unsold by heirs shall be first sold. In no case shall land devised, expressly charged with the payment of debts, be sold, by order of the surrogate. All the lands may be sold although more than necessary to pay debts, if deemed advisable.

Equitable or trust interests are not to be sold. So held under the law of 1813. Livingston v. Livingston, 3 Johns. Ch. 148.

The entire title is to be sold of whatever is sold. Pellitreau v. Smith, 30 Barb. 894.

Bonds.—If the lands are to be mortgaged or leased, the executor or administrator has, before the order is granted, to give bonds to be approved by the surrogate, for the proper application of, and accounting for, the moneys received. The bond is to be with sureties in a penalty in double the amount to be raised.

A like bond is also to be given before an order for any sale, in double the value of the land to be sold, that the executors, &c., will pay all moneys resulting by the sale, and that the executors or administrators will deliver all securities taken on such sales to the surrogate in twenty days after receiving them.

In case the executor or administrator refuses to give the bond, the surrogate may appoint a freeholder to mortgage, lease, or make the sale and give the bond. Preference is to be given to persons nominated by the creditors.

The Supreme Court, on appeal, will not review the exercise of the surrogate's discretion, when he has made the order. Moore v. Moore, 27 Barb. 27.

The surrogate cannot pass upon the question of title to disputed lands. Hewitt v. Hewitt, 3 Brad. 265.

The order cannot be made in order to pay the expenses of the administration. Fitch v. Witbeck, 2 Barb. Ch. 161.

An order to lease is not a revocation of a previous order to sell. Jackson v. Irwin, 10 Wend. 442.

An order vacating a previous order may be appealed from by the purchaser. Delaplaine v. Lawrence, 10 Pa. 602; 3 Com. 301.

TITLE III. THE SALE.

The following are the provisions relative to the sale, mortgaging, &c.

Notice of Sale—The notice of sale most be posted for six weeks at three of the most public places of the town or ward where the sale is to be had, and published in a county newspaper, or, if none, in the State paper, for six weeks successively. The notice must specify the number of the lots, and the name or number of the towns or townships where situated, or otherwise appropriately describe the lands and all improvements thereon.

Sale.—The sale must be made at public vendue in the county where the premises are situated, between 9 A. M. and sunset. It may be on a credit of three years for three-fourths of purchase money, if the surrogate so direct, secured by mortgage on the land and bond of the purchaser.

Purchaser.—Any sale made directly or indirectly to the executor or administrators or guardians of minors (except for benefit of the minors), is void. Also to one acting in behalf of the administrator. 26 N. Y. 53. As to protection of purchasers *bona fide*, *vide post*, *p.* 464.

The sale is void, even if the executor becomes interested after the sale and before confirmation. Terwilliger v. Brown, 44 N. Y. 237.

See also Bostwick v. Atkins, 3 Com. 53, as to waiver by the minor when of age.

Confirmation or New Sale.—On a return made to the surrogate, he may in certain cases, order a new sale. But if the sale be fairly conducted, and the sum bid be an adequate one, he may confirm the same and direct conveyances to be executed by the executor or administrator or freeholder. They shall recite the orders authorizing and confirming the sale; and they shall be deemed to convey all the estate, right, and interest in the premises, of the testator or intestate at the time of his death, *free* from all claim of dower of the widow. §§ 29, 30, 31.

The sale may be confirmed in part only; and a resale ordered of another part. Delaplaine v. Lawrence, 3 Com. (N. Y.) 301.

As to when a resale may be ordered for insufficient price. Kain v. Masterton, 16 N. Y. 179; Horton v. Horton, 2 Brad. 200.

The confirmation must be made previous to the conveyance. Rea v. McEachron, 13 Wend. 465.

Recitals of Orders.—The recitals in an order of sale as to jurisdictional facts, are not conclusive or sufficient. 16 N. Y. 180. The orders should be recited in the deed. 20 Wend. 241. A mistake therein, however, as recited, will not avoid the deed. 1 Seld. 497.

If the first deed is defective, a second may be given relating back. Sheldon v. Wright, 7 Barb. 39.

Widow's Dower.—The widow's dower is paid out of the proceeds. § 45. But the dower cannot pass by the sale if it has been assigned. Lawrence v. Brown, 1 Seld. 5 N. Y. 394; Lawrence v. Miller, 2 Com. N. Y. 245, reversing, 1 Sand. 516. But, it seems, if it be a mere claim to dower it will pass. *Ib.* *Vide supra*, p. 461; *post*, 463.

Or the lands may be sold subject to the widow's life estate. Maples v Howe, 3 Barb. Ch. 611.

She is entitled to interest on one-third proceeds. Higbie v. Westlake, 14 N. Y. 281. See, further, law of 1863, ch. 400, as to dower.

And to one-third of the gross amount sales, without deduction for expenses, &c. *Ib.*

The executors, &c., may sell in different plots under an order to sell the whole. Jackson v. Irwin, 10 Wend. 442; Delaplaine v. Lawrence, 3 Com. 301.

The sale may be made of different portions, from time to time, under the original order. Farrington v. King, 1 Brad. 182.

In Ackley v. Dygert, however, 33 Barb. 177, an order for a further sale, based upon the former proceedings, and not founded upon any new petition, or order to show cause, was held wholly void.

The law of 1863, ch. 362, § 6, provides that the surrogate may order a sale of a portion, and a mortgage or lease of another portion; and only one order to show cause need be made in any proceeding.

Prior Liens—The sale is made *subject* to all charges by judgment, mortgage, or otherwise, existing at the time of the decease of the testator or intestate. § 32.

The deed under the rulings, before the statutes of 1850 (*post*), had to recite at large, although not word for word, the order of sale. Atkins v. Kinnan, 20 Wend. 241.

Crops will pass on the sale. Jewett v. Keenholz, 16 Barb. 193.

If Executor, &c., Die, or be Removed.—By Laws of 1850, ch. 162, if the executor or administrator die, or be removed, or disqualified, after order made, the administrator of the estate unadministrated, or a freeholder, may execute the order on giving the requisite security.

Distribution.—If there is not sufficient remaining to pay the debts, the balance is to be distributed *pro rata*, as provided, on notice, and after examination of claims, &c.

If there is a surplus after payment of debts, it is to be distributed among heirs and devisees according to their rights. As also the principal of any securities taken. §§ 35 to 43, 1 R. L. 451.

If an heir has transferred his interest in the land sold, his portion of surplus proceeds goes to his grantee. Reed v. Underhill, 12 Barb. 112.

When surplus moneys on sales are brought into the surrogate's office, and shall belong to a minor or any person who has a temporary interest in said money, and the reversionary interest belongs to another person, the surrogate's court shall make such order for the investment thereof, and for the payment of interest and principal thereof, as the Supreme Court is authorized or required by law, to make in analogous cases. The money is to be invested on unincumbered real estate worth double the money, and subsequently to be distributed, as ordered.

As to distribution of surplus, and payment of liens therefrom, *vide* Sears v. Mack, 2 Brad. 394.

Record of Proceedings.—The several surrogates shall record in books all orders and decrees by them under above proceedings, and shall file and preserve all papers therein. § 60 *Id.;* Laws of 1823, 283; 1837, ch. 460.

Dower, Remaining Lands, Surplus, &c.—There are further provisions in the statutes providing that the heirs and devisees, and the remaining lands, shall be exonerated from the payment of debts according to the amount realized; that the executors, &c., shall account for the proceeds of sales, and the surplus be distributed for expenses, and for the payment of dower rights by a sum in gross, if the widow so consent by an instrument under seal, duly acknowledged, &c. Any amount due executors, &c., for deficiency is to be paid. If the widow do not consent, as above, the surrogate is to invest one-third the amount sales, and hold the securities, and pay her the interest for life. §§ 33 to 38, of 2 Rev. Stat. 1st ed.; Laws of 1863, ch. 400, p. 106.

Vide 5 N. Y. 394, as to exoneration of other lands, &c.

As to allowances to administrators, &c., for making the sale, *vide* Laws of 1844, p. 447; Higbie v. Westlake, 14 N. Y. 281.

Vide, also, as to debts, &c., *ante*, p. 392.

Surplus Moneys, on Mortgage Sales.—Surplus moneys arising after sale through a mortgage or other lien on decedent's real estate, are to be paid into the surrogate having jurisdiction, and may be disposed of and distributed by him in the same manner, as moneys derived from the sale of real estate under the above proceedings.. Provision is made as to proof, service on minors, and other details.

The act is not to apply where letters in this State have been issued four years previous to the sale. Law of Apr. 23, 1867, ch. 658; also ch. 460, as amended by Law of Apr. 1870, ch. 170; Apr. 28, 1871, ch. 834.

See also 8 Pai. 13; 15 Wend. 450; Law of 1843, ch. 172; 1847, ch. 298.

Character of Surplus Moneys.—As to the character in which surplus moneys are regarded in law, *vide ante*, pp. 369, 370.

Penalty against Executors.—The statutes also provide that executors, &c., fraudulently making sales contrary to the above provisions, shall forfeit double the amount of the land sold to the person having the inheritance. 1 R. L. 452; 2 R. S. 1st ed. 110; 2 Barb. Ch. 86.

Contracts of Sale.—As to sales of contracts for the purchase of land, *vide post*, ch. xix, *Contracts of Sale;* and law of 1837, ch. 460, §§ 40, 41, 42.

TITLE IV. VALIDITY OF THE PROCEEDINGS AND IRREGULARITIES.

The following are provisions of statute making sales valid under the above provisions, and as to the correction of irregularities therein.

Correction of Irregularities.—§§ 73 to 78, Rev. Stat. Whenever a con-

veyance has been made under above proceedings. irregularities (as to non-concurrence of a discreet person and non-recitals in the deed) may be rectified, and deed confirmed by the Supreme Court (formerly "chancellor"), on notice to heirs and devisees. Laws of 1819, p. 214; 1825, p. 445. This, however, would not allow rectification of jurisdiction or of matters of fact. The decree may be contested on other grounds than that of irregularity. Bostwick v. Atkins, 3 N. Y. 53; so holding, as to sale made under the law of 1801.

See also as to irregularities under the above statute, and their correction, Hallenbeck v. Brady, 2 Pai. 316; *in re* Hemiup, 3 Pai. 305; Bostwick v. Atkins, 3 Com. N. Y. 53; Rea v. McEachron, 13 Wend. 465.

Sales Made Valid.—By Laws of Mch. 23, 1850, ch. 82, § 1, all such sales, as above, heretofore made or hereafter to be made, shall be deemed as valid as if made by order of a court having original general jurisdiction; and the title of any purchaser at any such sale made in good faith, shall not be invalidated by reason of any omission, error, defect, or irregularity, in the proceedings before the surrogate, or by allegation of want of jurisdiction on the part of such surrogate, except in the manner and for the causes it could be impeached if sale made by a court of general jurisdiction. Sales made prior to the Revised Statutes are held within the provisions of this act as well as all since.

Nor shall such sale be impeached for any defect or omission in the petition; provided it show that an inventory has been filed, and that there is a debt which the personal estate is insufficient to discharge, and that recourse is necessary to the real estate. § 2.

Nor shall it be impeached because *all* the executors, &c., do not present the petition, nor all sign the bond, or deed, or notice, or act in any other proceeding; nor by reason of any irregularity in any matter or proceeding after the presentation of any petition and giving notice of order to show cause why the authority or direction should not be granted, and before the order confirming the sale. (The act not to affect suits commenced.) The surrogate, or other officer, however, shall not make any order for sale or confirmation unless satisfied that the provisions of the Revised Statutes and its amendments have been complied with, as if the act of 1850 had not been passed. *Ib.* § 3.

This law of 1850 has been held constitutional in its retrospective provisions. 24 Barb. 129; 40 Barb. 417; 26 N. Y. 53.

Law of April 20, 1869, *ch.* 269.—Neither shall such sale be invalidated for omissions to serve minor heirs or devisees with a copy of the above order to show cause, provided it has been served upon the general guardian, or the guardian appointed in these proceedings. See Havens v. Sherman, 42 Barb. 636.

Suits against Heirs and Devisees.—No suit shall be brought against heirs or devisees to charge them with debts within three years after granting letters testamentary, &c., and the court shall stay such suit brought after that time, if the proceedings under this title are commenced, until the result of the application. And on an order of sale therein the suit shall not be further prosecuted, unless the plaintiff alleges that lands have come to heirs or devisees not included in the order of sale. In such case the judgment shall not affect lands so ordered to be sold, &c., and the plaintiff shall have no share in the proceeds unless he discontinue his suit. 2 R. S. 1st. ed. p. 109, § 53; *vide* also, 26 Barb. 364; 13 *Ib.* 252; 10 *Ib.* 249; 10 How. Pr. 532; 3 S. Ch. 530; 5 Pai. 257; 27 N. Y. 167.

The Notice.—No offence in relation to giving notice of sale or taking down or defacing such notice, shall affect the validity of the sale to a purchaser in good faith, without notice of the irregularity.

Bona fide Purchasers Protected.—By law of May 11, 1869, ch. 845, amending § 72 of the act of May 16, 1837, no real estate, the title to which shall have passed out of any heir or devisee, by conveyance or otherwise, to a purchaser in good faith, and for value, shall be sold as above, unless letters testamentary or of administration shall have been applied for within four years after the decease of the deceased former owner; nor unless application shall be made for the sale within three years after granting such letters, provided the surrogate of any county in this State had jurisdiction to grant such letters. The act is not to apply where application has already been made for sale under the Revised Statutes, or said § 72.

If the debt on which the sale was made was fictitious, the title of the purchaser will not be avoided, unless he conspired with the administrator for a fraudulent sale. Sibley v. Waffle, 16 N. Y. 180.

By law of April 12, 1873, ch. 211, no real estate, the title to which shall have passed out of any heir or devisee to *bona fide* purchasers, for value, shall be sold as above, unless letters have been applied for within four years after the decease of the former owner, nor unless application for sale be made within three years after granting letters, provided any surrogate in the State had jurisdiction. The period in which an action by a creditor may be pending is not to be computed, provided the creditor file a notice of *lis pendens* with the county clerk, stating the object of action, and that said real estate will be held as security. The court may, on motion, relieve the real estate of such lien.

Even since the law of 1850, a sale under an order omitting to state that the inventory was filed, or that there are debts for which the personal property is insufficient, would be void. Ackley v. Dygert, 33 Barb. 176.

Under the above law of 1850, the burthen of proof is thrown upon the party impeaching the sale. Wood v. McChesney, 40 Barb. 417.

If the petition state facts sufficient to confer jurisdiction, under the law of 1850, the decree should have the same effect as a judgment to protect *bona fide* purchasers. Wood v. McChesney, 40 Barb. 417.

And this has been the general rule, and the title cannot be impeached collaterally, and parol evidence to supply defects may be given, and entries in the surrogate's books may be made *nunc pro tunc*. Jackson v. Crawford, 12 Wend. 533; Bloom v. Burdick, 1 Hill, 130; Farrington v. King, 1 Brad. 182.

Act of March 7, 1872, ch. 92.—This act amends § 1 of the act of April 20, 1869, so that § 3 of the act of March 23, 1850, reads in substance as follows:

§ 3. Nor shall such sale be invalidated nor impeached because the petition was or shall be presented by less than the whole number of executors or of administrators; nor by reason that, after the filing of the petition,

the bond be given by less than the whole number of the executors, &c., petitioning; nor by reason that any further proceeding, notice, sale, deed, or return has been, or shall be, had or made by less than the whole number of executors, &c., petitioning; nor by reason of omission to serve upon any minor, heir, or devisee, personally, or by publication, a copy of the order to show cause required by the 5th section of the 4th title of chap. 6, part 2, of the R. S.; provided such order shall have been duly served on the general guardian of the minor, or the guardian appointed in such proceeding; nor by reason of any irregularity in any matter or proceeding, after the presenting of any petition and the giving notice of the order to show cause why the authority or direction applied for should not be granted, and before the order confirming such sale; nor after a lapse of five years from the time of such sale, where the notice of such sale has been published for six weeks successively before the sale, although such publications may not have been for the full period of forty-two days; and in all cases where the records of the office of the surrogate, before whom such proceedings were taken, have been removed from the house, office, or other building in which such proceedings were taken, to another house, office, or other building, after such proceedings were taken, and twenty-five years have elapsed since said sale, it shall be presumed that guardians have been duly appointed for all minor devisees of the real estate sought to be sold in such proceeding. Such presumption is to be rebutted only by record evidence in such office, showing affirmatively that such guardians were not appointed. Provided, that nothing in the act should be construed to affect in any manner any suit or proceeding commenced for the recovery of any lands, or the proceeds thereof, sold under or by virtue of any order of any surrogate's court.

Infant Heirs accepting Proceeds.—As to when infant heirs would be estopped by accepting proceeds, *vide* Ackley v. Dygert, 33 Barb. 176.

In the case of Gaines v. New Orleans, 6 Wall. 642, the Supreme Court of the United States have held that a probate court cannot by subsequent order give validity to sales of real estate made by executors, which were void by the laws of the State where made.

CHAPTER XIX.

CONTRACTS TO SELL AND PURCHASE LAND.

TITLE I. THE CONTRACT, HOW MADE.

It is usual for parties to contract, in writing, for the purchase and sale of land, prior to the giving of the deed. The land must be described with certainty, or in such a way that it can be identified; and the agreement must be mutually binding on the vendor and vendee. Whether an instrument operates as passing an immediate interest, or rests in contract, depends upon the intention of the parties, to be collected from the whole instrument.

To be in Writing.—The Revised Statutes require the *contract* for the sale of any lands or interest therein, or for leasing over a year, or some note or memorandum thereof, to be *in writing, expressing the consideration, and to be subscribed by the party by whom the lease or sale is made, or his agent,* lawfully authorized. If not in writing, such a contract is to be void.

Vol. i, 1st ed. p. 139, § 8.

This statute was modified from 1 Rev. Laws of 1813, p. 78, and based on the English statute of frauds. 29 Car. II, ch. 3.

The above statute of this State would not apply to contracts for lands in other States. Burrel v. Root, 40 N. Y. 496.

The following agreements relative to land, it has been held, must be in writing, viz. :—

An agreement to exchange lands. Rice v. Peet, 15 Johns. 503. To give a release. Jackson v. Post, 15 Wend. 588. An agreement not to use land. Tryon v. Mooney, 9 Johns. 358. To pay off an incumbrance. Duncan v. Blair, 5 Denio, 196. An agreement to convey, on certain payments being made. Loomis v. Loomis, 60 Barb. 22. An agreement giving time

to redeem. Ryan v. Dox, 25 Barb. 440. To alter the boundary of lands. Davis v. Townsend, 10 Barb. 333. To set back a building. Wolfe v. Frost, 4 Sand. Ch. 72. To pay service in land. Lisk v. Sherman, 25 Barb. 433. To give possession. Howard v. Eaton, 7 Johns. 205. For a license to do any act affecting the enjoyment of land. Houghtaling v. Houghtaling, 5 Barb. 379; and see *post*, ch. For sale of a pew. Trustees v. Bigelow, 16 Wend. 28; Vielie v. Osgood, 8 Barb. 130; St. Paul's Church v. Ford, 34 Barb. 16. Any agreement of extension of the time of performance of the contract should be in writing, as a general rule. Hasbrouck v. Tappan, 15 Johns. 200. But the time may be extended by parol. Stone v. Sprague, 20 Barb. 509. To sell trees, fruit, and grass (unless severed from the land). Warren v. Leland, 2 Barb. 613; Silvernail v. Cole, 12 Barb. 685; Goodyear v. Vosburgh, 57 Barb. 243; Bank of Lansingburgh v. Crary, 1 Barb. 542; but see as to licenses to take the same, Jencks v. Smith, 1 Com. 90; Pierrepont v. Barnard, 6 N. Y. 279; reversing 5 Barb. 364.

A parol sale of standing trees is void. McGregor v. Brown, 10 N. Y. 114.

In Green v. Armstrong, 1 Den. 550, a distinction is made between growing trees, fruit or grass and other natural products of the earth, and annual crops of grain. The former are held parcel of the land, and a contract in writing is required, the latter are held personal, and not within the statute. See, also, Taylor v. Bradley, 39 N. Y. 29.

In Kilmore v. Howlett, 48 N. Y. 569, a contract to cut trees and deliver them as cord wood, is held not one necessary to be in writing.

An agreement to give another half an interest in lands bought must be in writing. Levy v. Brush, 45 N. Y. 589.

Also to allow a permanent dam. Mumford v. Whitney, 15 Wend. 380.

Agreements such as the following need not be in writing, or subscribed as the statute requires :—

An agreement to pay for improvements on land. Benedict v. Baker, 11 Johns. 145. A promise to pay for land already sold. Thomas v. Dickinson, 2 Ker. 364; reversing 14 Barb. 90. A license to remove buildings not fixtures. Dubois v. Kelly, 10 Barb. 496. An agreement with respect to disputed boundary lines, unless it transfer a specific interest or estate. Davis v. Townsend, 10 Barb. 333. An agreement to pay for services in land may be enforced in damages in the value of the land, without a writing. Burlinghame v. Burlinghame, 7 Cow. 92; *vide* King v. Brown, 2 Hill, 485. An agreement to take back land sold at a certain price, under certain circumstances. Burrell v. Root, 40 N. Y. 496.

Form of the Contract.—A contract required by the statute of frauds to be in writing cannot be partly in writing and partly by parol; and it must be definite in its character.

Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Wright v. Weeks, 25 N. Y. 153; affirming 3 Bos. 372; Rollins v. Pickett, 2 Hill, 552.

It is held, however, that although the memorandum must contain what is necessary to show what the contract between the parties is, the property may be ascertained by extrinsic evidence, especially if the memorandum refer to it. Pinckney v. Hagadorn, 1 Duer, 89; Tallman v. Franklin, 14 N. Y. 584; also, 48 N. Y. 344.

The memorandum signed may properly refer to another writing not itself signed. Newton v. Bronson, 3 Ker. 13 N. Y. 587; also, 48 N. Y. 637.

But the memorandum must contain the entire and full terms agreed on, and it must leave no part uncertain of the details of the contract, as to consideration, credits, &c. Davis v. Shields, 26 Wend. 341; Foot v. Webb, 59 Barb. 38.

Subscription.—The agreement must be subscribed at the end thereof. Davis v. Shields, 26 Wend. 341; Champlin v. Parish, 11 Pai. 406.

A printed subscription of a name is not sufficient. Vielie v. Osgood, 8 Barb. 130.

The Writing.—The contract may be in lead pencil. 12 Johns. 102; 14 Id. 484.

Seal.—There need be no seal, either to the contract or to any assignment thereof. Worrall v. Munn, 5 N. Y. 229; Stoddart v. Whiting, 46 N. Y. 627.

By whom Subscribed.—The contract properly should be subscribed by both parties, and necessarily by the vendor.

Champlain v. Harris, 10 Paige, 386; Worral v. Munn, 1 Seld. 229; The Nat. Fire Ins. Co. v. Loomis, 11 Pai. 431; Cammeyer v. German Churches, 2 Sand. Ch. 188.

All the vendors should subscribe. St. Paul's Church v. Ford, 34 Barb. 16.

It is supposed, however, that others might ratify and adopt the act of one, for their benefit. *Vide* Silliman v. Tuttle, 45 Barb. 171.

If signed by the vendor, it may be enforced against him, whether the vendee sign or not. Worrall v. Munn, 5 N. Y. 229; to the contrary was Cammeyer v. German Ch. 2 Sand. Ch. 187.

If signed by the vendee alone, the contract is void, and it cannot be enforced against him. Debeerski v. Paige, 47 Barb. 172; 36 N. Y. 537; Miller v. Pelletier, 4 Edw. 102; Cowles v. Bowne, 10 Pai. 526; McWhorter v. McMahan, 10 Pai. 386; Champlin v. Parish, 11 Pai. 405.

It had to be signed by the party who was to be charged thereby before the Rev. Stat. Since then it is to be signed only by the party making the sale. Davis v. Shields, 26 Wend. 341; First Bap. Ch. v. Bigelow, 16 Wend. 28; McCrea v. Purmort, 16 Wend. 460.

It seems a contract executed by the vendor only, but delivered to and accepted by the purchaser, and acted upon by him, can be enforced against such purchaser. Worrall v. Munn, 1 Seld. 229.

Delivery and Acceptance.—Although the vendor may have signed the contract, it will not bind him, unless delivered by him or by his authority, and accepted by the vendee. And, until acceptance, the vendor may withdraw or rescind it.

Stevens v. Buffalo, &c. R. R. 20 Barb. 332.

Parol evidence of conditions qualifying the delivery is not admissible. *Ib.*

Married Women.—As to contracts by, *vide ante*, pp. 80, 81.

Contract made by an Agent.—The Revised Statutes further provide as follows:

"§ 9. Every instrument required to be subscribed by any party under the last preceding section (§ 8), may be subscribed by the agent of such party lawfully authorized."

The contract, however, must be executed in the *name* of the principal to be binding on him. Townsend v. Orcutt, 4 Hill, 351; and see *ante*, p. 358; Sherman v. Hill, 22 Barb. 239.

It has been held, however, that where there has been a performance on the part of the principal, accepted by the other contracting party, the principal will be entitled, in equity, to a specific performance, notwithstanding that the agent contracted in his own name. St. John v. Griffith, 2 Abb. 198; *vide*, also, Squier v. Norris, 1 Lans. 282.

The agent must be appointed by all the vendors.

Appointment by Parol.—Although in the execution of deeds and leases, by which an interest *in presenti* passes, the agent's authority must be in writing, in agreements to convey, the agent's authority may be conferred by parol, and there may be a parol ratification of an unauthorized agent's written contract. Champlain v. Parish, 11 Pai. 406; Worrall v. Munn, 5 N. Y. 229; Lawrence v. Taylor, 5 Hill, 107; McWhorter v. McMahan, 10 Pai. 386; Pringle v. Spaulding, 53 Barb. 17; Blood v. Goodrich, 12 Wend. 523; Newton v. Bronson, 13 N. Y. (3 Ker.) 587; also, 36 Barb. 655.

An agent may bind his principal if he is recognized subsequently by his principal as such, and the sale confirmed.

A parol ratification of an agent's *sealed* contract, where the agent had no authority to make such contract, is insufficient. Blood v. Goodrich, 12 Wend. 525. But it might be valid as a simple contract if a seal were not requisite. Lawrence v. Taylor, 5 Hill, 107. And even where such agent had no power to bind the principal—viz., the agent of a trustee—but then the ratification must be in writing, as required by the terms of the statute. More v. Smedbergh, 8 Pai. 606; also, 3 Ker. 587, *supra*.

A written instrument subscribed by the owner of land, authorizing a real estate broker to sell it upon certain terms therein specifically stated, and an agreement to purchase the property upon those terms, subscribed by a purchaser, subsequently written across the face of the paper while unrevoked in the hands of the broker, do not, taken either separately or together, form a contract for the sale of the land binding upon the owner; nor does his subsequent parol assent to the terms of sale give validity to the transaction. Haydock v. Stow, 40 N. Y. 363.

A broker's authority to "sell," has been held to authorize him to sign the vendor's name to a contract. Pringle v. Spaulding, 53 Barb. 21. To the contrary, are intimations in Coleman v. Garrigues, 18 Barb. 68; Glentworth v. Luther, 21 Barb. 145; Barnard v. Monnot, 33 How. P. 440 (Court of Appeals).

Partners.—One partner cannot by contract bind another as to sales of real estate of the partnership. A verbal authority from his co-partner would, however, enable him so to do. Or the contract might be ratified and so made valid. Lawrence v. Taylor, 5 Hill, 107.

An Auctioneer as Agent.—At an *auction* the contract of sale is not completed until the auctioneer knocks the article down to the purchaser, until which time the bid may be withdrawn. Then the sale must be reduced to writing by the auctioneer as the agent of the vendor. Champlain v. Parish, 11 Paige, 405; Tallman v. Franklin, 14 N. Y. 584; reversing, 3 Duer, 395. See this case as to the auctioneer's memorandum. Also, Pinckney v.

Hagadorn, 1 Duer, 89. The clerk's signature is supposed sufficient. 12 N. Y. Leg. Ob. 250; Trustees, &c. v. Bigelow, 16 Wend. 28.

In Coles v. Browne, 10 Pai. 526, the mere memorandum of the sale, without the signature of the vendor or his agent subscribed, is held insufficient.

The auctioneer's memorandum in his sales-book, in a brief form, is sufficient as a memorandum. 1 Duer, 89, *supra*.

As to the auctioneer's signature before the Revised Statutes, *vide*, *supra*, 1 Duer, 89; Pinckney v. Hagadorn, 1 Duer, 89; The Trustees, &c. v. Bigelow, 16 Wend. 28.

The auctioneer must subscribe the memorandum of sale. Champlin v. Parish, 11 Pai. 406.

He need not sign it specially as agent for the vendor; that is implied. Pinckney v. Hagadorn, 1 Duer, 89.

A referee's report of sale made by him, or any written memorandum of sale containing the requisites of the statute, is sufficient. The Nat. Fire Ins. Co. v. Loomis, 11 Pai. 431.

Part Performance.—As to part performance of a parol contract, taking it out of the statute of frauds, *vide*, *post*, Title v.

Title II. Effect of the Contract.

From the time of entering into a valid contract for the conveyance of land, the estate vests, in equity, in the vendee, and the vendor retains the legal title, as a mere lien or security for the unpaid purchase money. The vendor remains a mere trustee, and his interest is in the proceeds and not in the land; and the vendee becomes trustee of the vendor for the purchase money.

Upon the decease of the vendor, his interest in the contract is personal property, and goes to his personal representatives. It will pass by assignment, with or without seal, like a bond and mortgage, and it may be sold as personal property by his executor or administrator.

And upon the sale of such a contract by the administrator of the vendor, the purchaser *thereof* will have the right to receive the moneys remaining due on the same, at the death of the vendor.

An assignment by the vendee of such a contract, will convey to the assignee all his interests therein, and entitle the assignee to demand and receive a conveyance from the vendor or his heirs, upon payment of the purchase money due thereon. The contract as owned by

the vendee or his assignees is the subject of devise by them, and descent to their heirs respectively, as of the realty, and in them is vested the equity of redemption. And the administrator, &c., of the vendee has no right in the contract or interest in the rents of the land.

The heirs of the vendor will take the title by descent, as a mere security in equity for the payment of the debt. The debt is due to the administrators or executors of the vendor; and as the lien is considered to be held by the heirs in trust, and simply as a pledge or security for its payment, on payment of the debt, the heirs are compellable in equity to execute the trust by the conveyance of the title, and the purchase money must be paid to the personal representatives of the vendor, and not to his heirs.

Hill v. Ressegien, 17 Barb. 162; Swartout v. Burr, 1 Barb. 495; Johnson v. Corbett, 11 Pai. 265; Lowery v. Tew, 3 Barb. Ch. 407; Moore v. Burrows, 34 Barb. 173; Griffith v. Beecher, 10 Barb. 432; Kidd v. Dennison, 6 Barb. 9.

The executors of a deceased vendee must pay for the land, if it has not been paid for, for the benefit of the heirs. Johnson v. Corbett, 11 Pai. 265; Cogswell v. Cogswell, 2 Edw. 231.

Improvements to the Land or Destruction of Building. —The destruction of a building on land contracted to be sold has been held no defence to an action for the purchase money, the purchaser being considered as owner. The general rule is that the vendee, in a contract for the sale of land, is entitled to any benefits or improvements happening to the land after the date of the contract, and must bear any losses by fire or otherwise which occur without the fault of the vendor.

McKeehvie v. Sterling, 48 Barb. 330; Mott v. Coddington, 1 Rob. 267; Paine v. Miller, 6 Ves. 349; Clinton v. The Hope Ins. Co. 45 N. Y. 454; Kidd v. Dennison, 6 Barb. 9.

The case of Smith v. McCluskey, 45 Barb. 610, seems to take a view somewhat different from the above; that case holding that if a building, which is the main object of the contract, be destroyed, the vendees having quitted under notice so to do, are not liable for future payments on the contract, and may recover back those paid, even under a judgment therefor. The contract was considered rescinded, under a failure of consideration. See, also, Title VI, *infra*, as to deterioration.

See also Clinton v. The Hope Ins. Co. 45 N. Y. 454.

See the latter case as to insurance moneys, on a loss occurring.

The distinction drawn in these cases appears to be, that where the per-

sonal property on the land is contemplated specially as a main feature in the contract, its destruction will prevent the consideration from being given as contemplated.

Possession.—Possession under a parol agreement constitutes the vendee the owner, with a right of redemption, &c., except as against *bona fide*, purchaser without notice.

Lowry v. Tew, 3 Barb. Ch. 407; also, 18 Barb. 80; 22 N. Y. 209.

A mere agreement to sell does not, of itself, import a license to enter into possession.

Eggleston v. N. Y. & H. R. R. 35 Barb. 162; Spencer v. Tobey, 22 Barb. 260.

Where a party occupies under an agreement to purchase, he is not a tenant, but a vendee, and "use and occupation" will not lie. Mott v. Coddington, 1 Robtn. 267; Thompson v. Bower, 60 Barb. 463.

A sale of lands on execution against the grantee (by quitclaim deed), of one who was in possession under a contract of purchase, does not give to the purchaser any interest in the lands, such sale being prohibited by statute. 1 R. S. 744, § 4. Sage v. Cartwright, 5 Seld. 49.

A vendee in possession is bound to pay interest. Stevenson v. Maxwell, 1 Com. 408.

A vendee in possession has not any permanent interest or estate in the land, nor is he tenant, but a licensee, subject to re-entry and revocation without demand or tender of a deed, on default of payment. Hotaling v. Hotaling, 47 N. Y. 163; Doolittle v. Eddy, 7 Barb. 74.

After the purchaser has remained in possession for a year and upwards, use and occupation, it is held, will lie under certain circumstances. Pierce v. Pierce, 25 Barb. 243.

A party in possession is entitled to *emblements, i.e.,* crops sown by him, as if he were a tenant at will, unless he is guilty of some wrongful act; and this even if the contract were invalid. Harris v. Frink, 49 N. Y. 24.

In the case of Burnett against Caldwell (1872), the Supreme Court of the United States decides, that if a contract for the sale of property is silent as to the possession of the vendee, he is not entitled to it. If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. The relation of landlord and tenant does not subsist between the parties. Upon default in payment of any instalment of the purchase money, the possession becomes tortious, and the vendor may at once bring ejectment.

See also, Powers v. Ingraham, 3 Barb. 576, holding that no notice to quit is necessary. See, also, Tibbs v. Morris, 44 Barb. 138; Stone v. Sprague, 24 N. Y. 509.

The Vendor's Lien.—The vendor has a *lien* on the land for the purchase money, unless other security be taken, or the lien is otherwise waived. The lien exists against a subsequent purchaser or incumbrancer, with notice or without consideration. A mere note or bond of the vendee or of a third person taken, will not be a waiver of the lien.

As to taking what description of security will remove the lien, *vide* Sanders v. Aldrich, 25 Barb. 63; Lewis v. Smith, 5 Seld. 9 N. Y. 502; Hallock v. Smith, 3 Barb. 267; Warren v. Fenn, 28 Barb. 333.

The vendor's equitable lien on the land for the purchase money is lost, where the parties have waived it; or where it is obvious they contemplated a different security for the purchase money. As for example if a deed for other property is taken in payment. Hare v. Van Deusen, 32 Barb. 92; Coit v. Fougara, 36 Barb. 195.

It is superior to the lien of a judgment obtained against the vendee. Arnold v. Patrick, 6 Pai. 310; see, also, 33 Barb. 9.

Vendee's Lien.—The vendee, in possession, who has made improvements has a lien on the land therefor, where the vendor cannot for defect of title complete the sale.

Gibert v. Peleter, 38 N. Y. 165.

Warranty of Title in Contracts.—In every contract for the sale of land, there is always an *implied warranty* by the vendor that he has *good title*, unless such warranty be expressly excluded by the terms of the contract. The implied warranty exists so long as the contract remains executory, *i. e.*, until the deed is given; when the party must rely on covenants in the deed, unless there have been fraud, in which case relief may be afforded in equity. When the deed is accepted, therefore, the original contract becomes null, unless it is otherwise intended, or the contract has collateral covenants. Particularly would it not be extinguished, if it stipulated for acts to be done by the vendee, after the conveyance. Nor would it be extinguished in respect to provisions for a rebate or increase of the purchase money, dependent on the quantity of land; or other provisions of a similar character, nor where there is to be an exchange of lands.

Woodruff v. Bunce, 9 Paige, 443; Carr v. Roach, 2 Duer, 20; Marvin v. Bennett, 26 Wend. 169; Tallman v. Green, 3 Sand. 437; Davis v. Lottich, 46 N. Y. 393; Delavan v. Duncan, 49 N. Y. 485; Burwell v. Jackson, 5 Seld. (9 N. Y.) 535; Bull v. Willard, 9 Barb. 641; Bogart v. Burkhalter, 1 Den. 125; Witbeck v. Waine, 16 N. Y. 532; Morris v. Witcher, 20 N. Y. 41; Bennet v. Abrams, 41 N. Y. 619.

Record of the Agreement.—These agreements may be recorded, when acknowledged, &c.

1 Rev. Stat. p. 762, 1st ed.

They are not strictly notice, however, when so record-

ed, nor considered as included in the term "conveyance" used in the recording statutes.

Gillig v. Maas, 28 N. Y. 191.

If the agreement is recorded, and there is possession, the rights of subsequent grantees or incumbrancers are subject to it, for such possession is notice of an interest.

Laverty v. Moore, 32 Barb. 347.

If it is to operate by way of security or mortgage, it must be recorded with mortgages. Gillig v. Maas, 28 N. Y. 191. And see *post* ch. xxvi, as to record of instruments.

Assignment of the Contract.—An assignee of the contract takes it subject to all equities against his assignor. And with all the rights of the assignor, *e. g.*, to a contract of insurance, and it may be enforced, although the insurers did not consent to the assignment.

Tompkins v. Seely, 29 Barb. 212; Stoddard v. Whiting, 46 N. Y. 627; Cromwell v. The Brooklyn Fire Ins. Co. 44 N. Y. 42; Reeves v. Kimball, 40 N. Y. 299; Wood v. Perry, 1 Barb. 115; Cythe v. Lafontain, 51 Barb. 186. There is no covenant implied of title. 48 N. Y. 193.

The assignee of the purchaser's interest in a contract for the purchase of land is not personally liable to pay the moneys thereafter becoming due on the contract, without an agreement to pay them express or implied.

Adams v. Williams, 40 Barb. 225.

Title III. Sufficiency of the Deed and Title.

As seen above, there is always an implied warranty by the vendor that he has a good marketable title, unless such warranty is excluded by the terms of the contract. And this is the rule even when the contract is general, without specification of what title is to be given.

A covenant to give *a deed*, it has been held, is satisfied by giving a deed without warranty or covenants, and without the vendor's wife joining in the deed. Ketchum v. Evertson, 13 Johns. 359.

This would not be the case if the contract were to give a *warranty* deed, in which case the wife must be a party. Pomeroy v. Drury, 14 Barb. 418; overruling 16 Johns. 367, and 20 Johns. 130.

And it is doubtful whether the above case in 13 Johns. now would be sustained, under recent decisions as to the wife's non-joinder.

A contract to give a deed in *fee simple*, is not satisfied by giving a title subject to incumbrances. Penfield v. Clark, 62 Barb. 684. To the contrary were 13 Johns. 359; 6 Cow. 13.

A covenant for *quiet enjoyment*, is sufficient to satisfy an agreement to convey by a "*warranty deed.*" That term does not include a covenant against incumbrances. Wilsey v. Dennis, 44 Barb. 354.

The title will be considered good, if there is only a trifling incumbrance or slight discrepancy of description, *e. g.*, a bare possibility of some fact vitiating it. Schermerhorn v. Niblo, 2 Bos. 161.

A covenant to give a *warranty* deed, implies a conveyance passing a perfect and complete title, in which the wife shall join. Even though the contract provide that there shall be no covenants in the deed, the purchaser is still entitled to a good title to the land. Atkins v. Bahrett, 19 Barb. 639; Pomeroy v. Drury, 14 Barb. 418; Penfield v. Clark, 62 Barb. 384.

In equity, under a general contract "to sell" a party is entitled to a good and unincumbered title. Guynet v. Mantel, 4 Duer, 86; Delavan v. Duncan, 49 N. Y. 485.

The deed must be not only sufficient in *form*, but an operative conveyance transferring a sufficient legal title.

2 Johns. 295; 11 Id. 525; 4 Paige, 628; 14 Barb. 418; 4 Coms. 396; 62 Barb. 585.

Under the words "*good and sufficient deed,*" the vendor is bound to convey *a good title*, and not merely to execute it sufficient *in form.*

Burwell v. Jackson, 5 Seld. 535; Story v. Conger, 36 N. Y. 673.

He is also bound to give a *legal* title as well as to execute the covenants. Fletcher v. Button, 4 Coms. 396, questioning 16 Johns. 267, and 20 Johns. 130; Winne v. Reynolds, 6 Pai. 407.

A contract to give a good and sufficient deed, implies a warranty against incumbrances. *Supra*, 5 Seld. 535.

Title in part Defective.—If the title to a part of the land is defective, the purchaser is not obliged to take the rest, even though compensation be tendered. Gibert v. Peteler, 38 N. Y. 165.

An old *lis pendens*, or invalid mortgage is not an objection to the title. Wilsey v. Dennis, 44 Barb. 354.

A covenant to give a *sufficient deed* to vest the title, or to give the *title*, means the *legal* estate in fee, free from all other claims, liens, or incumbrances whatever. Jones v. Gardner, 10 Johns. 266; 15 Barb. 16; 17 Wend. 246; 23 Wend. 66.

It is not satisfied by a deed not acknowledged by the wife. Stevens v. Hunt, 15 Barb. 17.

Title to be "satisfactory."—The words "title to be satisfactory," imply only that the title shall be good and marketable. Rigney v. Coles, 6 Bos. 479.

Where the contract prescribes that the title should be made satisfactory, and the vendor has no title, the vendee may recover damages, &c. without showing offer to comply with certain conditions precedent. Lawrence v. Taylor, 5 Hill, 107.

The Land Described.—Where a specified tract is sold in gross, the boundaries of the land control the description of the quantity it is said to contain; and neither party can have a remedy against the other for excess or

deficiency of quantity, unless such excess or deficiency is so great as to furnish evidence of fraud or misrepresentation.

The rule would not apply where there was a mistake in the "*boundaries*," nor where land was sold by the quantity.

Voorhees v. De Meyer, 2 Barb. 37; Belknap v. Sealey, 14 N. Y. 143.

The description may be made certain—*e. g.* "a farm"—by extrinsic evidence. Brinckerhoff v. Olf, 35 Barb. 27.

See more fully as to this, *post*, ch. xx, Tit. iv, and 5 Lans. 392.

TITLE IV. TENDER AND TIME OF PERFORMANCE.

Time is not generally, in equity, deemed to be of the essence of the contract, unless the parties make it so, or it necessarily follows from the nature and circumstances of the contract; but *time* is of the essence, and a condition of the contract, if the parties choose to so agree, and the courts will not enforce performance after the time specified. This rule is subject to modifications such as are below referred to.

Voorhees v. De Meyer, 2 Barb. 37; Dominick v. Michael, 4 Sandf. 374; Wells v. Smith, 7 Pai. 22; affirming 2 Ed. 78; Bennet v. Abrams, 41 N. Y. 619.

A contract to convey free of incumbrance by a certain day, requires that the land be free by that day. If a legal title cannot be given at the time agreed on, the purchaser may rescind. Morange v. Morris, 34 Barb. 311.

A short delay, where time is not a distinct condition of the contract—a delay fairly accounted for, so as to repel presumption of a waiver or abandonment of the contract—will not ordinarily deprive a party of his right to a specific performance. 7 Pai. 22; 2 Ed. 78, *supra*.

Where no time is fixed, a *reasonable time* is intended. Equity may extend the time, on cause shown, when the time is not essential. The time may be extended by *parol*. Wiswall v. McGown, 2 Barb. 270; Stone v. Sprague, 20 Barb. 509; Beebe v. Dowd, 22 Barb. 255.

The time fixed may also be waived by act of the parties. Gregg v. Van Phul, 1 Wallace, 274; Duffy v. O'Donovan, 46 N. Y. 223.

Where the time of payment has been extended generally the vendee is entitled to a reasonable time after notice to make his payment. Cythe v. La Fontain, 51 Barb. 186. See this case as to forfeiture generally.

Continued possession would preclude a party from rescinding the contract on the ground that the other did not perform on the precise day. Benson v. Tilton, 24 How. P. 494; affirmed, 41 N. Y. 619.

The party who caused any delay, or is unable to give a clear title, cannot raise the objection as to time, nor take advantage of a delay to complete the purchase on the part of the other. 7 Robt. 115; Merange v. Morris, 34 Barb. 311; Stone v. Sprague, 20 Barb. 509.

Tender of Performance.—If the vendor wishes to re-

scind the contract, or hold the purchaser, the deed must be prepared by the vendor on the day specified, ready for delivery, and tendered to the purchaser, and if on demand and tender he is in default, the vendor may rescind.

20 Johns. 15; 6 Cow. 13; 6 Barb. 147; 5 Denio, 161; McWilliams v. Long, 32 Barb. 194; also, Leaired v. Smith, 44 N. Y. 618.

Where there is a mutual obligation to pay the money and to convey, an offer, tender, and readiness on the part of the purchaser is sufficient, and he is not obliged to prepare and tender the deed to the vendor for execution, especially where the vendor refuses to convey at all, but he may do so to expedite the matter.

Fuller v. Hubbard, 6 Cow. 13; Tompkins v. Hyatt, 28 N. Y. 347; Stone v. Sprague, 20 Barb. 509; Foote v. West, 1 Den. 544.

Where a conveyance and payment are to be made simultaneously on a fixed day, and neither party tenders, neither party can recover in an action at law on the contract, but relief may be had in equity. Stevenson v. Maxwell, 2 Com. 408. As to mutual covenants, 1 Seld. 247; 48 N. Y. 247.

Where time, however, is not an essential ingredient of the contract, the tender may be made within a reasonable time after the day named. McWilliams v. Long, 32 Barb. 194; Goodwin v. Nelin, 35 How. 402.

Taking possession by the vendee waives default of the vendor in not delivering the deed at the requisite time. It also waives claim to relief for defective title, if vendee knew it. Tompkins v. Hyatt, 28 N. Y. 347; Bennett v. Abrams, 41 N. Y. 619; also, 24 How. P. 494.

Delay in making payments by a vendee will not work a forfeiture of vendee's rights, where the delay has been waived by acts, or otherwise not claimed. Richmond v. Foote, 3 Lans. 244.

A vendor who is to convey by a day certain is not in default until the vendee has demanded a deed, and after waiting a sufficient time to have it drawn, has demanded it again. Or the purchaser may prepare and tender the deed for execution, which dispenses with a second demand. Connolly v. Pierce, 7 Wend. 129; Stevenson v. Maxwell, 2 Com. 409; Wells v. Smith, 2 Ed. 78; affi'd, 7 Pai. 22.

If on the first demand the vendor refuse to convey, a second demand is unnecessary. Lutweller v. Litnell, 12 Barb. 512.

If the vendor die leaving infant heirs, the course of the vendee is to apply to the court, asking it to compel performance. Tompkins v. Hyatt, 28 N. Y. 347.

See this case, as to the effect of a decree in such matter, and how far it waives a defective title so known to the vendee.

If the purchaser die, a tender to his executor is sufficient. Brinckerhoff v. Olf, 35 Barb. 27.

When the last instalment is due on the contract, the payment and the giving of the deed are dependent acts, and the vendor cannot recover the balance due without showing performance or offer to perform, under a valid title. Smith v. McCluskey, 45 Barb. 610; see 1 Seld. 247; 48 N. Y. 247.

A certified check will be a good tender by the vendee, unless it is reused as not being money. Duffy v. O'Donovan, 46 N. Y. 223.

Where the contract provides that all payments shall be made previous to giving the deed, the vendor may sue, without conveyance or offer to convey. Adams v. Wadhams, 40 Barb. 225.

A tender may be waived by refusal to receive the money or to do the act required. Stone v. Sprague, 20 Barb. 509.

Where there is to be part cash payment on a fixed day, and a bond and mortgage to be given for the balance, on the delivery of the deed, if the money is paid, there must be a tender of the deed to put the vendee in default. If neither party tenders the deed or mortgage, neither is in default. Morange v. Morris, 32 How. 178; Leaired v. Smith, 44 N. Y. 618. And if both fail to perform mutual and dependent parts of the agreement on the contract day, as specified, each impliedly waives strict performance as to time, and the agreement remains in full force and effect otherwise; and either can have specific performance, on compliance with the terms of the agreement. Van Campen v. Knight, 63 Barb. 206; also, 22 Barb. 255.

A demand of a deed from one tenant in common is sufficient. 9 Wend. 68.

A tender need not be made after *refusal* to perform, or to receive the money. 23 Wend. 66; 20 Barb. 509; 48 N. Y. 225.

Nor after an inability to perform or to give an unincumbered title. Karker v. Haverly, 50 Barb. 79; Holmes v. Holmes, 9 N. Y. 525; Delavan v. Duncan, 49 N. Y. 485.

Place.—The tender, where no place is fixed, must be personal, if the time is fixed, unless, on application at the residence of the party, he is not found. If no time be fixed, the tender should be personal, if the party is in the State. Smith v. Smith, 25 Wend. 405; see, also, 2 Hill, 351.

Effect of Non-Performance.—If the vendee refuses to complete the purchase, he forfeits all payments on account. Garlock v. Lane, 15 Barb. 359; Green v. Green, 9 Cow. 46; Ellis v. Hoskins, 14 Johns. 363; Ketchum v. Everson, 13 Johns. 359; Simon v. Kaliske, 6 Ab. N. S. 224.

If the vendor rescind, or cannot make title, or the premises are incumbered, the purchaser has a right to treat the contract as rescinded, without demanding a conveyance, and may recover all payments made.

Burwell v. Jackson, 5 Seld. (9 N. Y.) 535; Ellis v. Haskins, 14 Johns. 363; Ketchum v. Sweet, 13 *Id.* 359; Foote v. West, 1 Den. 544; Utter v. Stewart, 30 Barb. 20; and cases *supra*.

If the premises are incumbered, a tender of the money is not necessary in order to save the vendee's rights under the contract. Delavan v. Duncan, 49 N. Y. 485; Karker v. Haverly, 50 Barb. 79; Morange v. Morris, 32 How. 178.

If the purchaser take possession, he cannot rescind the contract without restoring possession, nor refuse to pay the purchase money. Tompkins v. Hyatt, 28 N. Y. 347; Coray v. Mathewson, 44 How. P. 80.

Implied Rescission.—A rescission of the contract may be presumed from lapse of time. 8 Johns. 257; 3 John. Ca. 60; 2 Abb. Pr. 261; 7 Paige, 386.

TITLE V. SPECIFIC PERFORMANCE.

The specific performance of such contract may be enforced, either in favor of the vendor or vendee, in equity,

and even a *parol* agreement may be enforced in equity after a part performance. To entitle a party to a specific performance, the contract must be certain in its terms and mutual in its character.

Courts, however, will not enforce a specific performance, if there has been fraud or mistake, surprise or unreasonable delay, or excusable inadvertence; nor where the agreement is not mutual, so that both parties are bound by it; nor where it has been abandoned; nor where it is against the interest of persons under protection of the court.

Gillett v. Borden, 6 Lans. 219; Worrall v. Munn, 3 Seld. 229; German v. Machin, 6 Pai. 288; Copes v. Bowne, 10 Pai. 526; Matthews v. Terwilliger, 3 Barb. 50; Benedict v. Lynch, 1 Johns. Ch. 370; Cuff v. Dorland, 50 Barb. 438; Sherman v. Wright, 49 N. Y. 227; Wood v. Perry, 1 Barb. 115; Tibbs v. Morris, 44 Barb. 138; Dodge v. McBurney, 43 How. 427.

Performance will not be enforced if the vendor cannot make good title, except in cases where the vendee assumes to take the title as it is. 11 Johns. 525; Bates v. Delavan, 5 Pai. 299; Stevenson v. Buxton, 15 Abb. P. 352; and see cases, *ante*, p. 479; and 1 Lans. 169.

Neither will courts always enforce these contracts strictly; but the interference of the court will be exercised so as to defer to existing equities; and performance of the contract may be decreed or not decreed, on conditions that will prevent undue exaction or hardship.

Although, also, it is considered a matter of discretion whether specific performance will be decreed, yet the discretion must be exercised according to certain well established rules, and does not rest in the mere caprice of the court.

Mechanics' Bank v. Lynn, 1 Pet. 376; Cuff v. Dorland, 55 Barb. 486; also, 18 Barb. 350; Losee v. Morey, 57 Barb. 561; Seymour v. Delancey, 3 Cow. 445; Viele v. Troy & B. R. R. 20 N. Y. 184; Slocum v. Closson, 1 How. App. Ca. 758; Willard v. Taylor, 8 Wall. 557; King v. Hamilton, 4 Peters, 311; Morey v. Farmers' L. & T. Co. 4 Ker. 302; Foot v. Webb, 59 Barb. 38; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; St. John v. Benedict, 6 Johns. Ch. 111; Peters v. Delaplaine, 49 N. Y. 362.

Unless the parties have consented to the delay, these contracts will not be enforced after a long, unnecessary delay; and particularly if a serious injury has resulted therefrom, by defect of title, unless equitable circumstances explain the delay. McWilliams v. Long, 32 Barb. 194; Jackson v. Edwards, 22 Wend. 498; Hubbell v. Von Schoening, 58 Barb. 498; Voorhees v. De Meyer, 2 Barb. 37; 4 Sandf. 374; Leaired v. Smith, 44 N. Y. 418; 8 Pet. 420; Delavan v. Duncan, 49 N. Y. 485; Laurence v. Ball, 4 Ker. 477; Tompkins v. Seely, 29 Barb. 212; Peters v. Delaplaine, 49 N. Y. 362.

Where there has been a waiver, (which may be done verbally, even if the contract is written,) courts will not enforce the contract. Wood v. Perry, 1 Barb. 115.

Readiness to Perform.—Where the vendor does not show that he was ready and willing to perform, and where the purchaser shows that he was ready and offered to perform, the vendor cannot have judgment of specific performance. Haight v. Child, 34 Barb. 186.

Infants, Lunatics.—When specific performance may be decreed against such persons, *vide, post*, ch. 25.

It is held that specific performance of the contract of a guardian will not be enforced, unless it be for the interest of the infant. Sherman v. Wright, 49 N. Y. 227.

Voluntary Agreements without Consideration.—These will not be enforced. Acker v. Phenix, 4 Paige, 305; Minturn v. Seymour, 4 Johns. Ch. 497; Hayes v. Kenbow, 1 Sand. 258.

Fraud.—If fraud is shown in making the contract, the purchaser may be relieved in equity. Denston v. Morris, 2 Edw. 37.

And the contract may be reformed if there is a fraudulent omission. Matthews v. Terwilliger, 3 Barb. 50.

Demand not Necessary for the Action.—A party entitled to a conveyance, upon request, may bring an action for specific performance, without previous request. The previous demand only affects the question of costs. Bruce v. Tilson, 25 N. Y. 194.

Married Women.—The contract, prior, at least, to the laws of 1848–9, and 1860 (*ante*, p. 78), would not be binding upon a married woman, if signed by her, until also acknowledged by her. Knowles v. McCamley, 10 Paige, 342.

Where the wife refuses to join, the remedy is for damages, if the husband contracted that she should sign. Matter of Hunter, 1 Edw. 1.

To enforce the contract against a *feme-covert* or her heirs, she must have executed the contract with the husband, and duly acknowledged the same apart from him. Knowles v. McCamley, 10 Pai. 342.

Parol Rescission.—Equity will not compel specific performance where the parties have, upon default of one party, agreed, by parol, to rescind the contract. Arnoux v. Homans, 25 How. P. 427.

Agreements to Lease.—As to these, *vide, ante*, p. 178, and *post*, p. 489.

Where there are Incumbrances.—Specific performance may be decreed, when there are liens, &c., if the vendee, took knowing of them, or where they may be compensated for; or the purchaser was to take the risk of title. Guynet v. Mantel, 4 Duer, 86; Winne v. Reynolds, 6 Paige, 407.

Specific Performance for Part.—Where the title fails for part, specific performance may be decreed in favor of the vendee for the balance, and damages awarded for what cannot be conveyed, or the consideration money rebated. Harsha v. Reid, 45 N. Y. 415. The vendee, however, cannot be compelled to take a part. Faure v. Martin, 7 N. Y. (3 Seld.) 210; see, also, King v. Bardeau, 6 Johns. Ch. 38; Woodruff v. Bunce, 9 Paige, 443; Voorhees v. De Meyer, 2 Barb. 637; Gibert v. Peteler, 38 N. Y. 165; Roy v. Willink, 4 Sand. 525.

Lands Situated out of the State.—Specific performance relative to such lands may be enforced here, if the defendant were duly served here and subjected to the jurisdiction. Sutpher v. Fowler, 9 Paige, 280; Cleaveland v. Burril, 25 Barb. 532; Newton v. Bronson, 13 N. Y. 587; Bates v. Delavan, 5 Pai. 299.

Part Performance.—A partial performance of a parol contract to convey lands will frequently take the case

out of the statutes which require a written contract, and the contract will be enforced in equity, if its performance be consistent with the rules of equity, and required by the justice of the case. The theory of the interference of the court, in dispensing with the statutory requirement is, that unless the agreement were carried into complete execution, a mere partial performance would work a fraud against the party applying.

Generally, as to the above principles, *vide* Davis v. Townsend, 10 Barb. 333; Thompson v. Dickinson, 2 Ker. 12 N. Y. 64; Wolfe v. Frost, 4 Sand. Ch. 72; Murray v. Jayne, 8 Barb. 612; 3 Sand. Ch. 279; Thomas v. Dickinson, 12 N. Y. 364; reversing 14 Barb. 90; Coles v. Bowne, 10 Pai. 526.

§ 10.—By the Revised Statutes, it is also provided, that nothing in title i, ch. 7, part ii, relative to fraudulent conveyances and contracts, shall be construed to abridge the powers of courts of equity, to compel the specific performance of agreements in cases of part performance of such agreements.

The part performance claimed must be acts founded upon and referable solely to the agreement. Philips v. Thompson, 1 Barb. Ch. 131; Wolfe v. Frost, 4 Sand. Ch. 72.

As to part performance of a void contract and the recission thereof. *vide* Thomas v. Dickinson, 12 N. Y. 364; reversing 14 Barb. 90.

If the vendor admits the contract, and does not set up the statute of frauds in his pleading, specific performance will be decreed; and if the property has been transferred to another, with notice, the court will decree a conveyance by him. Duffy v. O'Donovan, 46 N. Y. 223.

A party who has voluntarily performed part of a void contract cannot therefore be compelled to perform the residue. Baldwin v. Palmer, 10 N. Y. (6 Seld.) 232.

Part Payment—It was formerly held that payment of the purchase money was part performance, but the more modern doctrine is, that payment of part or even of the whole of the purchase money is not of itself, and without something more, a performance that will take the case out of the statute; for the money may be repaid. This would not be the case where the consideration was not money and could not be easily estimated. Rhodes v. Rhodes, 3 Sand. Ch. 279; 4 Kent, 451; Haight v. Child, 34 Barb. 186.

Where a party has paid money upon a contract, and a recovery of the money will not restore him to his former condition, he is entitled to specific performance. Malins v. Brown, 4 N. Y. (4 Com.) 403; Richmond v. Foote, 3 Lans. 244.

Delivery of Possession.—Delivery of possession, even of part, will take the case out of the statute of frauds. Lowery v. Tew, 3 Barb. Ch. 407; Harris v. Knickerbocker, 5 Wend. 638; Lord v. Underdunck, 1 Sand. Ch. 46. So also, part payment and occupation, through a lease made to a third person. Merithew v. Andrews, 44 Barb. 200. And where there has been a parol agreement to straighten boundaries and exchange portions of adjoining lands, and parties have occupied. Davis v. Townsend, 10 Barb. 333.

Who can maintain the Action for Specific Performance.—Besides the purchaser the action may be maintained by the following persons: A trustee. Munro v. Allaire, 2 Cain. Ca. 183. A sub-purchaser of part of

the contracted land. Lord v. Underdunck, 1 Sandf. Ch. 46; Wood v. Perry,.1 Barb. 114. Personal representatives. Buck v. Buck, 11 Paige, 170.

Creditors.—The Revised Statutes provide that such contract may be enforced also by a judgment creditor of the purchaser, but that the interest of a party therein shall not be bound by a judgment or sold under execution.

Vol. 3, p. 35; *Vide post*, chs. 37, 38, judgments and sales by execution.

Limitation.—Actions for specific performance, whether the contract were under seal or not, must be brought within ten years after the cause of action accrued. Code, §§ 91, 97.

Peters v. Delaplaine, 49 N. Y. 362.

Title VI. Miscellaneous Proceedings.

Interests of Purchasers liable to be Sold by order of Surrogates.—The proceedings with reference to the sale of lands of deceased persons by the order of surrogates, when there is not sufficient personal assets for the payment of the debts of the estate, have been fully given in a previous chapter.

The statutes of this State also provide for the sale of the interest of the deceased in land held under a contract of purchase, either as original party or as assignee, on applications similar to those set forth in the above chapter, in the same cases and in the same manner as if he had died seized of the land. The provisions with reference to such interests will be found in the laws of 1837, ch. 460. The details of these proceedings can not be here given.

Vide Richmond v. Foote, 2 Lans. 244, *ante*, p. 456.

Lien of Judgments on the Interest of those holding Contracts.—By the Revised Statutes, the interest of any person holding a contract for the purchase of lands, shall not be bound by the docketing of any judgment or decree, nor be sold by execution upon any such judgment or decree.

The manner in which the interest of the defendant may be reached or sold under the judgment of the court,

and applied to the payment of what is due by him under the judgment, is considered hereafter. Ch. 38.

Effect of a Judgment against Vendor.—A judgment against the vendor after contract would not bind the land, the vendee being treated as the owner of the estate. Swartout v. Burr, 1 Barb. 495; Smith v. Gage, 41 Barb. 60. And the vendee in possession would be protected. Moyer v. Hinman, 13 N. Y. 180; overruling 17 Barb. 139. Nor would a judgment against his assignee or devisee. See as to the effect of such a judgment, Smith v. Gage, 41 Barb. 60; see also 10 Pai. 560; 46 N. Y. 12; and see *post* ch. 37, "Judgments and execution," ch. 38.

Taxes.—As to taxes payable under a contract to purchase.

Vide Kern v. Towsley, 45 Barb. 150.

Damages on Non-performance.—Where the title fails, the remedy of the purchaser at law is an action for damages.

The proper rule for damages on a breach of contract for sale of land is, the amount paid by the purchaser on executing the contract, together with the difference between the contract price and the actual value of the premises at the time the contract was to be performed.

Pringle v. Spaulding, 53 Barb. 17; Pumpelly v. Phelps, 40 Barb. 60, allowing recovery only when vendor knew he had no title.

It is held that courts of equity will not decree damages instead of a specific performance of a contract, when they have obtained jurisdiction on other grounds. Wiswall v. McGown, 2 Barb. 270.

The purchaser to whom the deed is due may, on a failure of title, recover the purchase money paid by him, and interest, whether the purchaser has been in occupation or not. Fletcher v. Button, 4 Com. 396.

As to when the sum specified will be considered a penalty and when liquidated damages, *vide* Pearson v. Williams, 26 Wend. 630; Brinckerhoff v. Olf, 35 Barb. 27.

Fraudulent Conveyances.—The provisions of Title ii, in reference to fraudulent conveyances and contracts, &c. have no reference to contracts concerning lands.

Young v. Dake, 1 Seld. 463; reversing 7 Barb. 191.

Deterioration of the Estate between Contract and Completion.—The rule established by the courts in England appears to be, that if there is a palpable deterioration after the vendee takes possession, or after he might have taken possession under the contract, there can be no allowance for such deterioration; but otherwise he would be entitled to a deduction, especially if through defects

in title there was a delay before possession could be given, and even if there was a mutual mistake as to such defects. When in possession the vendee is to prevent waste, and would be allowed reasonable repairs. The cutting of valuable timber would be a deterioration. Timber blown down would belong to the purchaser.

Binks v. Bokely, 2 Swauts. 222; Philips v. Silvester, 20 W. R. 406; s. c. 21 Id. 179; 17 S. J. 364; Poole v. Shergold, 1 Cox, 273; Magennis v. Fallon, 2 Moll. 584; Foster v. Deacon, 3 Madd. 394; Ferguson v. Todman, 1 Simm. 530; Lord v. Stevens, 1 Younge & C. 222; Minchin v. Nance, 4 Beav. 332; Corrodus v. Sharp, 20 Beav. 56; The Regent's Canal Co. v. Ware, 23 Beav. 515. See also, Sugden on Vendors, Am. ed. p. 747; Taylor v. Porter, 1 Dana, 423; Williams v. Rogers, 2 Id. 375.

We have seen above, Title ii, what has been the ruling in this State, when there has been a destruction, by fire, of buildings on the premises.

Heirs of the Vendor.—These are bound to convey.

Vide, *ante*, Title ii, and *post*, ch. xxv, as to Infant Heirs; and Hill v. Ressegieu, 17 Barb. 162; Hyatt v. Seely, 1 Ker. 11 N. Y. 52.

CHAPTER XX.

TITLE BY DEED.

A *Deed* is defined as a writing in proper and efficient words, upon paper or parchment, sealed and delivered by the parties; its object being to pass some estate or interest in land.

Under the early principles of the common law, based upon the feudal system, the tenant of lands by livery from the feudal owner had no right to alien the lands without the consent of the latter, in whom and his heirs continued the right of reversion on forfeiture, or on failure of heirs of the feudatory.

Various changes in the law were made from time to time, as the oppressions of the system were gradually

removed, and through the means of subinfeudations, the provisions of the Magna Charta, and the passage of various acts in the times Henry I and Edward I, the right of free alienation by the subvassal, without the consent of the lord of whom he held, was finally established.

The principles of the statutes "*De donis*" and "*Quia emptores,*" passed in the time of Edward I, which relate to the right to transfer real estate, have been adverted to in preceding chapters.

Subsequent statutes allowed the involuntary alienation of land through proceedings to enforce debts, and finally, the penalty of forfeiture on the alienation of lands by tenants *in capite*, holding immediately from the king, which had not been theretofore removed, was avoided through the substitution of a fine, by virtue of a statute passed in the reign of Edward III.

As regards the right of alienation in this State, and in what persons and to what extent the right exists, reference is made to the antecedent chapters iii, iv, v, where these subjects are treated of in detail, and the principles of the common law in connection with statutory changes in the State, are reviewed. It has been seen that it is established as a principle of constitutional right and law in this State, that every owner of land therein has the *jus disponendi* as a right appurtenant to its ownership; and that, on parting with such ownership in fee, there is no *reverter* or possibility of *reverter* to him remaining, and that he can annex no conditions or restraints to the alienation which would prevent the alienee from disposing of the land so granted.

Whether the old English statute, called "*Quia emptores*" (181 Edw. 1), allowing every freeman to sell his lands at pleasure, became part of the law of the colony and State of New York or not, the Act of Oct. 22, 1779 (1 Jones & Varick, 44), and the Act of Feb. 20, 1787 (1 Rev. Laws, 70), entirely removed the foundation on which the right of the grantor to clog and restrain the

alienation of land had formerly rested, as an incident of the feudal tenure of real property.

Consequently, all reservations in a conveyance or lease in fee, restricting the alienation, would be repugnant to the estate granted, and void.

Vide Van Rensselaer v. Hays, 19 N. Y. 68; *vide* De Peyster v. Michael, 6 N. Y. 468; and *ante*, pp. 131 to 143.

Prior to the Revised Statutes, the forms of conveyance hereafter referred to were employed in this State, and are to a certain extent still in use; the only ones expressly abolished being *feoffments* and *fines and recoveries.*

The Revised Statutes, however, have simplified alienation by deed, and recognize any deed clearly intended to transfer the ownership of real estate as sufficient for the purpose, within the restrictions and provisions referred to in this chapter.

They particularly provide, that in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the *intent* of the parties, so far as such intent shall be collected from the whole instrument, and is consistent with the rules of law.

Vide, as to the intent in deeds, Jackson v. Blodget, 16 Johns. 168; Jackson v. Myers, 3 Johns. 195; Jackson v. Beach, 1 Johns. Ca. 402; Fish v. Hubbard, 21 Wend. 654.

The Revised Statutes apply the general term "*grant*" (which formerly was applicable to the conveyance of incorporeal hereditaments only) to indicate the instrument by which a freehold estate is transferred, and provide that *deeds of bargain and sale* and of *lease and release* may continue to be used, and shall be deemed "*grants.*"

The Revised Laws of 1813.—The Revised Laws of 1813, Vol. I, p. 369, c. 97, contain embodied all the laws concerning deeds then in force, and how they are to be acknowledged and recorded. This act, with the exception of §§ 7, 10 and 11, was repealed by the general repealing act of 1828, and also an act of March 8, 1817, as to record and acknowledgments.

TITLE I. DEEDS, HOW MADE.

Formerly conveyances were chiefly made by *parol*, and by "*livery of seizen*," through certain overt acts, without any writing, until by the Statute of Frauds (29 Charles II.) they were required to be in writing, and to be signed by the grantor, in order to transfer interests in lands other than estates for three years or less.

This statute has been re-enacted in our State, as follows:

Rev. Stat. part 2, ch. 7, title 1, § 6, taken from Rev. Laws of 1813, p. 78.

§ 6.—"No estate or interest in lands other than *leases for a term not exceeding one year*, nor any *trust* or *power* over or concerning lands, or in any manner *relating thereto*, shall hereafter be created, granted, assigned, surrendered or declared, unless by *act or operation of law*, or by a *deed or conveyance in writing, subscribed by the party* creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized *by writing*."

Exception is made in favor of wills, implied trusts, declarations of trusts, and fines; for which exceptions *vide ante*, p. 260.

As to *contracts* for the sale of land, *vide* ch. xix, *ante*.

As to *leases*, *vide* ch. viii, title 2, *ante*.

Parol acts and declarations and gifts, may also effect by estoppel a transfer, in equity, of the title to Real Estate, notwithstanding the statutes above cited, particularly if possession is taken and improvements made, and innocent parties are mislead by acts or declarations of the owner. People v. Goodwin, 5 N. Y. 568; Bush v. Lathrop, 22 N. Y. 535; Bassen v. Brennan, 6 Hill, 47; Embury v. Conner, 3 Com. 516; Sherman v. Mc Keon, 38 N. Y. 266; Reeves v. Kimball, 63 Barb. 120; Levick v. Sears, 1 Hill, 17; Freeman v. Freeman, 43 N. Y. 34; 1 John. Ch. 344; 3 Pai. 545; 6 John. Ch. 166.

Transfer by Statute.—A statute or proceedings under a statute authorizing the taking of land, would also vest title, without a deed, providing the transfer were made pursuant to constitutional provisions. But any transfer made by which land is transferred *in invitem*, even though compensation were made, would be void, if not made for a public purpose, under the Constitution. Embury v. Conner, 3 Com. 511. *Vide ante*, Eminent Domain, ch. ii.

Incorporeal hereditaments.—These, including easements, water privileges, and other interests in land have to be in writing. Thompson v. Gregory, 4 John. 81; Wolfe v. Frost, 4 San. Ch. 72; Brown v. Woodworth, 5 Barb. 550, and *post*, ch. xxii.

Sale of a Pew.—This requires a deed. First Baptist Church v. Bigelow, 16 Wend. 28, and *vide ante*, p. 107, and ch. xix.

Contract—A contract under seal, executed and delivered, may be sufficient to constitute a grant. Hunt v. Johnson, 44 N. Y. 27.

Presumption.—After long possession and claim under a deed—the existence of a deed may be presumed. Deery v. Cray, 5 Wall. 795; De Meyer v. Legg, 18 Barb. 14; Vrooman v. Shepherd, 14 *Ib.* 441.

The Manner of the Writing.—The English rule is that the writing must be (printed or written) on paper or parchment and not on other substance. It may be either in ink or pencil. Merrit v. Classon, 12 John. 102; affi'd, 14 *Id.* 484; Davis v. Shield, 26 Wend. 354.

Title II. The Parties.

A deed must have a competent grantor, grantee, and thing granted. The *parties* must be truly and sufficiently described or designated so as to be ascertained. If they are left uncertain the deed is void.

Cruises Dig. Tit. 32, ch. 20.

A grant to the *inhabitants of a town not incorporated*, or to the *people of a county*, would be void. 8 Johns. 385; 9 Johns. 73. *Vide post.* as to towns, villages and counties, ch. 24. The grantee, however, need not be named if sufficiently designated. Webb v. Weatherhead, 17 How. 576, U. S. Rep.

The parties must be of sound mind and of full age, or the deed may be disaffirmed. *Vide ante*, p. 49; as to those capable of aliening lands. The parties may be bodily infirm, *e. g.* blind, deaf and dumb, if of sound mind; and made cognizant of their acts.—*Vide* Lansing v. Russell, 13 Barb. 510; *Ib.* 3 Barb. Ch. 325; Jackson v. Corey, 12 John. 427.

Deed by Public Officers.—A deed by a public officer, in behalf of a State is the Deed of the State, although the officer is the nominal party. Sheets v. Selden, 2 Wall. 177.

Deed to one and others.—Under a deed to A., B. and associates, the legal estate vests only in A. B. Jackson v. Sisson, 2 John. Ca. 221.

To a deceased person.—Such a deed would pass no title to his heirs. Doughty v. Edmiston, 1 Cooke (Tenn.), 134.

Deed Poll.—Although a deed, in form, begins as an Indenture, if it purports to be and, in fact, is only the deed of the grantor, it is a deed poll, and does not estop the grantee from denying the grantor's title. 1 Com. 242; 4 Barb. 180; 3 Hill, 518. Champlain Co. v. Valentine, 19 Barb. 484.

Conveyances are good in many cases when made to a grantee by a certain designation, without the mention of either the christian or surname, as to the wife of I. S., or to his eldest son; for. *id est certum, quod potest reddi certum.* Co. Litt. 3 a. 4 Kent, 539; Friedman v. Goodwin, 1 Mc Al. C. C. Cal. 1; Griffing v. Gibb, *Ib.* 212.

A grant of land to a class of persons is good, if the class is sufficiently described, and if the individuals of the class are ascertainable.

It has been seen, above, ch. x, that since the Rev. Stat. where it is apparent from a deed, that the property embraced in it was intended to be conveyed to the grantee merely as trustee, he will take no beneficial interest or legal estate therein. See also LaGrange v. L'Amoureux, 1 Barb. Ch 18.

Under the practice of the English law, deeds were executed by both parties; and although now but generally executed by the grantor, unless there are mutual covenants, they still retain, even in this State, the language and form of a mutual contract executed by both parties, and each of them is, under the theory of the paper being an *indenture*, (or a single piece of parchment cut into two,) supposed to retain a copy.

Towns, Villages, Counties, States, &c.—Vide post, ch. xxiv, and *ante,* ch. i.

Corporations.—As to them, *vide post,* ch. xxiv.

Married Women.—Ante, ch. iii.

Infants, Lunatics, &c.—Post, ch. xxv.

Partners.—One may make a deed in the firm name, if by the direction or with the assent of the others.

Gibson v. Warden, 14 Wall. 244; and *ante,* p. 324.

Title III. The Consideration.

The deed should be founded upon sufficient consideration, which may be either *good* or *valuable,* and must, to be valid, not partake of anything immoral, illegal, or fraudulent.

A *good* consideration is such as that of *blood* or of natural love and affection between near relations by blood.

A *valuable* consideration is such as money, marriage, goods, services, or whatever else may be esteemed in law an equivalent for the grant.

A consideration was not required in conveyances under the common law, by reason of the fealty and homage incident to such conveyances, which were deemed sufficient consideration therefor.

A consideration became necessary, however, to conveyances operating under the statute of uses, such as are hereafter enumerated; and it became settled that a consideration, expressed or proved, was necessary to conveyances so operating.

The consideration need not be expressed in the deed, but it had to exist. The general expression of a consideration was not sufficient, but a monetary or valuable consideration had to be expressed to raise the use, or be proved as existing. Since the Revised Statutes, a consideration is not essential, as between the parties.

2 Johns. 230; 2 Hill, 659; 3 Johns. 491; 5 Barb. 455; Cunningham v. Freeborn, 11 Wend. 248; Barnum v. Childs, 1 Sand. 58; 11 Barb. 14; Meriam v. Harzen, 2 Barb. Ch. 232; Ring v. Steele, 4 Keyes, 450.

The relation of husband and wife, and his duty to support her, is held

a good consideration, except as against creditors. Hunt v. Johnson, 44 N. Y. 27.

Seal.—A seal is presumptive evidence of consideration, which may be rebutted if the defence is pleaded. 3 R. S. p. 691; 4 Johns. 416; Hunt v. Johnson, 19 N. Y. 279.

Natural love and affection is held in this State a good consideration between those of the same blood, and the insertion of a small nominal pecuniary consideration in addition is not sufficient to indicate that the estate is passed as a *purchase*, and not a gift. Morris v. Ward, 36 N. Y. 587.

Natural love or affection will not render valid a covenant, promise, or executory agreement. Duvoll v. Wilson, 9 Barb. 487.

An agreement to support a party is a valuable consideration. Spalding v. Hollenback, 30 Barb. 292.

Prospective Marriage.—This is a *valuable* consideration, and a voluntary deed ceases to be so, if a marriage were induced by its provisions. Whelan v. Whelan, 3 Cow. 57; Verplanck v. Sterry, 12 Johns. 536.

An heir cannot set up want of consideration in the deed of his ancestor. Jackson v. King, 4 Cow. 207.

Non-payment of the nominal consideration in a sealed instrument does not render it void. Barnum v. Childs, 1 Sand. 58.

Execution of a Trust Power.—A nominal consideration of one dollar, executed in pursuance of a trust power, is sufficient to pass the legal estate. Meakings v. Cromwell, 1 Seld. 136.

See, *post*, as to considerations under deeds of "Bargain and Sale."

Expression of the Consideration.—As the expressed consideration may be always enquired into, the only effect of the clause acknowledging a consideration paid, is to estop the grantor from denying that there was any consideration. For every other purpose it may be explained, varied, or contradicted by parol. It is not necessary that it be shown to have been paid, if the deed recite that it was paid. Its extent or amount may be questioned, and another or different one be proved, and fraud or illegality may be shown.

Neither the grantee nor the grantor is estopped from proving that there were other considerations than the one expressed, or from showing how it was to be paid.

Wooden v. Shotwell, 3 Zabr. (N. J.) 465; Goodspeed v. Butler, 46 Maine, 141; Emmons v. Litchfield, 13 Maine, 233; Meakings v. Cromwell, 2 Sand. 512; 5 N. Y. 136; Spalding v. Hallenbeck, 30 Barb. 292; Stackpole v. Robbins, 47 Barb. 212; Seaman v. Hasbrouck, 35 Barb. 151; Delamater v. Bush, 63 Barb. 168; Winans v. Peebles, 31 Barb. 371; reversed, 32 N. Y. 423, on other grounds; Webster v. Van Steenbergh, 46 Barb. 211; Wheeler v. Billings, 38 N. Y. 263; Meriam v. Harsen, 2 Barb. Ch. 232; see, also, 5 Barb. 455; 14 Johns. 210; 20 *Id.* 338; 16 Wend. 460.

Voluntary Conveyances.—Deeds upon *good* considerations only are considered as merely *voluntary*, and in

certain cases are set aside in favor of creditors and *bona fide* purchasers. A voluntary conveyance is one without valuable consideration.

A *gift* or voluntary conveyance would be effectual, as between *the parties*, without consideration, and is only liable to be questioned when the rights of creditors and subsequent purchasers are concerned. By the Revised Statutes no conveyance or charge shall be considered fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.

3 Rev. Stat. p. 225.

This provision of Statute was in opposition to the Statute of Elizabeth (27 ch. 4.) under which a voluntary conveyance, even for a meritorious purpose, was deemed to have been made with fraudulent views, and was set aside in favor of a subsequent purchaser for a valuable consideration, even as sometimes held, though he had notice of the prior deed.

The question of Fraudulent Conveyances is reviewed in a subsequent chapter (*post* ch. 21), to which reference is made for the laws regulating the validity of Voluntary conveyances, made with the intent to defraud creditors or purchasers, or otherwise

Title IV. Description of the Land Conveyed.

In order to pass title to land, the word "*Land*," or something equivalent, should be used: The word "*Land*" includes, in legal signification, any ground or soil whatever, and all structures and things that are attached to or growing thereon. The word also includes "*water*," which, if the subject of conveyance as realty, must be described as land covered by water. Land has also legally an indefinite extent upward as well as downward.

The general principles to be observed in the matter of description are illustrated by the following cases:

Insufficient description.—If the description is not sufficiently specific, the deed will be void, or if it is so ambiguous that it cannot be determined which of several tracts is intended to be conveyed. Rollins v. Pickett, 2 Hill, 552; Jackson v. Ransom, 18 Johns. 107; Mason v. White, 11 Barb. 173; Dygert v. Pletts, 25 Wend. 402.

As to descriptions in tax deeds, *vide post*, ch. 46. Peck v. Mallams, 10 N. Y. 509.

A conveyance of "all my estate" is sufficiently certain. Jackson v. Delancy, 4 Cow. 427; The Chautauque Bank v. White, 2 Seld. 237.

A grant of a stream or pond, would not carry the land thereunder but only water privileges. Nostrand v. Durland, 21 Barb. 478.

If there are certain particulars stated sufficient to designate the thing to be conveyed, the addition of circumstances, false or mistaken, will not frustrate the deed; and they will be rejected as surplusage. The description however must agree with necessary particulars, and if they are all necessary and the description cannot be made certain by them no title passes. Raynor v. Jimerson, 46 Barb. 518; Hathaway v. Power, 6 Hill, 453; Jackson v. Clark, 7 Johns. 217; Finlay v. Cook, 54 Barb. 9; Jackson v. Marsh, 6 Cow. 281. See, also, as to certainty of description. Jackson v. Roosevelt, 13 Johns. 97; Same v. Delancey, *Id.* 537; Same v. Ransom, *Id.* 107; Dygert v. Plitts, 25 Wend. 402; Jackson v. Parkhurst, 3 *Id.* 369; Corbin v. Jackson, , 14 *Id.* 619; Jackson v. Livingston, 7 *Id.* 136.

The intention of the parties may, at times, be supplied. Reed v. Proprietors & Co. 8 How. 274; Mason v. White, 11 Barb. 173.

Acquiescence.—A mutual acquiescence for many years, in a dividing line, well defined and known, estops all parties, and declarations and acts may be proved to show acquiescence. 10 Wend. 104; 13 *Id.* 536; 7 Cow. 761; Pierson v. Mosher, 30 Barb. 81; Baldwin v. Brown, 16 N. Y. 359; Vosburgh v. Teator, 32 N. Y. 561; Jackson v. Van Corlear, 11 Johns. 123; Dibble v. Rogers, 13 Wend. 536; Jackson v. McConnell, 19 Wend. 175. This case requires 20 years acquiescence. Hunt v. Johnson, 19 N. Y. 279; Laverty v. Moore, 33 N. Y. 658; Hubbell v. McCulloch, 47 Barb. 287. Twenty years necessary. Corning v. The Troy &c. Factory, 44 Barb. 577. See also, 3 Johns. 269; 10 *Id.* 377; Adams v. Rockwell, 16 Wend. 285; 7 Cow. 761; Van Wyck v. Wright, 18 Wend. 157.

Actual location.—An actual location, on the strength of which improvements have been made, concludes parties and privies. So also an actual location where the description is vague. Corning v. The Troy Co. 44 N. Y. 577; Laverty v. Moore, 33 N. Y. 658; Jackson v. Wood, 13 Johns. 346.

An actual location may be maintained even contrary to the boundaries in the deeds, where there have been acts sufficient to make an estoppel, or adverse possession, or mutual acquiescence, or obscurity of description. Adams v. Rockwell, 16 Wend. 285; Clark v. Wethey, 19 Wend. 320; Hubbell v. McCullock, 47 Barb. 287; Van Wyck v. Wright, 18 Wend. 157.

Where a description in a deed does not apply to land intended to be conveyed, but does apply to other land, the description in the deed will prevail, and parol evidence of intention will not be admitted. McAfferty v. Connover, 7 Ohio (N. S.), 99.

Fraud and Mistake.—In case of misrepresentation or fraud as to the description, also in case of mutual mistake, equity will relieve. Wiswall v. Hill, 3 Paige, 13; Johnson v. Taber, 6 Seld. 319; Voorhees v. De Meyer, 2 Barb. 37.

A vendor is guilty of fraud, if, knowing that he has no title he wilfully suppresses the facts from the purchaser, and an action on the case will lie. Clark v. Baird, 5 Seld. 183.

A true and certain description in a grant of land is not invalided by the insertion of a falsity in the description, when, by rejecting the erroneous part, the conveyance can be supported according to the intention of the parties. Abbott v. Pike, 33 Maine, 204; Dodge v. Potter, 18 Barb. 193; Harvey v. Mitchell, 11 Foster, 575; Bell v. Sawyer, 32 N. Y. 72.

The mistake of a scrivener in preparing a writing may be shown by parol evidence, and the instrument reformed accordingly. Such reformation is an exercise of the equity powers of all our courts. This would be especially so when the correction is made to render valid and effectual

what would otherwise be void for informality. Mistakes may be so apparent on the face of an instrument that courts will construe it as it ought to have been drawn. The liberality of courts has been particularly exercised as to the statement of the consideration both in correcting what is wrong and inserting what has been omitted.

Parol Evidence.—Parol evidence may be given to explain and identify the description. A parol understanding, however, cannot control the express terms of the deed. Extrinsic evidence of a documentary character may also explain what is ambiguous. But as a general rule parol evidence will not be received to engraft on a deed any condition, limitation, or restriction inconsistent with its terms.

13 Johns. 346; Clark v. Baird, 5 Seld. 183; Rathbun v. Rathbun, 6 Barb. 98; Dygert v. Pletts, 25 Wend. 402; Hunt v. Johnson, 19 N. Y. 279; Clark v. Wethey, 19 Wend. 320; Mason v. White, 11 Barb. 173; Nightengale v. Walker, 3 Iowa, 96; see, also, 5 Wheat. 359; 4 Wend. 369.

Latent ambiguities may be explained. Seaman v. Hogeboom, 3 Barb. 215.

Parol agreements between adjoining owners may be upheld, by way of estoppel, when to settle boundaries, if they are indefinite or uncertain—otherwise they would be void by the statute of frauds. Clark v. Baird, 9 N. Y. 83; Vosburgh v. Teator, 32 N. Y. 561; Terry v. Chandler, 16 N. Y. 354; Clark v. Wethey, 19 Wend. 320.

Where the words of an ancient deed are equivocal, the usage of parties under the deed may be given to explain it. An ambiguity apparent on the face of the instrument cannot be explained extrinsically, but a latent ambiguity may. See, on this head, Fish v. Hubbard, 21 Wend. 654; French v. Carhart, 1 Com. 102; Sevick v. Scars, 1 Hill, 17; Livingston v. Ten Broeck, 16 Johns. 14; Parsons v. Miller, 15 Wend. 561. A grantee may take any uncertainty in his favor. Jackson v. Hudson, 3 Johns. 375; Same v. Gardner, 8 *Id.* 394.

Monuments and Boundaries.—Visible, known and fixed boundaries, monuments or *natural objects*, as a river, a spring, a marked tree, &c. referred to in a deed, control quantity, courses, and distances, where they conflict. The *least* certain and material parts of a description must yield to those that are most certain and material.

Raynor v. Timerson, 46 B. 518; Schoonmaker v. Davis, 44 Barb. 463; People v. Wendell, 8 Wend. 183; affirming 5 *Id.* 142; 7 Johns. 723; 1 Cow. 605; 5 *Id.* 371; *Id.* 346; 9 *Id.* 661; Van Wyck v. Johnson, 18 Wend. 157; Seaman v. Hogeboom, 3 Barb. 215; Clark v. Baird, 5 Seld. 9 N. Y. 183; Northrop v. Sumney, 27 Barb. 196; Jones v. Holstein, 47 Barb. 311.

In cases of ambiguity courts hold parties to the actual location. 1 John. 5.

Natural boundaries are more to be regarded than artificial ones, or those not permanent. 9 Johns. 100; Baldwin v. Brown, 16 N. Y. 359.

If the boundaries are definite and distinct, no extrinsic facts or parol

evidence can be resorted to. 17 Johns. 29; Drew v. Swift, 46 N. Y. 204; Van Wyck v. Wright, 18 Wend. 157.

An erroneous boundary, though continued for twenty years, may be altered. Smith v. McNamara, 4 Lans. 169.

As to agreement to settle boundaries, *vide* Wood v. Lafayette, 46 N. Y. 484.

A grant from one terminus to another means a direct line; but if the line is to run along a river or creek from one terminus to another, it must follow the river or creek, however sinuous it may be; and if that description will not reach the terminus, it must be pursued so far as it conducts towards the terminus, and then relinquished for a direct line to it. Lessee of Wyckoff v. Stephenson, 14 Ohio, 13; Shultz v. Young, 3 Ired. (N. C.) 385; Jackson v. Carey, 2 John. Ca. 350: Kingsland v. Chittenden, 6 Lans. 15.

If there be nothing to control the course and distance, the line is run by the needle.

So also the line of another tract referred to in the deed as matter of description, controls "courses and distances." Corn v. McCrary, 3 Jones (N. C.), 496.

As to verbal declarations as to boundaries. *Vide* Smith v. McNamara, 4 Lans. 169.

A known and well ascertained place of beginning cannot be varied by the incidental mention of it in a subsequent patent. 17 Wend. 146; 5 Wend. 142; affi'd, 8 *Id.* 183.

Where a lot and "building" is contracted for, the grantors must convey the building and lot *on which it is*, although it may not be within the boundaries as specified. White v. Williams, 48 N. Y. 344.

Quantity.—In the absence of fraud the selling land *in bulk, e. g.* as a farm, or representations by the vendor, as to the *quantity* of a tract, where the sale is for a gross sum; or the mere mention of a *quantity* of acres, after descriptions by boundaries, is but matter of *description*, and does not amount to a covenant of warranty of quantity, or bind the vendor to make compensation for any deficiency.

Roat v. Puff, 3 Barb. 353; 2 Johns. 37; 19 Wend. 175; 1 Cai. 493; 2 Johns. 37; Johnson v. Taber, 6 Seld. 10 N. Y. 319; Moore v. Jackson, 4 Wend. 59; reversing 6 Cow. 706; Northrop v. Sumney, 27 Barb. 96.

Nor do the words "*more or less*" extend the grantees boundary or description as given. A sale of land at a fixed price, stating the number of acres is a sale in bulk. Butterfield v. Cooper, 6 Cow. 481; Brady v. Hennion, 8 Bos. 528; Marvin v. Bennett, 26 Wend. 169; Faure v. Martin, 3 Seld. 210.

A conveyance of "lot 14," "it being 160 acres," would convey the whole, though it contained 185 acres. Hathaway v. Power, 6 Hill, 453.

A grantee may claim all the lands embraced by monuments, boundaries, &c. although the tract is stated to contain less than the actual number of acres. Root v. Puff, 3 Barb. 353; Jackson v. McConnell, 19 Wend. 175; The Morris Canal Co. v. Emmet, 9 Pai. 168.

A very great difference, however, between the actual and the estimated quantity of acres of land sold in the gross, would entitle a party to relief in chancery on the ground of gross mistake. Quesnel v. Woodlief, 2 Hen. & Munf. 173, *note;* Nelson v. Matthews, 2 *Ib.* 164; Harrison v. Talbot, 2

Dana (Ken.), 258; Voorhees v. De Meyer, 2 Barb. 37; Belknap v. Sealy, 14 N. Y. 143.

As to a mutual mistake of contents, where land was sold at a certain price *per acre*, *vide* George v. Tallman, 5 Lans. 392.

Equity will not relieve against a *mistake* in the conveyance of lands, in respect to the *quantity conveyed*, where a deed is executed and delivered by the vendor, and a mortgage given in return to secure the purchase money, unless the proof be clear, direct, and positive.

Also to entitle the purchaser to relief in equity, where land was conveyed and a mortgage taken back, the *quantity* must have constituted a *condition* of the sale, as agreed upon between the parties; it is not enough that it may have operated as an *inducement* to the purchase in respect to which the purchaser, in the absence of fraud, will be deemed to have assumed the risk. Nor will relief be granted, if the purchaser, with ordinary vigilance before the completion of the contract, by *viewing* the premises or properly settling the *terms* of the description, might have guarded against the alleged mistake.

It is also held that equity will only interfere where the sale had been made by the acre or foot, unless there had been fraud or willful misrepresentation. The Morris Canal Co. v. Emmet, 9 Pai. 169; Marvin v. Bennett, 26 Wend. 169.

Streams.—Land bounded, in general terms, by a small lake, pond or stream, above tide water, and not "navigable," as so generally understood, is not bounded by the bank, but *by the middle of the stream*, unless otherwise specified (subject to its use by the public as a highway), and the grantee has a right to use the land and water in any way not inconsistent with the public easement.

17 Wend. 571; 26 Wend. 404; 4 Hill, 369; The Seneca Nation v. Knight, 23 N. Y. 498; 24 Wend. 451; 6 Cow. 579; 15 John. 447; 12 *Id.* 252; 5 Cow. 216; Wetmore v. Law, 34 Barb. 515; Demeyer v. Legg, 18 Barb. 14; Case v. Haight, 3 Wend. 632; Kingsland v. Chittenden, 6 Lans. 15; Morgan v. King, 30 Barb. 9.

Boundaries by or up a creek would also take through the centre, or along the meanders thereof, running from a post on the bank. Seneca Nation v. Knight, 23 N. Y. 498; Jackson v. Loew, 12 Johns. 252; so held where bounded only on the margin of a creek. *Ex parte*, Jennings, 6 Cow. 518.

The above principle applies to small inland lakes, but does not apply to the great lakes; when such small lakes are filled in, the adjoining owner has title to the land made.

The owner on large lakes, unless it is otherwise expressed, owns to low water, or the flats. Champlain & Co. v. Valentine, 19 Barb. 484; Howard v. Ingersoll, 13 How. U. S. 318; Ledyard v. Teneyck, 36 Barb. 102; Banks v. Ogden, 2 Wal. 57; Kingman v. Sparrow, 12 Barb. 201; 30 Barb. 9 *sup.*

The rule does not apply to a national boundary where it is a river. 19 Barb. 484, *supra*, Kingman v. Sparrow, 12 Barb. 201; 30 Barb. 9, *supra.*

To the north bounds of a river would carry to the centre. Walton v. Tift, 14 Barb. 216.

The rule has been held to apply to the Mississippi river. Jones v. Soulard, 24 How. U. S. 41.

Descriptions "by the river," or "along the river" or "upon the margin," or "to the bank" of a river, or along the waters of an "outlet," also, "to the river, and thence *along the shore*," &c., restrict the grant to the margin. 6 Mass. 435; 17 *Id.* 298; 4 Hill, 369. So a boundary by the *bank* of a river excludes the river; Kingman v. Sparrow, 12 Barb. 201; Starr v. Child, 5 Den. 599; but would take to the margin at *low* water mark where the stream was not navigable. Walton v. Tift, 14 Barb. 216; Halsey v. McCormick, 13 N. Y. 296. So would a boundary by the *shore*. 4 Hill, 309; reversing 20 Wend. 149. The rule as to grants bounded on the shore or bank of the sea or navigable rivers is not applicable to streams not navigable. Halsey v. McCormick, 3 Kern. 296.

Alluvial Increment and Attrition.—As to these subjects, *vide* Child v. Starr, 4 Hill, 369; also, Livingston v. Jefferson, 1 Brock. R. 203. As a general rule the title of a riparian owner is changed by *alluvion* or *dereliction* only where the accretion of dry land is by *imperceptible degrees*. 18 N. Y. p. 147; and the accretion belongs to the contiguous strip. The Mayor, &c. v. the U. S. 10 Pet. 662; Saulet v. Shepherd, 4 Wall. 502; Banks v. Ogden, 2 Wall. 57. Alluvion, however, at the end of a wharf does not affect the right of the State. 31 Cal. 118.

Where the accretion is sudden and large on tide water, it belongs to the State. Emaus v. Turnbull, 2 Johns. 313; 2 Black. Com. 261; Harg. Law Tracts, 28.

Islands.—A description to and up a river would not include an island. Nor would the grant of a river pass the soil under it, but only the piscary. Jackson v. Halstead, 5 Cow. 216; Co. Litt. 4 b. Com. Dig. Grant (E. 5).

Patents from the United States.—Persons taking lands under patent from the United States, do not, in taking lands bordering on navigable streams, take beyond the border of the stream, although the stream be beyond tide water. St. Paul, &c. R. R. Co. v. Schurmeir, 7 Wall. 272.

Navigable Streams.—In the case of the People v. the Canal Appraisers, 33 N. Y. 461, it is held, as to the Mohawk river, that it is a "navigable stream," and the title to the bed is in the people, who are not liable in damages for any diversion of the stream. This case holds that the common law rule as to the ownership of the bed of fresh water streams, beyond *tide water*, whether navigable or not, are not applicable to this country.

This case, after an elaborate review of all the cases in the State, upholds the decision in the Court of Errors in the case of The Canal Appraisers v. The People, 17 Wend. 571; reversing, 13 Wend. 335, which is to the effect that the great navigable fresh water streams of this country are not subject to the principle of individual appropriation allowed by the common law of England.

See, also, McManus v. Carmichael, 2 Clarkes Ca. (Iowa); Bowman v. Watheu, 2 McL. 376; St. Paul v. Schurmeir, 7 Wall. 272.

Tide Waters and Arms of the Sea.—When the sea, bay, or a navigable river, or tide water is named as the boundary of land in a grant of the title of land, the line of ordinary high-water mark is intended and inferred where the common law prevails. Where the grant, however, is one of *jurisdiction*, the boundary would extend to low-water mark.

Martin v. Waddell, 16 Pet. 367; United States v. Pacheco, 2 Wall. 587; Palmer v. Hicks, 9 Johns. 133; Gough v. Bell, 1 Zabriskie, N. J. R.

156; The Railroad Co. v. Schurmier, 7 Wallace, 272; Lansing v. Smith, 4 Wend. 9; Wiswall v. Hall, 3 Pai. 313; People v. Tibbets, 19 N. Y. 523; Gould v. Hudson R. R. R. 6 N. Y. 522; People v. Canal Appraisers, 33 N. Y. 461; The Champlain R. R. Co. v. Valentine, 19 Barb. 484; *vide*, also, 18 How. U. S. 71; 15 *Ib.* 426.

Streets and Highways.—Land in a highway may pass not only by special description in a conveyance, but constructively. If a person, over whose land a highway is laid out, convey the land on either side of it, but describing the land by such special boundaries as not to include the road or any part of it, the property in the road would not pass to the grantee by the deed, nor would it pass as an incident or appurtenance.

If, however, lots are conveyed by descriptions bounding them "by" or "along" roads or streets in which the grantor has an interest or estate, the respective grantees will take the fee of the land in front of their respective lots to the centre of the streets. This applies equally to city lots as to rural property. The rule is otherwise when the land is so bounded by feet, etc., as to exclude the street, or is bounded by a specific side of the street. Or probably if a municipal corporation were to grant land bounded by a public street. So also if a strip of land were the only means of access to lots, and they were bounded on that, they would be considered as bounded to the centre (unless words were used showing an intention to restrict the grant); subject, in all cases, to the public easement.

Perrin v. The N. Y. C. R. R. Co. 36 N. Y. 120; affirming, 30 Barb. 65; Herring v. Fisher, 1 Sand. S. C. 344; Sherman v. McKeon, 38 N. Y. 266; Jackson v. Yates, 15 Johns. 447; Jones v. Cowman, 2 Sand. S. C. 234; Hammond v. McLachlan, 1 Sand. S. C. 323; 23 N. Y. 68; Adams v. Saratoga and Wash. R. R. 11 Barb. 414; The People v. Law, 34 Barb. 494; Wetmore v. Story, 22 Barb. 486; Anderson v. James, 4 Robn. 35; Wetmore v. Law, 34 Barb. 515; Dunham v. Williams, 36 Barb. 136; and 37 N. Y. 251.

The Presumption as to Ownership.—The legal presumption, both as to grantor and grantee, as respects a highway or road, is that one who owns both sides of a highway, is presumed entitled to the fee of the road, subject to the public easement. Matter of Johnst. 19 Wend. 659; Van Amringe v. Barnett, 8 Bos. 358; Mott v. Mayor, 2 Hilton, 358; Herring v. Fisher, 1 Sand. 344–350; Wetmore v. Story, 22 Barb. 487; Bissell v. N. Y. C. R. R. Co. 23 N. Y. 61; The People v. Law, 34 Barb. 494; Dunham v. Williams, 37 N. Y. 251; Williams v. N. Y. C. R. R. 16 N. Y. 97; Adams v. Saratoga R. R. 11 Barb. 414; Adams v. Rivers, 11 Barb. 216.

But land bounded by a *street*, it has been held, does not take to the centre, unless the street is a *highway*, and has been dedicated and accepted as such. 2 Wend. 472; 8 *Id.* 85; 11 *Id.* 486; 5 Duer, 70; 17 *Id.* 650; 18 *Id.* 411; 19 *Id.* 128; 1 Hill, 189; 1 Wend. 262; 20 *Id.* 96. This view, however, is overruled in the later case of Bissel v. N. Y. Central R. R. Co. 23 N. Y. 61, reviewing all the cases.

A boundary generally "by the street" gives to the centre, whether the land be in the city or country, subject only to the public easement. 23 N. Y. 61; 42 Barb. 465; 1 Sand. 123; 20 Barb. 52; Hammond v. McLachlin, 1 Sand. 123; Adams v. The Saratoga, &c. R. R. 11 Barb. 414; Terrett v. N. Y. &c. Co., 49 N. Y. 666; The People v. Law, 34 Barb. 494; Banks v. Ogden, 2 Wall. 57; and cases above cited.

Not so if bounded by the "line" by metes and bounds and feet. Jones v. Cowman, 2 Sand. 234.

Boundaries to a road, and "along a road," take to the centre. Sizer v. Devereaux, 16 Barb. 160.

So also, if there is reference to a map, and the map shows the premises adjacent to a street, the grantee would take to the centre.

A boundary along the "line" of a street would take to the middle. Sherman v. McKeon, 38 N. Y. 266. To the contrary was Wetmore v. Law, 34 Barb. 515, reviewing previous cases. See, also, Adams v. W. & S. R. R. 11 Barb. 414.

"Along," "upon," or "running to" a highway would not take to the centre. Walton v. Tift, 14 Barb. 216.

If an intention is shown not to convey to the centre that governs. Jones v. Cowman, 2 Sand. 234.

Boundary by the "side" or "along the side," does not take to the centre. Sizer v. Devereaux, 16 Barb. 160; Van Amring v. Barnett, 8 Bos. 357; Terett v. N. Y. Co. 49 N. Y. 666.

A deed bounded on a highway, *prima facie*, carries the title to the centre on the assumption that the grantor owned it. But if it appear to have been owned by another, the terms of the deed are satisfied by a title extending only to the road side. Dunham v. Williams, 37 N. Y. 251.

Parks.—Where the open space on a map referred to, on which the lots are bounded, and by which only they can be approached, is called a PARK, the lots are bounded by the *centre* of the park. (Perrin v. N. Y. Central R. R. Co. 36 N. Y. 121.)

Maps.—Where lots are sold by a map number bounded by a private street, the boundary extends to the centre of the street, although the street is not referred to in the conveyance. (Hammond v. McLaughlin, 1 Sand. 123; Bissel v. N. Y. Central R. R. Co. 23 N. Y. 61; Perrin v. N. Y. C. R. R. *supra.*) As a general rule, streets laid down on maps, by reference to which lots are conveyed, are considered dedicated as streets, so far at least as purchasers are concerned, and also where they are used as approaches to land for a continuous time

without restriction of the easement. The acquisition of rights by dedication is fully considered in a subsequent chapter.

Reference to a Map.—If a deed refer to other papers, as maps or plans, for the purpose of fixing a boundary, the effect is the same as if they were inserted in the deed, and controls the description. Kingsland v. Chittenden, 6 Lans. 15; Noonan v. Lee, 2 Black. 499; Glover v. Shields, 32 Barb. 374.

Appurtenances.—As a general rule, whatever is affixed to, or on, or essential to the beneficial use of the land passes with the land, although this rule has been modified at times to suit the customs of different localities or trades.

If a house or store be conveyed, everything usually passes which belongs to and is in use for it as an incident or appurtenance; also rights of way, easements, water privileges, and growing crops.

Everything essential to the beneficial use of the property designated is, unless specially excepted, to be considered as passing by the conveyance. Shuts v. Selden, 2 Wall. 177; Noyes v. Terry, 1 Lans. 219; Dubois v. Kelly, 10 Barb. 496; Huttemeier v. Albro, 18 N. Y. 48; Rood v. N. Y. & E. R. 18 Barb. 80; Jackson v. Hathaway, 15 J. R. 447.

See *ante*, as to fixtures, pp. 107, 208.

Manure.—Manure lying around the barn yard does not pass to the grantee. It is otherwise, if taken from the yard, and piled in heaps upon the land where it is to be used. Buckman v. Outwater, 4 Dutch. (N. J.) 481; Fay v. Mussy, 13 Gray, 53.

Under appurtenances would pass rights of way, common of piscary and pasture, the use of a mill dam and water, conduits of water from other lands of the grantor, raceways; a right to use adjoining roads, and a passage even over other land of the grantor to the highway. Also a right to overflow other lands of the grantor, if necessary, for the use of a water privilege. Co. Litt. 121, *b.*; Kent v. Waite, 10 Pick. 138; Story v. Odin, 12 Mass. 157; Blaine v. Chambers, 1 Serg. & Raw. 169; Strickler v. Todd, 10 *Ib.* 63; Oakley v. Stanley, 5 Wend. 523; Pomfret v. Ricroft, 1 Saund. 321; Child v. Chappel, 5 Seld. 246; Jordan v. Mayo, 41 Maine, 552; Cromwell v. Selden, 3 Com. 353; Olmstead v. Lewis, 5 Seld. 423; Badeau v. Mead, 14 Barb. 328; Oakley v. Stanley, 5 Wend. 523.

Appurtenances however signify something appertaining to another thing, as principal, and which passes as incident to the principal thing, and which is of a different though congruous nature. Land cannot be appurtenant to land. Nor can a right not connected with the enjoyment or use of a parcel of land be annexed as an appurtenance incident to it. Jackson v. Hathaway, 15 J. R. 447; Harris v. Elliott, 10 Peters. 25; Lawrence v. Delano, 3 Sand. 333; United States v. Harris, 1 Sum. 37; Linthicum v. Ray, 9 Wall. 241; Tabor v. Bradley, 18 N. Y. 109; Badeau v. Mead, 14 Barb. 328; Grant v. Chase, 17 Mass. 443.

Exceptions and Reservations.—A reservation is a clause

by which the grantor reserves some thing to himself issuing out of the thing granted and not a part of it. An exception is part of the thing generally granted, or out of the general words and description in the grant. A reservation operates at times as an implied covenant, or estoppel.

Case v. Haight, 3 Wend. 632; Craig v. Wells, 1 Ker. 315. See, also, 1 Barb. 399; 5 Den. 599; 4 Johns. 81; 2 Wend. 517; 11 Wend. 35; 21 *Ib.* 290; 3 Com. 253; 34 Barb. 566; 8 Barb. 28; 3 Wend. 635; 1 Ker. 315.

If the exception is as large as the substance of the grant, it would be repugnant to the deed and void. So it would be if the excepted part were specifically granted, as if a person grant two acres excepting one of them.

As to reservation of water rights, *vide* Cromwell v. Selden, 3 Com. 253.

A reservation is strictly construed against a grantor in a deed. Ives v. Van Aucken, 33 Barb. 566.

As to reservations of "quarter sales," *vide ante*, p. 137.

A valid restriction of the use of property conveyed, may be imposed by a condition upon covenant of the grantee. But a prohibition of the use or alienation of property granted, inconsistent with the title conveyed is void. Craig v. Wells, 1 Ker. 315. And see fully as to restraints upon alienation and estates on condition, *ante*, ch. v.

A reservation cannot be made in favor of a stranger to the deed, *e. g.* as a right to use water in a well for third persons. Ives v. Auken, 34 Barb. 566; Bridges v. Pierson, 1 Lans. 481.

As to a reservation of a right to dig clay and sand, &c., *vide* Ryckman v. Gillis, 6 Lans. 99; Ludlow v. The Hudson River R. R. 6 Lans. 128.

Title V. The Estate Conveyed.

The clauses usually known as the "*habendum* and *tenendum*" (i. e. "*to have and to hold*") were, and are still, in a measure, used to designate what *estate* or *interest* is granted. They may lessen, enlarge, explain, or qualify, but not totally *contradict* or be *repugnant* to the estate granted in the previous parts of the deed. They would be void if entirely repugnant to the estate theretofore granted, although they may limit its extent and duration, and qualify its nature.

As to the law on this head, *vide ante*, pp. 122 to 150; also Jackson v. Ireland, 3 Wend. 99.

Words of Inheritance.—Before the Revised Statutes, unless the land were conveyed or devised *in terms* to the grantee *and* "*his heirs*," &c., *i. e.*, unless there were words of *inheritance* connected with the transfer, the grantee

or devisee, by the common law, only took an estate *for life.*

See *ante*, pp. 118, 403, the cases cited; see, as to reforming a deed, where a fee was not conveyed as supposed, Wright v. Delafield, 23 Barb. 498; reversed on other grounds, 25 N. Y. 266.

Although the omission of the word "*heirs*" might not in *devises* prevent the estate vesting in fee, if the *intent* were manifest, the word was *indispensable* in a *deed* to pass the fee.

In conveyances to corporations sole, the word successors carried the fee. A corporation is supposed to be always in life. So also, deeds to a sovereign or a State, 7 Cow. 353; 10 Paige, 140; Nicoll v. N. Y. & E. R. R., 2 Ker. 21.

It was the rule also that if those words were omitted in the *prior* part of the deed, a *life* estate could not be enlarged into a fee by the use of those words in the *covenant of warranty*, on the principle that a warranty cannot enlarge the estate.

By the Revised Statutes, however (taking effect in 1830), it is provided that the term "*heirs*," or other words of *inheritance* shall not be requisite to create or convey an estate in fee, and every *grant or devise* of real estate, or any interest therein, thereafter to be executed, shall pass *all* the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily *implied* in the terms of such grant."

Vol. I, p. 748, 1st ed.

In examining title to land by conveyance, before the Revised Statutes, therefore, *it is very necessary to see that words of inheritance are used, if a fee is to be passed.*

Rule in Shelley's Case.—As regards the "Rule in Shelley's Case," and its abolition, *vide ante*, p. 222.

Implication of Estate Conveyed.—By the Revised Statutes, also, "no greater estate or interest shall be construed to pass by any grant or conveyance thereafter executed than the grantor himself possessed at the time of the *delivery of the deed*, or could *then* lawfully convey; except that every grant shall be conclusive as against the grantor and his heirs claiming from him by descent."

The "Tenendum" clause was formerly used particularly to signify the TENURE by which the estate was to be held, as "*per servitium militare*," "*in burgagio*," &c. It is now usually coupled with the *habendum*, as "to have and to hold."

Reddendum, &c.—Next in the old deeds follows the terms of stipulation, if any, upon which the grant was made, as upon the rendition of a service, produce, or sum certain, &c., to the grantor. Next also were inserted the *conditions*, if any, defeating or terminating the estate.

Growing Trees or Timber, &c.—These must be conveyed by writing, under seal. *Vide ante*, pp. 106, 468; Warren v. Leland, 12 Barb. 613; 57

Barb. 243; McIntyre v. Barnard, 1 Sand. Ch. 52. A parol license to cut timber may be given. Pierrepont v. Barnard, 6 N. Y. 279. Growing grass might be transferred by a chattel mortgage. Jencks v. Smith, 1 Com. 90. And see *ante*, p. 468, as to crops and growing timber, and what agreements and transfers of land have to be in writing.

The words "Lands" and "Real Estate."—These words, as used in ch. i, part ii, of the Revised Statutes, relative to the conveyance of land, &c., are to be construed as co-extensive with lands, tenements, and hereditaments.

1 R. S. p. 750, 1st ed. As to definition of "land" and "estate in land" generally, *vide ante*, p. 105; see also as to the estate granted, "Covenants," title vi, *infra*.

Title VI. The Covenants.

A conveyance in fee, by the common law, as modified and understood in this State, does not of itself imply a *covenant of title*, and in order that there may be recourse to the grantor or his privies, on failure of title, *express covenants of warranty* are used. Without them a simple deed, made in good faith and without fraudulent representation, does not make the grantor responsible for defects of title. A deed without covenants or warranty purports to convey no more than the grantor's estate at the time, and would not operate to pass or bind an interest not then in existence.

Sherman v. Johnson, 56 Barb. 59; Gouverneur v. Elmendorf, 5 John. Ch. 79; Tallman v. Green, 3 Sand. 437; Thorp v. Keokuk Co. 48 N. Y. 253; see also 5 Pai. 300; 25 Wend. 107; 2 John. Ch. 523. The rule has not been held to apply to purchases from trustees, Adams v. Humes, 9 Watts, 305.

The ancient warranty bound the grantor and his heirs to warrant the title, and to yield other lands to the value of those from which there might be eviction, by paramount title. This is now obsolete.

By the old English law, the heir of the warrantor was bound only on condition that he had, as assets, other lands of equal value by descent, which he was bound to apply in case of eviction of the warrantee.

Lineal and Collateral Warranties.—*Lineal* warranty was where the heir derived title to the land warranted, either from or through the ancestor who made the warranty; in which case, he was bound to give land of equal value, on eviction of the alienee, if he had real assets by descent.

Collateral Warranty was where the heir's title was not derived from the warranting ancestor, and yet it barred the heir from claiming the land by any *collateral* title, upon the presumption that he *might* thereafter have assets by descent from or through the ancestor.

Collateral warranties were abolished in 1788. *Vide* 1 Rev. Laws, p. 525.

See also, as to the abolition of warranties by tenants for life, and collateral warranties by ancestors, not actually seized. Colonial Act of 1773, 2 Van S. p. 767.

By the Revised Statutes, both *lineal and collateral warranties*, and all their incidents are abolished, and heirs and devisees of every person who shall have made any covenant or agreement are "made answerable to the extent of the lands descended or devised to them in the cases and in the manner prescribed by law."

Vol. III, p. 30.

By Revised Statutes, also, no greater estate or interest shall be *construed* to pass by any grant or conveyance thereafter executed than the grantor himself possessed at the *delivery* of the deed, or could *then* lawfully convey; except that every grant shall be conclusive as against the *grantor and his heirs claiming from him by descent.*

Vol. III, p. 30.

Every grant shall also be *conclusive* as against subsequent purchasers from such grantor, or from his heirs claiming as such, except a subsequent purchaser in *good faith* and for a *valuable* consideration, who shall acquire a superior title by a conveyance first duly recorded. *Ib.*

By the *covenants* in a deed the parties stipulate as to the validity of the title, or other facts, or bind themselves to the performance of certain conditions.

Words Necessary.—No particular words are necessary to make a covenant, but such as import an agreement between the parties. Bull v. Follett, 5 Cow. 170.

As to when words will be construed as a covenant and when as a condition, *vide* Aiken v. The Albany, &c. R. R., 26 Barb. 289; and *ante*, p. 126.

Divisibility of Covenants.—It may be remarked that covenants are divisible, and a discharge of part is not a release of the whole, although the rule is otherwise as to conditions subsequent affecting title to real property, where, if the condition is partially dispensed with, it is wholly extinguished. *Vide* Williams v. Dakin, 22 Wend. 201.

Covenants by Married Women.—As to these, *vide ante*, p. 83.

Implied Covenants.—As seen in the previous chapter, there is an implied covenant of title in every *executory contract* for the conveyance of land (unless the terms of

the instrument exclude it), and it is continued down to the execution of the *conveyance*, and is *then extinguished* by it. The settled common law rule is that an *express* covenant will restrain or destroy a general *implied* covenant (7 Johns. 258), but the Revised Statutes have further declared that no *covenant shall be implied* in any *conveyance* of real estate, whether such conveyance contain special covenants or not.

Vol. III, p. 29. Kinney v. Watts, 14 Wend. 40; Hone v. Fisher, 2 Barb. Ch. 509.

The word "*demise*" or grant, however, in a *lease for years*, implies a covenant for warranty and quiet enjoyment, and a power to let. See 4 Wend. 502; 8 Pai. 597; 15 N. Y. 327; 13 N. Y. 151; 7 Wend. 210; 11 Paige, 566; Frost v. Raymond, 2 Ca. 188; also Granniss v. Clark, 8 Cow. 36; and the above cases.

The case of The Mayor v. Malne holds that a demise implies a covenant for quiet enjoyment. 13 N. Y. 152, questioning 14 Wend. 38 (Kinney v. Watts). The subsequent case of Edgerton v. Paige, 20 N. Y. 81, seems to limit such implied covenants to leases not exceeding three years, although the point was not directly involved.

The case of Mack v. Patchen holds that, on a breach of this implied covenant in a lease, the damages are the value of the unexpired term, less the rent reserved. If there is a special covenant as to enjoyment, the other will not be implied. 42 N. Y. 167; Burr v. Stenton, 43 N. Y. 462. No covenants are implied in a lease in fee. Carter v. Burr, 39 Barb. 59. But they may be implied in agreements relative to land. Sandford v. Travers, 40 N. Y. 140.

Leases for three years and under are not within the above statutes. Moffat v. Strong, 9 Bos. 57.

A covenant of a good right to sell and convey does not imply a warranty of absolute title, but only of actual seizin and possession. Raymond v. Raymond, 10 Cush. 134.

Before the Revised Statutes, it was held that the word "gift," in a conveyance, *implied* a warranty for the life of the grantor. 7 Johns. 258; 2 Caines, 188; Bunnel v. Jackson, 5 Seld. 535.

In New Hampshire it has been held (*semble*) that any words showing the intent of the parties to do or not do a certain thing, will make an express covenant. Lovering v. Lovering, 13 N. H. 513.

Actions lie, however, for fraud or misrepresentation, even if there are no covenants. Haight v. Hayt, 19 N. Y. 464; Sherman v. Johnson, 56 Barb. 59. See, also, 5 Abb. N. S. 331.

Covenants Running with the Land.—Generally the covenants in a deed do *not run with the land*, but affect only the covenantor and the assets in the hands of his representatives after his death, by an action to recover a compensation in damages for the land lost upon eviction for failure of title. As a general rule, also, all covenants concerning *title* run with the land, with the exception of

those that are *broken before the land passes;* as, for example, the covenant of *seizin* being broken the instant it is made, if at all, becomes a *chose in action,* and therefore does not run with the land.

The right of action, on breach of such a covenant, descends to the personal representatives, and not the heirs. 5 Cow. 137. See, also, 21 Wend. 120; *et infra.*

As a general rule, also, no covenant runs with the land, unless it touch or relate to the land itself.

If the covenanter covenants for himself and *his heirs,* it is then a covenant *real,* and descends upon the *heirs,* who are bound to perform it if they have assets by descent, but not otherwise. If he covenant also for his *executors and administrators,* his personal assets are likewise pledged for the performance of the covenant. Covenants running with the land have relation to the *land* only, and the assignee is not bound as to things *collateral.* Dolph v. White, 2 Kernan, 301; Spencer's Case, 5 Co. 16.

A covenant to keep up a *partition fence,* or to make and repair fences, is a covenant running with the land, and when it imposes a liability other than that imposed by the statute as to division fences, it is an "*incumbrance*" under the covenant against incumbrances. *Vide* 19 Abb. 228; 1 Brad. 41.

Covenants not to build, &c. run with the land; also those against nuisances. 4 Paige, 510; 1 Paige, 412; 6 Johns. Ch. 215; 5 Cow. 143; 21 Wend. 120; 8 Pai. 351.

Covenants for Renewal.—Covenants by a lessor to repair also run with the land. 3 Denio, 285; 33 Barb. 401. See also on this head, *ante,* p. 186.

As to who can sue on these covenants, *vide* Kane v. Sanger, 14 Johns. 89. Compare Withy v. Mumford, 5 Cow. 137, holding that an assignee, with or without warranty, can maintain an action for breach happening after assignment. Gulock v. Closs, 5 Cow. 14; see also Beddoe v. Wadsworth, 21 Wend. 120.

All the covenantees must sue for a breach. Smith v. Kerr, 3 Com. 144.

If one covenantor die the action is against survivor. 6 Hill, 350.

No covenant relating to things not in *esse* will bind the assignee of a lease unless named. Tallman v. Coffin, 4 Com. 134.

A covenant by the owner of land not to allow a mill, &c., to be erected thereon, does not run with the land or bind an unnamed assignee. Harsha v. Reid, 45 N. Y. 415.

It had been held that such a covenant would bind assigns if named. Norman v. Wells, 17 Wend. 148.

A covenant to pay ground rent runs with the land. Hurst v. Rodney, 1 Wash. C. C. 375.

Covenant to pay rent charges. *Vide ante,* p. 143.

A covenant of the surety of the lessee passes to the grantee of the reversion. Allen v. Culver, 3 Den. 284.

Covenant to Pay Taxes.—A covenant to pay taxes and assessments is broken when a lessee neglects to pay them. A lessor may therefore recover the amount immediately against the lessee. The covenant runs with the land, and binds the assignee of the term; but not under tenants, nor their assignees. Trinity Church v. Higgins, 48 N. Y. 532; Post v. Kearney, 2 Com. 394; Martin v. O'Connor, 43 Barb. 514.

Such a covenant include taxes and assessments that may be imposed, though not legal at the time. Post v. Kearney, 2 Com. 394; Oswald v. Giffert, 11 John. 443; Corporation v. Cushman, 10 *Id.* 96; Bleecker v. Ballou, 3 Wend. 263; Astor v. Hoyt, 5 Wend. 603.

Covenants against Nuisances as to Buildings, &c.—These also run with the land, and may be enforced by injunction; also covenants relative to buildings, repairs, renewals of leases, to pay rent, to make no claim, &c.; 1 Pai. 412; 6 Johns. Ch. 215; 17 Wend. 148; 50 Barb. 135; 3 Abb. N. S. 311; 32 Barb. 48; 6 Johns. Ch. 215; 4 Paige, 510; Allen v. Culver, 3 Den. 284. See that case as to covenants running with the land generally; and also, *post*, p. 509.

A covenant against nuisances may be enforced even by those not parties to the deed. 8 Pai. 351; 23 Barb. 153.

The Usual Covenants.—The usual covenants in deeds of "full warranty" in this State are, as below specified:

1. *That the grantor is lawfully seized.*
2. *That he has good right to convey.*
3. *That the land is free from incumbrances.*

These covenants are *personal* covenants, not running with the land or passing to the assignee, because if broken the breach occurs on the execution of the deed, and they become *choses in action*, which are not technically assignable.

2 Johns. 1; 4 Johns. 72; 14 *Id.* 248; 10 Wend. 142; 2 Hill, 105; 21 Wend. 120; Webb v. Alexander, 7 Wend. 281; Beddoe v. Wadsworth, 21 *Id.* 120. See cases cited in note; Mitchell v. Warner, 5 Coms. 497; Bingham v. Weiderwax, 1 Com. 509.

If the purchase money has not been all paid, courts will offset damages arising from a breach of these covenants. Woodruff v. Bunce, 9 Paige, 443.

Covenant of Seizin.—The purchaser, on the breach of this covenant, recovers back the consideration money and interest, and nothing more (4 Johns. 11; see also 3 Caines. 111; 13 *Id.* 50; 1 Coms. 509; 3 Caines, 324), unless there has been *fraud*. Wilson v. Spencer, 11 Leigh's R. 261.

It is broken even if the grantor has no title to the *appurtenances*. Mott v. Palmer, 1 Coms. 564. The right of action is immediate, and a subsequently acquired title is no bar. 3 Hill, 134; 1 N. Y. 509; 14 Johns. 248; 17 Johns. 161. The covenant is broken if the grantor was not seized of the entire estate. Sedgwick v. Hollenback, 7 Johns. 376. The covenant that the grantor "*has good right to convey*" is synonymous with the covenant of seizin. Rickert v. Snyder, 9 Wend. 421.

See as to recovery of costs and interest. 3 Cai. 111; 4 John. 1; 13 *Id.* 50; 3 Cai. 324.

It is no defense that the grantee was dispossessed under a mortgage which he had assumed. 1 Com. 509, *supra*.

This covenant is not broken by a wrong estimate in the description. Mann v. Pearson, 2 John. 37; Stannard v. Eldridge, 16 John. 254.

Nor by the fact of part of the land being a highway. Whitbeck v. Cook, 15 Johns. 483.

The action may be maintained on this covenant even where there has been no eviction. Pollard v. Dwight, 4 Cranch. 421; Le Roy v. Beard, 8 How. 451; 17 Johns. 161.

A covenant of "a good right to sell and convey" does not imply a warranty of absolute title, but only of actual seizin and possession. Raymond v. Raymond, 10 Cush. 134.

Covenant against Incumbrances.—On breach of this covenant, the rule of damages is the amount paid to extinguish the incumbrances, provided the same does not exceed the *consideration* money and interest. 13 Johns. 105; Foote v. Burnet, 10 Ohio, 317. Where the deed *recites* an incumbrance, subsequent covenants are understood as subject to that exception. 9 Cow. 274.

The effect of the covenant against incumbrances is to release any claim which the covenanter may have on the land. Holcomb v. Holcomb, 2 Barb. 20.

If a party contract to give a good and sufficient deed, it implies a warranty against incumbrances. Burwell v. Jackson, 5 Seld. 535; overruling Giles v. Dugro, 1 Duer, 331, and *ante*.

A public highway over the land is an incumbrance. 4 Mass. 627; 2 *Id.* 97; Rutler v. Gale, 27 Vermont, 739.

The grantee may recover on breach of this covenant, where there is a judgment or other incumbrance, by paying the same. *Eviction* is not necessary. O'Hall v. Dean, 13 Johns. 105.

An assignee may recover when the covenant is with the grantee, "his heirs or assigns." Colby v. Osgood, 29 Barb. 339.

Party Wall.—A party wall is not an incumbrance. Hendricks v. Stark, 37 N. Y. 106.

Restriction against Buildings of a specified character.—Such restrictions are held incumbrances. So also against building beyond a certain line. Roberts v. Levy, 3 Abb. U. S. 318; Perkins v. Coddington, 5 Robin. 647.

Or against the use of a building for certain purposes, commonly called nuisances. Gibert v. Peteler, 38 N. Y. 165; Roberts v. Levy, 3 Abb. N. S. 311; *in re* Whitlock, 10 Abb. 316.

The existence of a lease assigned, with assent of parties, held not a breach of this covenant. Pease v. Christ, 31 N. Y. 141.

The other usual covenants are:

4. *Of quiet enjoyment.*

5. *That the grantor will warrant and defend the title against all lawful claims.*

These covenants are *prospective*, and actual *ouster* or disturbance of the possession, or *eviction* by lawful title, is necessary to constitute a breach of them, and such title must have existed at the time of conveyance to the covenantee. They are therefore in the nature of *real* covenants, and run with the land conveyed, as being annexed to the estate, and descend to heirs, and vest in assignees of the purchaser as being privies in estate.

5 Cow. 137; 4 Hill, 345; Kelly v. The Dutch Church, 2 Hill, 111; Fowler v. Poling, 6 Barb. 165.

The law also is that the *assignee* or *purchaser* of a covenant of warranty running with the land, who is evicted, may sue any one or more of the covenantors, whether immediate or remote; but he must show a damage to

himself from the breach alleged, by first making satisfaction upon his own covenant to the person evicted.

Miller v. Watson, 5 Cow. R. 137; Norman v. Wells, 17 Wend. 136; Hunt v. Amidon, 4 Hill, 345; Baxter v. Byers, 13 Barb. 267.

The damages on these two covenants belong to the *personal representatives*, and not to the *heirs*. Beddoe v. Wadsworth, 21 Wend. 120.

See, as to the measure of damages, 13 Barb. *supra*.

Covenant of Quiet Enjoyment.—This covenant goes to the possession only, and not to the title, and is broken only by actual *entry* and *ouster or expulsion* from or disturbance in the possession.

A party is not liable for mere defect of title under this covenant. Whitney v. Lewis, 21 Wend. 131.

A mere *recovery* in ejectment against the covenantee would not be sufficient. 3 Johns. 471; 5 *Id.* 120; 13 *Id.* 236; 15 *Id.* 483. Nor is an entry by a trespasser, or one having no lawful claim at the time of conveyance, a breach of this covenant. The eviction or disturbance must be by title *paramount*. 2 Hill, 105; 3 Duer, 464; 5 Hill, 52; 1 E. D. Smith, 169; 3 Kernan, 151; 21 Wend. 120; 7 Wend. 281; 21 Wend. 124.

Damages lie for loss both of possession and title. *Ib.*

The tortious entry by the covenantor, however, is held a breach. Sedgwick v. Hollenbeck, 7 Johns. 376.

The mere commencement of a suit is not a breach of this covenant; the possession must be disturbed. 3 Johns. 471; 13 *Id.* 236; 4 Hill, 345; 6 Barb. 165; 15 Johns. 483. *Semble*, if possession is surrendered on demand of the true owner, it would be eviction. *Ib.;* Greenvault v. Davis, 4 Hill, 643; also, under a decree and sale under foreclosure. Hunt v. Amidon, 4 Hill, 345; Cowdrey v. Cort, 44 N. Y. 382; Van Slyck v. Kimball, 8 Johns. 198.

The *damages* under this covenant are the consideration money paid, with six years' interest. 2 Hill, 106.

See Sedgwick on Dam. ch. vi, p. 166.

As to part of the land being a highway, *vide* Whitbeck v. Cook, 15 Johns. 483.

The remaindermen of a life tenant are not liable for a breach of this covenant, by reason of his decease before the termination of the lease. Coakley v. Chamberlain, 8 Abb. N. S. 37.

The Covenant of Warranty.—Under this covenant, the plaintiff to recover must show an *eviction*, or an actual dispossession under a lawful claim, by a paramount title: 7 Johns. 258; Fowler v. Poling, 6 Barb. 165; Miller v. Watson, 5 Cow. 195; Talliard v. Wallace, 2 Johns. 395.

A *trespass* is not an *eviction*. 3 Kernan, 151. Nor the mere commencement of a suit. 3 Johns. 471. If an entire failure of title is shown, *semble* the purchaser may recover back the price paid, without eviction. Lamans v. Garnier, 10 Rob. (La.) 425.

The eviction need not be by process of law, but may be by surrender to the true owner. Fowler v. Poling, 6 Barb. 165. But it must be by title *paramount*. 7 Wend. 281; 21 Wend. 120; and cases cited, *supra*.

The eviction may be for a mere right of possession. Rickert v. Snyder, 9 Wend. 416.

The covenant of warranty extends to the possession as well as to the title; and whenever there is a disturbance of either under title paramount the covenant is broken. Rea v. Milner, 5 Lans. 196; Bridges v. Pierson, 1 Lans. 481.

Action for breach will lie against the executors, &c. of the warrantor. Townsend v. Morris, 6 Cow. 123.

As to contradicting the consideration clause in the deed, under an action for breach, *vide* Greenvault v. Davis, 4 Hill, 643.

See, as to joinder of wife, and proceedings in the action, Griffin v. Reynolds, 17 How. 609.

Eviction.—As to eviction under a lease, *vide*, *ante*, p. 189.

Estoppel by Warranty.—By a covenant of warranty, a subsequently acquired title of the grantor will pass *by estoppel*, binding also heirs and assigns. 1 Johns. Ca. 81; 16 Johns. 110; 12 Johns. 201; 6 Barb. 98; 1 Pai. 473; 3 Barb. Ch. 528. But no title not *in esse* will pass by deed by way of estoppel, unless the deed contain a *warranty*. 14 Johns. 193; 4 Wend. 619; Doyle v. Peerless Pet. Co. 44 Barb. 239; Irvine v. Irvine, 9 Wall. 617; Van Rensselaer v. Kearney, 11 How. 297.

A married woman's covenant of warranty, however, did not *estop her*. 6 Wend. 11; 4 Sandf. 374; compare 20 Barb. 123. All covenants made by her, except as trustee or for lands held as her separate estate, were void (6 Wend. 11) until the law of 1862, ch. 172, enabling her to make covenants in a deed. Before that act, however, she would be estopped where her action would be otherwise a fraud. 20 Barb. 123.

Her covenants now (under the acts of 1860, 1862, *ante*, p. 83) bind her separate estate. Sigel v. Johns. 58 Barb. 620; Kolls v. De Leyer, 41 Barb. 211.

The Action on this Covenant.—An assignee of the grantee may recover of the original warrantor. Whitby v. Mumford, 5 Cow. 137.

The warrantor is concluded by a verdict in ejectment of which he had notice. Cooper v. Watson, 10 Wend. 202.

A verbal agreement cannot be set up in an action for breach of this covenant. Miles v. Avery, 2 Barb. Ch. 583.

Before one can recover, under a breach of warranty, he must offer to reconvey to the grantor. Meyer v. Shoemaker, 5 Barb. 319.

A covenant for further assurance is also generally inserted in warranty deeds. By it, the grantor binds himself and his heirs, and all persons deriving title through them, at the request of the grantee, his heirs and assigns, to execute such further and other conveyances and assurances as may at any time be necessary further to vest and confirm the title to the grantee, his heirs or assigns.

This covenant runs with the land. Spencer v. Noyes, 4 Vesey, 370; Colby v. Osgood, 29 Barb. 339; Campbell v. Lewis, 3 Barn. & Ald. 392.

A release of a mortgage is a further assurance. 29 Barb. 339.

This covenant is broken, after demand and refusal or neglect. Miller v. Parson, 9 Johns. 336.

Remedies of Heirs and Grantees of Lessor.—As to their remedy on covenants by lessees, *vide*, *ante*, pp. 180, 185, 186, 187.

Remedies of Lessees, Assignees, and their Representatives for the Breach of Covenants.—As to these, *vide*, *ante*, pp. 185, 186, 187.

Dependence and mutuality of Covenants.—The general rule is that where mutual covenants go to the whole consideration, on both sides, they are mutual conditions, the one precedent to the other, but where the covenants go only to a part of the consideration, then a remedy lies on the covenant to recover damages for a breach of it, and it is not a condition precedent. The dependence or independence of covenants is determined by the time in which their performance is required.

The subject of the mutuality of covenants is discussed in the following cases: McCullough v. Cox, 6 Barb. 386; Pepper v. Haight, 20 Barb. 431; Evans v. Harris. 19 Barb. 416; Grant v. Johnson, 1 Seld. 247; The Meriden, &c., Co. v. Zingsen, 48 N. Y. 247; Morris v. Sliter, 1 Den. 59; and see, *ante*, p. 126, as to covenants operating as conditions.

Implied Covenants by Grantee.—The acceptance by the grantee of a conveyance containing a covenant by him, his heirs and assigns is equivalent, without his signing the deed, to an express agreement on his part to perform the covenant; and the obligation affects the title of his grantees.

Atlantic Dock v. Leavitt, 50 Barb. 135; Spalding v. Hallenbeck, 30 Barb. 392; Plumb v. Tubbs, 41 N. Y. 442.

Where the conveyance, under which a party holds, refers to a deed of the same premises, which contains a restrictive clause, and which is on record, it will be presumed, that he has notice of the restrictive covenant. Gibert v. Peteler, 38 N. Y. 165.

A covenant not to put up an obstruction binds the land. *Ib.*

Breach before Assignment.—A covenant broken before assignment or transfer, does not bind the assignee; as a covenant to pay a mortgage if the mortgage becomes due before the sale.

Tillotson v. Boyd, 4 Sand. 516.

Covenant in a void Deed.—A covenant of title, etc., in a void deed is void.

Lewis v. Baird, 3 McLean, 56.

Transfer and descent of Covenants.—A release or quit claim deed passes covenants as well as a deed with covenants.

Beddoe v. Wadsworth, 21 Wend. 120; Hunt v. Amidon, 4 Hill, 345; Fowler v. Poling, 6 Barb. 165.

On a sale by foreclosure the purchaser acquires the covenants.

Andrews v. Walcott, 16 Barb. 21.

Discharge of Covenants.—Covenants under seal must be discharged by acts of as high a nature as those which create them. Therefore a covenant under seal cannot be discharged by a parol agreement before breach.

Kay v. Waghorn, 1 Taunt. 427; Wall v. Munn, 1 Seld. 239; Blake's Case, 6 Co. 43; Suydam v. Jones, 10 Wend. 180.

Recitals.—As a general rule, all parties to a deed are bound by the *recitals* therein; and they operate as an *estoppel*, working on the interests in the land, and binding all parties and their *privies*, in blood, in estate, and in law, and them only. They do not bind strangers or parties claiming by title paramount.

Deery v. Cray, 5 Wall. 795; 9 Wend. 209; 4 Denio, 480; 1 Barb. 610, 10 Barb. 454; 18 Barb. 14; 3 Duer, 73; 9 Johns. 92: Reed v. McCourt, 41 N. Y. 435; Demeyer v. Legg, 18 Barb. 14; Hardenburgh v. Lakin, 47 N. Y. 109; Tefft v. Munson, 63 Barb. 31.

A recital, however, cannot control the plain words of the body of the deed. 5 Johns. Ch. 23. Nor if it be general, and not of a particular fact. *Ib.*

A *recital* also works no *estoppel* in a deed poll, nor when the allegations in the deed are immaterial to the contract therein contained, nor when an action is not founded on the deed, but it is wholly collateral to it. 5 Johns. Ch. 23; Champlain, &c. v. Valentine, 19 Barb. 484. Nor is it evidence against strangers, nor against one claiming under the party executing the reciting deed by prior title or adversely to him. 10 Barb. 454; see, also, 9 Paige, 659; 17 Barb. 109; Carver v. Astor, 4 Pet. 1; Crane v. Morris, 6 Pet. 598.

A recital not true in fact or founded in mistake will not be a bar. Stoughton v. Lynch, 2 Johns. Ch. 209.

To operate as an estoppel, a recital must be a direct and precise allegation. Dempsey v. Tylee, 3 Duer, 73.

As notice.—A recital of facts forming a link in the title is constructive notice of any defect, incumbrance, etc., but they must be unambiguous. Acer v. Wescott, 46 N. Y. 384; Gilbert v. Peteler, 38 N. Y. 165.

Vide Titles, "Lease and Release," *post*, and Sheriff's Deeds," as to recitals therein, *post*, ch. 38.

A person entering into possession under a party bound by a recital is a privy in law of such party, and bound by the recitals. Jackson v. Parkhurst, 9 Wend. 209.

TITLE VII. THE DATE, SEALING, SIGNING, AND ATTESTATION.

The Date.—The *date* of a deed is immaterial to its validity, the date of its *delivery* controlling and giving it

effect. (19 How. U. S. 73; 4 Johns. 230.) The date, however, is *presumptively* the true time of the execution and delivery of a deed.

5 Wend. 532; 25 N. Y. 260; and see *post* Title viii, "Delivery."

A deed executed by several grantors is considered as dated when the last grantor executed it. 4 Cranch, 180.

A deed executed in pursuance of a previous contract is good by relation from the time of making the contract, so as to render valid every intermediate sale or disposition by the grantee (Jackson v. Bull, 1 Johns. Ca. 81), but not so as to do wrong to strangers. 4 Johns. 230; 5 Wall. 81.

But it will take effect from that date as regards purchasers with notice. Demarest v. Ray, 19 How. P. 574.

Signing and Sealing.—The grantor must seal and sign the deed. A written instrument not under seal is, in general, held inoperative and ineffectual to pass the legal title to land.

The seal has always, by the common law as well as by statute, been necessary for the conveyance of a freehold. The *signature* does not appear to have been essential until the Statute of Frauds (29 Car. II.), re-enacted in this country Feb. 26, 1787. *Vide* 1 Rev. Laws, p. 78.

A deed, however, cannot bind a party *sealing or signing* it, without words expressive of an intention to be bound. There must be words of grant or release. Catlin v. Ware, 9 Mass. 278; Lufkin v. Curtis, 13 *Ib.* 223.

Hill 489

The Revised Statutes require that every grant in fee, or of a freehold estate, must be *subscribed* and *sealed* by the person from whom the estate or interest is intended to pass, or his lawful agent, and either *duly acknowledged previous to its delivery*, or its execution and delivery be *attested* by at least *one witness;* or if not so attested, it shall not take effect as against a purchaser or incumbrancer until *so acknowledged.*

3 Rev. Stat. p. 29; see, also, Morse v. Salisbury, 48 N. Y. 636; Jackson v. Wood, 12 Johns. 73; Commissioners, &c. v. Chase, 6 Barb. 37; Mann v. Pentz, 2 S. Ch. 630.

But it is good as against the grantor and between the parties, whether acknowledged and attested or not. Voorhees v. Presbyterian Ch. 17 Barb. 103; Wood v. Chapin, 3 Ker. 509; Genter v. Morrison, 31 Barb. 155.

The statute refers to subsequent incumbrancers. 3 Kern. *supra.*

The place of signing in the instrument is immaterial, and even a printed instead of a written name has been said to be sufficient. *Vide* 2 Bos. & Pull. 239.

The Seal.—The common law required for a *seal* an impression upon *wax* or *wafer* or other *tenacious* substance, and such is the law in this State.

Bank of Rochester v. Gray, 2 Hill, 227.

A scrawl is not a seal. Warren v. Lynch, 5 Johns. R. 239; 4 Cow. 508; 17 Barb. 309; Farmers' & Manufacturers' Bank v. Haight, 3 Hill, 493; 17 N. Y. 521. One seal will answer for two or more persons, if intended for the seal of all. Van Alstyne v. Shuyck, 10 Barb. 383; Mackay v. Bloodgood, 9 Johns. R. 285; 4 Hill, 351.

In the case of courts and public officers, and also of corporations (Laws of 1848, ch. 197), an impression on paper, without the use of wafer or wax, is valid. Rev. Stat. vol. 3, p. 687; 3 Hill, 493; 15 N. Y. 225; 2 Hill, 228.

Paper sufficiently *tenacious* would satisfy the rule of law. Ross v. Bedell, 5 Duer, 462.

A stranger tearing off the seals will not vitiate the deed. 6 Cow. 746.

See Warren v. Lynch, 5 Johns. Rep. 239, and Jackson v. Wood, 12 Johns. 73, as to the origin, nature, and use of *seals*.

Seals of Corporations.—See *post*, ch. xxiv, "Corporations."

Seals of Courts.—A stamp on paper is sufficient. Laws of 1815, p. 38; Laws of 1848, ch. 197; 2 R. S. p. 276.

Seal Omitted by Mistake.—If the deed is passed, and the seal is casually omitted, the land is considered equitably in the grantee, and the deed is good against a subsequent purchaser with notice. Wadsworth v. Wendell, 5 Johns. Ch. 224.

Legislative Act.—A seal is unnecessary to a grant by legislative act. Wetmore v. Story, 22 Barb. 414, 485.

Evidence of Consideration.—A seal is presumptive evidence of consideration. 11 Wend. 106; 13 *Ib.* 529; 22 Barb. 99; 10 Barb. 106; 4 Johns. 416; 5 Duer, 294; 21 Wend. 637; 15 *Ib.* 359, 519; 14 *Ib.* 199; 2 R. S. pp. 406, 155, c. 61; 10 Barb. 312; 6 Barb. 25; 5 How. P. 66; 25 Wend. 113; Hunt v. Johnson, 19 N. Y. 279.

Estates less than freehold may be conveyed without a seal—*e. g.*, growing trees. Warren v. Leland, 2 Barb. 613.

Attestation.—The Revised Statutes provide that if not duly *acknowledged* previous to its delivery, every grant in fee, or of a *freehold* estate, shall be attested by at least *one witness;* or, if not so attested, it shall not take effect as against a purchaser or incumbrancer until so acknowledged.

3 Rev. Stat. p. 29. See cases, *supra*. p. 514.

In the case of Roggen v. Avery, 63 Barb. 65, it is held that an instrument under hand and seal, but without subscribing witness or acknowledgment, is insufficient to convey real estate, as against a purchaser holding through a devise by the former grantor. To the same effect, Goodyear v. Vosburgh, 57 Barb. 243.

The witness should subscribe at the time or be called in and requested to witness the deed by the parties immediately on execution. 9 Cow. 113; Henry v. Bishop, 2 Wend. 575; Hollenbach v. Fleming, 6 Hill, 305; Voorhees v. Presbyterian Ch. 17 Barb. 103. See the above cases as to the proof of execution by the witness, on a trial.

TITLE VIII. THE DELIVERY AND ACCEPTANCE.

It is also requisite that the deed be *delivered* to give it vitality. The deed takes effect so as to vest the estate or interest conveyed only from its *delivery*. The

date is no part of the substance of a deed; the real date is the time of delivery. The delivery need not be by formal words or acts. Those showing an intention are sufficient. But there must be an intention to deliver.

.4 Johns. 230; 2 *Id.* 230; 12 Wend. 105; 4 Pet. 1; 1 Johns. Ca. 250; Fisher v. Hall, 41 N. Y. 416; Roosevelt v. Carow, 6 Barb. 190; Bracket v. Barney, 28 N. Y. 333; U. States v. Le Barron, 19 How. U. S. 73.

The deed is generally presumed to have been delivered at the time of its date. Harris v. Norton, 16 Barb. 264; *vide ante* Title vii, p. 514; and People v. Snyder, 41 N. Y. 397.

And, as a general rule, the delivery is complete where the grantor has put it beyond his power to reclaim the deed. Brown v. Austen, 35 Barb. 341.

The presumption that it was executed at the time of the date, does not hold in respect to deeds in fee, unattested and unacknowledged. Elsey v. Metcalf, 1 Den. 323; 16 Barb. 264, *supra;* Genter v. Morrison, 31 Barb. 155. Nor where the contrary is proved. Costigan v. Gould, 5 Den. 290.

The presumption that a deed was delivered at its date is not affected by the statute (1 R. S. 738, § 137) as to attestation, &c. Robinson v. Wheeler, 25 N. Y. 252.

Where a revenue stamp is cancelled of a certain date, that will control the presumption of the delivery as of the date. Van Rensselaer v. Vickery, 3 Lans. 57. Or where it was shown to have been, subsequent to its date, in the hands of grantor. Elsey v. Metcalf, 1 Den. 323.

Delivery to an agent is delivery to the party; and even the grantor may act as agent to the grantee. 25 Wend. 43; Worrall v. Munn. 1 Seld. 229.

And, if unconditional, it will take effect immediately. Brown v. Austen, 35 Barb. 341; Ernst v. Reed, 49 *Ib.* 367.

If the delivery is void, all subsequent titles under the deed are void. Ford v. James, 4 Keyes, 300.

Parol evidence of conditions qualifying the delivery, if contrary to the terms of the instrument, are inadmissible. Worrall v. Munn, 5 N. Y. (1 Seld.), 229.

Possession is presumptive evidence of signing, sealing and delivery. Chandler v. Temple, 4 Cush. 285; Rhine v. Robinson, 27 Penn. State R. 30; 14 Peters, 327. But may be rebutted. Roberts v. Jackson, 1 Wend. 478.

A delivery to a stranger as agent to deliver passes the title. 49 Barb. 367; 15 Wend. 656. If the grantee assent. Also, a registration of it by the grantor, if accepted by the grantee. Young v. Guilbeau, 3 Wallace, 636; Parmelee v. Simpson, *Ib.* 81.

A delivery to an attorney-at-law, who holds it for the consideration of his client, is not a delivery if the latter decline to accept. Carnes v. Platt, 7 Abb. N. S. 42.

A delivery on *Sunday* is held good. Shuman v. Shuman, 27 Penn. St. 90.

Unless disclaimed, a delivery to a third person is a good delivery, if done for the grantee's use. Church v. Gillman, 15 Wend. 656. And the acceptance of the grantee will be presumed. Sayres v. Townsend, 15 Wend. 647.

Where a deed delivered *in escrow*, is to be delivered on the death of a grantor, the title by relation passes at the time the deed was left for delivery. 34 N. Y. 92. Leaving for record is presumptive evidence of delivery (5 McLean, 457; 1 Den. 323), if left for grantee's use; but may be repelled. 3 Wallace, 636; Van Valen v. Schemerhorn, 22 How. Pr. 416; Rathbun v. Rathbun, 6 Barb. 98; Wilsey v. Dennis, 44 Barb. 354. Even

if the grantor recorded it himself. *Ib.;* Ford v. James, 4 Keyes, 300; Parmelee v. Simpson, 5 Wall. 81.

The return of a deed to the grantor and the destruction thereof, after it has been executed and delivered, will not re-invest the grantor with the title. Parshall v. Shirts, 54 Barb. 99; and *post*, p. 518, 519.

Redelivery.—A redelivery, after an alteration by grantor, is, in legal effect, also a re-execution. 1 Wall. 285; 22 How. P. 416.

A deed may be delivered or tendered to one of several grantees. Carman v. Pultz, 21 N. Y. 547.

Ratification.—A ratification may be made of a grantor's unauthorized delivery; but not so as to cut off an intervening incumbrancer for value. Parmelee v. Simpson, 5 Wall. 81; The Lady, &c. v. McNamara, 3 Barb. Ch. 375; Church v. Gilman, 15 Wend. 656; Sowerby v. Arden, 1 Johns. Ch. 240; Carnes v. Platt, 7 Abb. N. S. 42.

Decease of Grantor.—A delivery after the death of the grantor is no delivery. 12 Wend. 105; 20 Wend. 44; 4 Pai. 9. But see conditional delivery, *post.*

Deeds will be presumed to have been delivered on the day of acknowledgment. Loomis v. Pingree, 43 Maine, 299.

The Revised Statutes provide that all rules of law in force when they were enacted, in respect to the delivery of deeds, should apply to grants thereafter to be executed. Vol. i, § 137, p. 689, 1st ed. Also, that the delivery of a grant, where an expectant estate is created, by grant, is to be deemed the time of the creation of the estate. *Ib.* p. 726.

If a deed be duly delivered, in the first instance, it will operate, though the grantee suffer it to remain in the custody of the grantor. Fisher v. Hall, 41 N. Y. 417; 19 Barb. 243; 16 Barb. 264; 15 Wend. 545; 17 Wend. 686; 1 Johns. C. 240.

See, also, as to when delivery and acceptance are to be implied from the fact of execution, &c. Doe v. Knight, 5 Barn. & Cress. 671; Scrugham v. Wood, 15 Wend. 545.

Conditional Delivery.—The delivery may be either *absolute*, to the grantee himself, or to any other by his assent or direction; or to a third person for or on account of the grantee, to hold until some conditions be performed on his part, in which last case it is said to be delivered in "*escrow.*" The delivery, also, may be contingent and provisional.

Where a deed absolute on its face is delivered to the *grantee*, its effect cannot be changed by parol. 6 Paige, 310; 11 Barb. 349. Until the condition is performed and the deed delivered, the estate does not pass, but remains in the grantor. 1 Barb. 500; 1 Cranch. 193; 20 Barb. 332; 6 Wend. 666; 1 Johns. Ch. 288; 18 Johns. 544; also, Hunter v. Hunter, 17 Barb. 25, 82. The delivery in *escrow* must be to a *stranger*, and not to one of the parties or his agent. 11 Barb. 349; 1 Seld. 229; 33 Barb. 9; 6 Paige, 310; 5 N. Y. 229; 26 *Ib.* 483.

A deed may be delivered in *escrow*, and such delivery may be made effective on the performance of the condition, even if the grantor has died. Hunter v. Hunter, 17 Barb. 25, 82.

A delivery in escrow to be delivered to grantee on grantor's death has been held to take effect from such death. Nottbeck v. Wilks, 4 Abb. 315. In the case of Hathaway v. Payne, however (34 N. Y. 92), the title in such case is held to pass at the time the deed was left for delivery; and a dis-

tinction is drawn between deeds left in escrow, or on *condition*, or those the delivery of which depends on a contingency or a mere lapse of time. To the same effect was Tooley v. Dibble, 2 Hill, 641. See also, Goodell v. Pierce, 2 Hill, 659; Hunter v. Hunter, 17 Barb. 25, 82.

The *presumption* is that a deed was not delivered in escrow. Chouteau v. Suydam, 21 N. Y. 179.

A deed in escrow does not take effect until performance of the stipulated condition, although the instrument has gone into the grantee's possession. Smith v. Smith Royalty B'k, 32 Verm. 341; Hinman v. Booth, 2 Wend. 267.

Generally, a deed given in escrow would take effect and the title pass from its actual or second delivery, after performance of the condition, but the delivery would take effect by relation back to the first delivery, in cases of necessity, to prevent injury to the operation of the deed from what might have occurred intermediately, as in case of the marriage of a woman who was sole when the deed was first delivered; or where either of the parties die before condition performed. The delivery to a third person to be delivered to the grantee by him would take effect also from the time of delivery to such third person. Jackson v. Catlin, 2 John. 248; affi'd, 8 Johns. 120; Ruggles v. Lawson, 13 Johns. 285.

An intermediate judgment, however, would attach against the grantor in most cases. Jackson v. Rowland, 6 Wend. 666; Jackson v. Catlin, *supra*.

Acceptance and Ratification.—To make the delivery complete there must be an *acceptance* express or implied; and not merely a physical taking, but an intention to accept.

12 Johns. 418; 11 Wend. 240; 24 Wend. 280; Stephens v. Buffalo & N. Y. R. R. Co. 20 Barb. 332; 28 N. Y. 333; 46 Barb. 109; 47 *Id.* 505.

A subsequent acceptance, even on the same day, cannot divest the right of an intermediate lien, deed, or levy. 47 Barb. 505; 24 Wend. 280. Where a deed has been duly executed, delivered, and accepted, a subsequent surrender or destruction of it will not divest the estate conveyed by it. 1 Johns. Ch. 417; 6 Hill, 469; 46 Barb. 109; 3 Barb. 404; 6 *Id.* 373; Parshall v. Shirts, 54 Barb. 99; and see *post*, *Alteration*.

An acceptance in some cases may be implied, even where the grantor retains possession of the deed. McLean v. Britton, 19 Barb. 450; see also, *supra*, "Delivery."

As a general rule, a ratification of a grantor's unauthorized delivery can be made by the grantee, but not when the effect would be to cut out an intervening mortgage for value. Parmlee v. Simpson, 5 Wall. 81; and *supra*, p. 517; Foster v. Beardsley Scythe Co. 47 Barb. 505.

As a general rule, there is a presumption in favor of an acceptance when a delivery has been proved. Cruise's Digest, title 32, ch. 1; Cunningham v. Freeborn, 11 Wend. 240; Jackson v. Bodle, 20 John. 184; Jackson v. Phipps, 12 John. 418.

TITLE IX. AVOIDANCE, ALTERATION, AND CANCELLATION.

A deed may be invalid for defect in the requisites above set forth, or it may be avoided by matter *ex post facto*, as—

1. *By rasure, interlining,* or *other altertion* in any *material* part, unless a memorandum be made thereof at the time of the execution and attestation.

2. *By Breaking off and Defacing the Seal.*—A deed is not avoided by the seal being torn off by the *grantor,* or by his direction (1 Gall. 69), or by a stranger.

Rees v. Overbaugh, 6 Cow. 746; Enevery v. Merwin, 6 Cow. 360. Nor when done after delivery, Frost v. Peacock, 4 Edw. 678.

3. *By Cancellation.*—As a general rule, executed and recorded deeds under seal can be surrendered and cancelled only by other deeds under seal (*vide* 1 Black. 450; 4 McLean, 12), and the destruction or surrender of the instrument will not destroy title.

2 Johns. 84; 3 Barb. 404; 6 *Id.* 373; 6 Hill, 469; 1 Johns. Ch. 417; 46 Barb. 109; 54 *Id.* 99; and *ante,* p. 517, and *infra.*

Alteration.—As a general rule, the material alteration of a deed made by a party claiming under it, or by any person under whom he claims, renders it void. Any alteration, however, by a stranger, without the privity of the party interested, does not render the deed void when its original contents can be ascertained; and the party seeking to recover must show that the alteration was not made by him, or by those under whom he claims; or that it was made before execution, unless the alteration is against the interest of the party producing the deed, when he is not bound to account for the alteration. Jackson v. Jacoby, 9 Cow. 125; Acker v. Ledyard, 8 Barb. 514; and reversed on other grounds, 4 Seld. 62; Garret v. Maybee, 2 E. D. Smith, 1; affi'd, 16 N. Y. 560.

In order to avoid a deed on the ground of alteration, it must be proved that the alteration was made by the party in interest (3 Edw. 14), or by some one under whom he claims. 36 Miss. 355. An *immaterial* alteration after title passed does not destroy the title or the deed. 1 Wend. 625, 659: 22 Wend. 388; 1 Denio, 239; 39 Barb. 319; see also 5 Lans. 365.

An alteration by a third person does not vitiate. 6 Cow. 746; 2 Barb. Ch. 133; 6 Cow. 360.

A deed may be altered after execution in material parts with consent of parties. 4 Johns. 54; Penny v. Corwithe, 18 Johns. 499.

Semble.—An interlineation without anything to excite suspicion that it was not made before execution, will be presumed to have been so made. Herrick v. Malin, 22 Wend. 388; Waring v. Smith, 2 Barb. Ch. 133; see these cases as to the proof relative to alterations.

The fraudulent destruction of a deed may operate to discharge the estate held under it, unless the estate may exist without the deed. Herrick v. Malin, 22 Wend. 338; Smith v. McGowan, 3 Barb. 404.

So also an alteration in a material part. Waring v. Smith, 2 Barb. Ch. 119; Garnet v. Maybee, *supra.*

The alteration of one of two duplicates does not vitiate the other. 4 Wend. 423.

An authority to fill in blanks or alter a deed ceases after it has been delivered. 6 Cow. 59.

The mere surrender, destruction or cancelling of a deed by the grantee

after delivery will not reinvest the grantor with the title, nor when done by agreement of parties. Schutt v. Large, 6 Barb. 373; Parker v. Kane, 4 Wis. 1; Jones v. Neale, 2 P. & H. (Va.) 339; Jackson v. Chase, 1 Johns. 84; Raynor v. Wilson, 6 Hill, 469; Nicholson v. Halsey, 1 Johns. Ch. 417; Lewis v. Payn, 8 Cow. 71; Smith v. McGowan, 3 Barb. 404; also, 46 Barb. 100; 3 Barb. 404; 6 *Id.* 373; 54 Barb. 99.

The above cases hold that although the title passed by the deed will not be changed by surrender or cancellation, the deed itself and the covenants therein will be avoided.

Title X. Deeds given under Adverse Possession, Champerty, &c.

By our statutes, every grant of lands by parties *out of possession* at the time of delivery, and with an *adverse* possession against them are absolutely void.

Webb v. Bindon, 21 Wend. 98; 1 R. S. p. 740, 1st ed. § 147; Poor v. Horton, 15 Barb. 485; Vrooman v. Shepherd, 14 *Id.* 441.

Actual possession by the occupation of grantor is not necessary to give effect to his deed; for if the possession held by another be of a fiduciary character, or if its origin and continuance were such as not to amount to a disseizin, it will not impede the operation of the deed.

Although deeds by parties out of possession are void as against the person holding possession, and his privies, they are good as to the rest of the world, and as between grantor and grantee. Hamilton v. Wright, 37 N. Y. 502; 15 Wend. 164; 3 Barb. 589; 15 *Id.* 485; 17 *Id.* 665; 2 Hill, 526, as the conveyance works an estoppel. 10 Johns. 164.

As to *mortgages* when mortgagor out of possession, *vide* head "Title by Mortgage." A deed from the true owner while a trespasser is in possession is good. 3 Duer, 35.

The prior possession, in order to avoid the conveyance, must be under claim of the entire *specific title*, which must cover the possession, and the title must be adverse to that of the grantor, in the deed sought to be avoided. 4 Duer, 454; Hallas v. Bell, 53 Barb. 247; Fish v. Fish, 39 Barb. 513; Stevens v. Hauser, 39 N. Y. 302; Crary v. Goodman, 22 N. Y. 170; Howard v. Howard, 17 Barb. 663; Corning v. Troy Factory, 39 Barb. 611.

As to what title the possessor should have in order to avoid the deed, *vide* 12 Johns. 452; *Ib.* 488; 14 Wend. 227; 12 *Id.* 602, 674; 7 Hill, 476; 9 Cow. 530; 1 *Ib.* 286; 9 Wend. 512; 5 *Ib.* 346; 5 Wend. 532; 2 *Ib.* 357; 5 Cow. 74; 5 Rob. 71.

The above rule as to a "specific title" would not apply to adverse possession under the statute of limitations. Crary v. Goodman, 22 N. Y. 170. See, also, 53 Barb. 247.

An Indian possession would not be considered an adverse one so as to avoid deeds by patentees. 3 Johns. 375.

There is no adverse possession against a reversioner. Clarke v. Hughes, 13 Barb. 147.

A party may always buy in outstanding titles, to quiet his title. 8 Johns. 137; Marble v. McMinn, 57 Barb. 421.

The time to which the grant is to relate is the time when the bargain for the sale was concluded. Jackson v. Bull, 1 John. Ca. 81.

Adverse possession cannot be set up to avoid a grant of the State. Jackson v. Jumaer, 2 Cow. 552; Candee v. Haywood, 34 Barb. 349.

Although a deed would not be good to a stranger where there is adverse possession, the party ousted may release to the party in possession. Williams v. Council, 4 Jones Law (N.C.), 206; Early v. Garland, 13 Gratt. (Va.) 1; 4 Kent, 446.

As to adverse possession set up by a tenant or one holding over, *vide* Learned v. Tallmadge, 26 Barb. 443.

Champerty and Maintenance.—Champerty is defined as a bargain between a plaintiff or a defendant and a third person, to divide the land or matter in dispute between them, if they prevail, the champertor to carry on the suit at his own expense. Maintenance is an assistance improperly given to either party, in a suit by a third person not concerned in it, for the purpose of stirring up litigation and strife. The prohibitions of law against them were not supposed to apply to parties having any legal or equitable interest in the matter in dispute, or standing in relationship to each other, such as husband and wife, ancestor and heir, &c.

Every agreement relating thereto was also held void; and solicitors, counsel, attorneys and other officers could not contract for a part of the matter in litigation, as a compensation for services, nor accept anything from the client pending the suit except lawful demands for services, &c.

Our statutes provide that taking a conveyance of any interest in lands in suit, from a party *not in possession*, is a misdemeanor; as also it is a misdemeanor to buy or sell *pretended rights* in lands, unless the grantor or those under whom he claims have had possession, or the reversion or remainder or the rents, &c., for a year. 2 Rev. Stat. p. 691, 1st ed.

The above is not to apply to releases or mortgages under Chap. I. Part II Revised Statutes. Nor where the person, in possession, does not hold adversely to the grantor. Pepper v. Haight, 20 Barb. 429; Webb v. Bindon, 21 Wend. 98.

These statutes have no application to judicial sales. 6 Wend. 213; 2 Barb. 156; 2 Wend. 166; 7 Cow. 238; 5 N. Y. 320. Unless there is an actual adverse possession at the time of the decree. Carroll v. Dawson, 5 Cranch C. C. 514.

If the grantor is in possession, the conveyance would be good. 21 Wend. 98. It seems the statute against champerty has no application to a devise. 2 Wend. 166. By the Revised Statutes the old laws against champerty and maintenance were abolished, except as therein provided. 14 N. Y. 289. For other cases in this State on this subject, *vide* 34 Barb. 56; 14 N. Y. 289; 22 N. Y. 170. Under the code, agreements made with attorneys relative to remuneration to be made out of land in suit are valid. 23 Barb. 420. See also Pepper v. Haight, 20 Barb. 429; Wallis v. Loubat, 2 Den. 607; Small v. Mott, 22 Wend. 403; Reversing 20 *Id.* 212; also 5 Johns. 489; 10 Pai. 352; 1 Hoff. Ch. 421. And the law fully reviewed in Sedgwick v. Stanton, 14 N. Y. 289.

These statutes, however, did not apply where there was no knowledge of the pendency of the suit, nor where both parties had an interest in the litigation. 8 Johns. 479; 12 *Id.* 484; 8 *Id.* 220; 3 Cow. 623.

The Revised Statutes modified the earlier statutes and common law on these subjects; and the Code has removed the restriction so far as attorneys are concerned. Sedgwick v. Stanton, 14 N. Y. 289; and maintenance is no longer an offence, except as to buying and selling pretended titles, and falsely suing and maintaining suits. Small v. Mott, 20 Wend. 212; 22 *Ib.* 403.

Former Statutes.—Acts of 1788; 1801; 1 R. L. of 1802, 343; 1 R. L. of 1813, 172.

The statutes on the subject of champerty and manintenance in this State were founded on laws passed in the reigns of Ed. I and III and Henry VIII.

Title XI. Different Forms of Conveyance.

It may be desirable that a brief memorandum of the old modes of conveyance should be given, and of the modifications of them now in use.

The different classes of conveyance, as given by Blackstone, are distinguished as:

1. *Conveyances at Common Law.*
2. *Such as had their force and efficacy by virtue of the Statute of Uses.*
3. *Those operative by force of Statutory Enactments.*

The *first* class are subdivided into *Primary* or *Original*, *i. e.* those by which an estate is created or first arises, and *Derivative or Secondary*, whereby the estate originally created is enlarged, restrained, transferred or extinguished.

Original Conveyances are specified as: 1. *Feoffment.* 2. *Gift.* 3. *Grant.* 4. *Lease.* 5. *Exchange.* 6. *Partition.*

Derivative Conveyances are subdivided into: 1. *Release.* 2. *Confirmation.* 3. *Surrender.* 4. *Assignment.* 5. *Defeasance.*

Title XII. Feoffment.

A *Feoffment* was the ancient feudal conveyance, transferring a feud or fee. It required a delivery of the corporeal possession of the land, actual or symbolical, called *livery of seizin*, without which the feoffee had a mere estate at will. The transfer was not, at first, but was subsequently accompanied by a *written deed* in order to specify the purposes, limitations and subject-matter of the grant. The feoffment, in time, became the usual mode of transfer of an estate of inheritance.

Livery of seizin is still by the common law impliedly necessary on every grant of a freehold estate, whether of inheritance or for life. Schott v. Burton, 17 Barb. 173.

The livery, to be valid, required actual possession in the feoffor.

By the common law the feoffment operated upon the *possession*, and though the feoffor had nothing more than a naked or even tortious possession, the feoffment passed the fee by reason of the *livery*, and cleared away all other estates. It barred the feoffor also from all future right or possibility of right; and the feoffee continued vested with the freehold until the *disseizee*, by entry or action, regained his possession, the right to which might be barred by time.

The conveyance by feoffment with livery has become obsolete in England. The Revised Statutes have in terms abolished it. 3 Rev. Stat. p. 29.

TITLE XIII. GIFTS AND GRANTS.

The conveyance by *gift* (*donatio*) is properly applied to the creation of an estate *tail*. The operative words of the conveyance were "*do*" or "*dedi*." Gifts *in tail* also required livery of seizin.

Grants.—This was the conveyance by the common law, used in transferring interests in *incorporeal* hereditaments, as reversions, rents, commons, services, &c., which could not pass by *livery*. The operative words were "*dedi*" and "*concessi*." To render the grant effectual, the common law required the consent of the *tenant* of the land out of which the rent or other incorporeal interest proceeded, and this consent was called "attornment."

A "grant" passed only the estate that the grantor could lawfully convey. A feoffment, it has been seen, would pass an estate, and disseize the true owner, even if the feoffers possession were tortious.

Vide ante as to the effect of a grant in transferring an estate under the Revised Statutes, Title I. and *post*, 528.

Attornment.—The Revised Statutes (vol. iii, p. 30) provide as to *attornments* that "where any lands or tenements shall be occupied by a tenant, a conveyance thereof, or of the rents or profits, or of any other interest therein, by the landlord of such tenant, shall be valid without any *attornment* of such tenant to the grantee; but the payment of rent to such *grantor*, by his tenant, *before notice of the grant*, shall be binding upon such grantee; and such tenant shall not be liable to such grantee for any breach of the condition of the demise, until he shall have had notice of such grant. *Vide* Moffat v. Smith, 4 Coms. 126, as to constructive notice.

By Revised Statutes also, the *attornment* of a tenant to a *stranger* shall be absolutely void, and shall not in any wise affect the possession of his landlord unless it be made with the consent of the landlord, or pursuant to a legal judgment, order or decree, or to a mortgagee after forfeiture of the mortgage. *Vide* Chalmers v. Wright, 5 Rob. 713. See as to attornments, *ante*, p. 184.

The Revised Statutes have given to deeds of the conveyance of the inheritance of freehold the denomination

of GRANTS; and all the interest of a freehold estate of inheritance may now be transferred by *grant.* Deeds of "Bargain and Sale," and "*Lease and Release,*" are now to be deemed *grants.*

TITLE XIV. LEASES.

A *Lease* is properly a conveyance (usually in consideration of rent) for a less time than the lessor has in the premises. The usual operative words in a lease are "*demise, grant, and to farm let.*"

No livery of seizin was necessary except for leases for life.

By Revised Statutes, leases for a year and under need not be *in writing;* but for a longer period, as also *contracts for leasing* for a longer period than a year, are void, unless the contract or some memorandum or note thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made, or his lawful agent.

Vol. iii. p. 220; and see *ante*, p. 178.

Leases in fee or for life, like grants of freehold estates, must be sealed and witnessed or acknowledged. 3 R. S. p. 29. Otherwise no seal is necessary to a lease. 12 Johns. 73.

Leases are generally in duplicate, both parts of which are deemed *originals.* 8 Cow. 71.

See fully as to leases, and the rights and obligations of parties under them, *ante*, pp. 129 to 150; 177 to 214.

TITLE XV. EXCHANGE AND PARTITION.

An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The word "*exchange*" is necessary. Before the Revised Statutes the word "exchange" *implied* a warranty. The old conveyance by exchange is now not usual.

The estates should equal in quantity of interest, but need not equal in value. As a *fee* for a *fee*, etc., *vide* Wilcox v. Randall, 7 Barb. 628; Runyan v. Stewart, 12 Barb. 542.

A parol exchange of lands cannot operate as a conveyance. Clark v. Graham, 6 Wheat. 577.

Partition is where two or more joint tenants or tenants

in common agree to divide the lands so held among them in severalty, each taking a specified and distinct part.

Vide infra, ch. "Title by Partition." It is also held that a *parol* partition followed by possession, is valid and severs the estate. 7 Wend. 136, 141; 4 Johns. 202; 2 Ca. 174; 9 Johns. 270; 14 *Id.* 619; 5 Cow. 221; 25 *Id.* 434.

After twenty years no mistake or errors in the survey, etc., can be corrected. Jackson v. Hasbrouck, 3 Johns. 331.

Title XVI. Releases.

A *release* is classified under the above enumerated *secondary* or *derivative* conveyance. It is a discharge or conveyance of a right in land to another who already has an estate in *possession*. The operative words generally used are "*remise, release* and *forever quitclaim.*"

A release technically operates upon a present interest only (9 Johns. 123), and not on a right subsequently acquired (24 Barb. 55), or to a person out of possession (3 Johns. 363), although it may operate as an *estoppel*, though neither party is in possession. A mere possibility of a future interest was at first generally held by the courts not capable of being effected by a release. (*Vide* 5 Den. 664.) But see this case partially overruled, and cases on this point cited *ante*, p. 221, and the provisions of the Revised Statutes as to the transfer of estates in expectancy. *Ante*, p. 222, changing the former law.

Releases as classified by common law writers operate,

1. By way of *enlarging* an estate, as a remainder man releasing to a particular tenant in possession.

2. By way of *passing* an estate, as one tenant in common or joint tenant to another.

3. By way of passing a *right*, as where a *disseizee* released to the *disseizor*.

4. By way of *extinguishment*.

5. By way of entry and feoffment, as where a release is made by disseizee to one of two joint disseizors, who enters and excludes the other disseizor.

No *livery* was necessary to a release, the releasee being in possession. A release has been held good in this State as a conveyance by Bargain and Sale, and sufficient to pass the fee though the releasee was not in possession. 10 Johns. 456; 21 Wend. 120; 2 Seld. 42. It is therefore, under the Revised Statutes, good as a *grant*.

Vide, also, *post*, "Lease and Release."

Title XVII. Confirmation, Surrender, Assignment and Defeasance.

A confirmation confirms a voidable estate or *increases* a particular estate. The words usually used "*given granted, ratified, approved and confirmed.*"

A surrender yields up an estate for life or years to the reversioner or remainder man, or to one having the greater estate. The usual words are "*surrendered granted, and yielded up.*"

To make a valid *surrender*, there should be privity of estate between the parties, and the surrenderer must be in possession. 8 Johns. 262; 12 Wend. 602; 5 Cow. 97. A surrender may be by *parol* or act of the parties; as where a tenant gives the key of premises to the landlord, who accepts the same and resumes possession. 1 E. D. Smith, 121. The acceptance of a new lease implies a *surrender* of a prior one. 12 Johns. 357; 16 Johns. 28; see Livingston v. Potts, 16 Johns. 28, as to a surrender by operation of law, and more fully, *ante*, p. 205.

An assignment is usually applied to an estate for life or years. It differs from a *lease* in that by a *lease* an interest less than the lessor's is passed, and by an *assignment* the whole estate is tranferred.

Vide ante, p. 184, and as to the difference between an assignment and an under lease, and the rights and obligations of assignees, etc.

Before the Statutes of Frauds, chattels real might be assigned by parol. 12 Johns. 284; 17 *Id.* 284; 19 Johns. 342; *Id.* 95.

By the Revised Statutes, assignments of real estate interests must be in writing.

A defeasance is a collateral deed made at the same time with the principal conveyance, and containing certain conditions defeating the latter when performed. Mortgages were originally so made.

Vide infra, ch. "Mortgages."

A writing to operate as a defeasance to a deed, must be of as high a nature, and therefore under *seal*. 4 Mass. R. 443; 14 Pick. 179; 22 *Id.* 530.

TITLE XVIII. CONVEYANCES BY VIRTUE OF THE STATUTE OF USES.

These conveyances arose by virtue of the "Statute of Uses," before alluded to. (*Vide ante*, p. 78.) This statute *executed the use*, *i. e.*, annexed the *possession* to the *use*, and thereby made the *cestui qui use* the legal instead of equitable owner of the land. Such conveyances were in use in this State before the revision of 1830. The conveyances that had their operative effect through this statute were as follows:

1. *A Covenant to stand seized to Uses.*—By this, *in con-*

sideration of *blood* or *marriage*, the covenanter stood seized to the use of a child, wife, or kinsman. Here the statute transferred the possession to the use, for the benefit of the party who had acquired the use.

Affinity by a past marriage is not a sufficient consideration for this covenant. 2 Seld. (6 N. Y.) 342. Such a covenant in this State would be good, doubtless, in equity, or might be upheld as a grant. *Vide* Hayes v. Kershaw, 1 Sand. Ch. 258; also, Lynch v. Livingston, 8 Barb. 463; Jackson v. Staats, 11 Johns. 373.

The consideration of blood may be shown *aliunde*. Goodell v. Pierce, 2 Hill, 169.

A marriage *in futuro* would be a good consideration. 22 Wend. 140. A deed to a stranger in trust for relatives cannot operate as a covenant to stand seized. The blood or marriage relation must exist between the covenantor and covenantee. Schott v. Burton, 13 Barb. 173. A freehold to commence *in futuro* might be granted by a covenant to stand seized. Roberts v. Roberts, 22 Wend. 140.

2. *Bargain and Sale.*—This is the species of conveyance now most prevalent in the United States, and has superseded the old form of transfer by lease and release. Under the statutes existing here, it is equivalent to the deed of feoffment with livery.

It originally was a kind of real contract, whereby the *bargainor* for some pecuniary consideration *bargains* and *sells*, that is, contracts to convey the land to the bargainee, and became by such bargain a trustee for or *seized to the use* of the bargainee; and then the "Statute of Uses" completed the purchase and transfer, *without livery* of *seizin*. Thus the *bargain* first vested the *use*, and then the *statute* vested the *possession*. The use could be limited to no other person than the bargainee. (16 Johns. 302.) This form of deed required an actual *pecuniary* or valuable *consideration expressed*.

16 Johns. 47, 515; 1 Cow. 622; 9 Wend. 619; 6 N. Y. 342; 9 Barb. 219, 487; 2 Seld. 342; 3 Ker. 509; Schott v. Burton, 17 Barb. 173.

The consideration need not be money (30 Barb. 292, 296), but valuable. 16 John. 47; 4 Cow. 427; 9 Cow. 69. The consideration may be proved if not in the deed. 10 Johns. 456; 30 Barb. 292; 3 Kern. 509.

The words remised, released, and quitclaimed, where an intent to convey the estate of the grantor is recited, and a pecuniary consideration appears, have been held effectual as words of "bargain and sale," although in a deed to one not in possession. *Vide* 10 John. 456; 18 *Id.* 60, 78; 6 N. Y. 422; 21 Wend. 120; 18 Barb. 203, and *infra*, p. 528.

A pecuniary consideration to take effect *in futuro* is effectual. 3 Wend. 233; 9 Wend. 611; 4 Denio, 201.

So also the words "release and assign," (10 John. 456), "make over and confirm," (18 John. 60), "make over and grant," (3 John. 484), have been held effectual as words of bargain and sale.

The use must be limited to the bargainee. 16 John. 302; 3 *Id.* 388.

So also a deed not good as a lease and release, because the grantee was not in possession, nor as a covenant to stand seized, may be good as a bargain and sale, notwithstanding the granting words are "remise, release, and quit-claim," if there is a pecuniary consideration expressed, and an intention is evident to convey the whole estate. Lynch v. Livingston, 8 Barb. 463; affi'd, 2 Seld. 422.

The nominal consideration of one dollar not paid has been held not sufficient. 9 Barb. 487.

Natural affection or affinity by past marriage is not sufficient. Corwin v. Corwin, 2 Seld. 342; reversing 9 Barb. 342.

The words "for value received," have been held evidence of a pecuniary consideration, and as sufficient to raise the use. Jackson v. Alexander, 3 *Ib.* 484; Jackson v. Root, 18 *Ib.* 260.

Judge Nelson observes, in Rogers v. Eagle Fire Ins. Co. 9 Wend. 619, that the consideration sufficient to support a bargain and sale has become purely technical, without substance or value, and a nominal consideration has been held sufficient. In Wood v. Chapin, 3 Ker. 509, the court holds, however, that without some consideration, even though nominal, the deed would be void, if executed before the Revised Statutes. Those statutes, as to grants of freehold estates, may have altered the rule.

By Revised Statutes of 1830, deeds of "*Bargain and Sale*," and of "Lease and Release," may continue to be used, and shall be deemed "*Grants*," and as such shall be subject to all the provisions of the chapter concerning grants.

1 N. Y. 248.

A deed of bargain and sale to take effect *in futuro* is effectual. 9 Wend. 611.

3. *Lease and Release.*—Under this form of conveyance a *lease*, or bargain and sale for a pecuniary consideration, (generally a nominal one), was made for a year. This, in the case of a lease, vested the possession in the lessee; or in the case of a bargain and sale, vested in the *lessee* the *use* of the term for a year, and then the statute annexed the *possession;* and being then in *possession*, he could receive a *release* of the freehold and reversion from the lessor, by way of enlargement of the estate, without livery of seizin or consideration. Thus the *lease* and *release* operated as one conveyance, and in effect amounted to a *feoffment*, without the ceremony of *livery of seizin.*

This was the usual mode of conveyance in England substituted for the

feoffment. It was also the mode universally in practice in New York until about 1st May, 1788, when all English statutes were by law abolished, except those specifically re-enacted. 2 Greenl. 116, § 37. It was then supplanted in a great measure by the deed of bargain and sale, although it was at times still lawfully used.

The lease was not usually recorded. The recital of it in the release was deemed conclusive evidence of its existence upon all persons claiming under the parties in privity of estate. 4 Pet. 88. Carver v. Jackson, 4 *Ib.* 1.

And in order to support the release, a previous lease may be presumed. McBurney v. Cutler, 18 Barb. 203; Jackson v. Lamb, 7 Cow. 431.

By Revised Statutes, deeds of "*lease and release*" may continue to be used, and shall be deemed "*grants*," and as such shall be subject to all the provisions of the statute relative to grants.

3 Rev. Stat. p. 30, § 162.

Estates both in possession, remainder, and reversion, can be conveyed by lease and release. The consideration (although nominal) was inserted in the lease to raise the use; but the release need not have a consideration expressed, being a common law conveyance.

Title XIX. Fines and Recoveries.

These were solemn and public alienations by matters of record, and at times were employed in this State for the purpose of barring claims and assuring title.

Fines and recoveries were established by the statutes of this State. For the proceedings under them, *vide* "An Act concerning fines and recoveries of lands and tenements." 1 Rev. Laws of 1813, p. 358.

By the Revised Statutes, fines and recoveries are expressly abolished.

Vol. III, p. 629, § 24.

CHAPTER XXI.

FRAUDULENT CONVEYANCES.

It has been seen, in the preceding chapter, that a gift or voluntary conveyance would be effectual as between the parties, and is only liable to be questioned in certain cases, when the rights of creditors and subsequent purchasers are concerned.

Van Wyck v. Seward, 18 Wend. 375; Rosevelt v. Carow, 6 Barb. 190; The Manhattan Co. v. Evertson, 6 Pai. 457; Matthews v. Duryea, 45 Barb. 69; Maloney v. Horan, 49 N. Y. 111.

To make a deed voluntary, it must be without the least valuable consideration. Seward v. Jackson, 8 Cow. 406.

A voluntary conveyance may become valid upon matter, *ex post facto*, or it may acquire validity so far as concerns the claims of others. Wood v. Jackson, 8 Wend. 9.

The English Statutes (of Elizabeth, 13th and 27th, and Charles II), confirmatory of the common law against *fraudulent conveyances* have been substantially re-enacted in this State, commencing with "An Act for the prevention of Fraud," passed 26th July, 1787.

1 Green. 381; 1 Rev. Laws, p. 75.

TITLE I. FRAUD ON PURCHASERS.

The Revised Statutes provide that every *conveyance* of or *charge* upon land, &c., or rents and profits of land, made with *intent to defraud* prior or subsequent *purchasers* for *valuable* consideration, shall be *void* as against *them;* but no such conveyance shall be deemed fraudulent in favor of a subsequent purchaser if he have *actual*

or *legal* notice thereof at the *time of his purchase*, unless the *grantee* or *person to be benefited* was *privy* to the intended fraud.

Part 2, ch. 7, title 1, §§ 1 and 2.

The deed is good as against the grantor and his heirs. Jackson v. Gamsey, 16 Johns. 189.

Also as against the grantee. Mosely v. Moseley, 15 N. Y. 334.

§ 3, *Ib.* It is further provided, that every conveyance or charge on an estate or interest in land containing any provision for the *revocation*, *determination*, or *alteration* thereof at the will of the grantor, shall be void as against subsequent *purchasers* from such grantor, for valuable consideration, of any estate or interest so liable to be revoked, &c., although the same be not expressly revoked, &c., by the grantor, by virtue of the power reserved or expressed in the prior conveyance or charge.

§ 4, *Ib.* Where a power to revoke a conveyance of any lands, rents or profits, and to reconvey the same, shall be given to any person other than the grantor in such conveyance, and such person shall thereafter convey the same lands, &c., to a purchaser for value, such subsequent conveyance shall be as valid as if the power of the revocation were recited therein, and the intent to revoke the former conveyance expressly declared.

§ 5, *Ib.* If a conveyance to a purchaser under either of the last two sections be made before the person making the same, shall be entitled to execute his power of revocation, it shall be as valid from the time the power vests in such person as if then made.

Purchasers for value without notice.—The title of a purchaser for *value* shall not be affected unless it appears that such purchasers had previous *notice* of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

Vide 18 Wend. 353; 14 Johns. 493; 18 Johns, 515; Title iii, ch. vii. § 5.

The purchaser must have acquired the legal title, to be entitled to protection. Peabody v. Fenton, 3 Barb. Ch. 451.

Actual Value.—The consideration, or something of value, must have been actually parted with or secured. Jewett v. Palmer, 7 Johns. Ch. 65; Starr v. Strong, 2 Sand. Ch. 139; DeMott v. Starkey, 3 Barb. Ch. 403; Keyser v. Harbeck, 3 Duer, 373.

Taking the deed merely in payment of a former debt is not sufficient to protect. Root v. French, 13 Wend. 570.

A purchaser with notice, from one who purchased without notice of the fraud, may protect himself under the first purchaser. So also one who has taken without notice from one who had notice. Griffith v. Griffith, 9 Paige, 315; Noyes v. Burton, 29 Barb. 631; Jackson v. Walsh, 14 John. 407; Frazer v. Western, 1 Barb. Ch. 230; and affi'd, How. Ap. Ca. 447, 479.

This last case reviews the obligations of grantees from those taking voluntary conveyances, and how far they are under obligation to inquire into the circumstances attending the original transfer. *Vide infra*, ch. 26, "Record of Instruments," and the "Doctrine of Notice."

Title II. Fraud against Creditors.

By the Revised Statutes it is provided as follows:

Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, &c., or upon the rents, &c., made with intent to hinder, delay or defraud creditors or *other persons* of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void.

Title iii, ch. 7; Part II, R. S. § 1.

The decisions under this section are very numerous, and are based on the intent of the parties, as manifested from the facts, in each case. In the case of a voluntary conveyance, as well as in any other, the question is as to the actual fraud, and is to be passed upon as a fact. *Vide* Jackson v. Post, 15 Wend. 588; Seward v. Van Wyck, 8 Cow. 406; Jackson v. Peck, 4 Wend. 300; Jackson v. Zimmerman, 7 *Id.* 437; Hinde's Lessees v. Walworth, 11 Wheat. 199.

What Creditors.—It has been generally held that the above section only applies where there are lawful debts of creditors existing at the time of the transfer. Baker v. Gilman, 52 Barb. 26; Lormore v. Campbell, 60 Barb. 62.

This limitation was not sustained in the case of Case v. Phelps, 39 N. Y. 164.

Where, it is held, that a voluntary deed may be set aside by subsequent creditors, where made not in fraud, but to secure against possible loss, on engaging in a new business. See also Dygert v. Remerschnider, 32 N. Y. 629; Savage v. Murphy, 34 N. Y. 508.

A recent case in the U. S. Supreme Court, in construing a similar statute, holds that the deed would not be set aside in favor of subsequent creditors, unless a fraud was intended at the time of the conveyance. Mattingly v. Nye, 8 Wallace, 371; Loeschig v. Addison, 4 Abb. N. S. 210.

The same principle is asserted in the case of Savage v. Murphy, 8 Bos. 75.

The fraud must appear to have been mutual, *i. e.*, between grantor and grantee. Carpenter v. Muren, 42 Barb. 300.

Unless no consideration, at all, appears. Newman v. Cordell, 43 Barb. 448; Wood v. Hunt, 38 Barb. 302; Mohawk Bk. v. Atwater, 2 Pai. 54.

Post nuptial settlements are void against antecedent creditors. 3 Johns. Ch. 481; 5 Wend. 661. A conveyance, however, which operated as the inducement to a marriage, held good. 8 Wend. 9; 3 Johns. 488. See also as to a contract to convey after marriage, 16 Barb. 136.

In the case of Philips v. Wooster (36 N. Y. 412), it is held that voluntary conveyances to the wife, by the husband, without fraudulent intent, at a time when he was not indebted, cannot be questioned by subsequent creditors.

So held, also, as to children. Holmes v. Clark, 48 Barb. 237. See, also, Wicker v. Clarke, 8 Pai. 161.

Whether the particular transaction was intended as a fraud upon creditors is a question of fact. Dygert v. Remerschnider, 32 N. Y. 629; affirming 39 Barb. 417.

Where the husband, in good circumstances, pays the consideration for a deed to his wife in good faith, it is valid as against subsequent creditors. Curtis v. Fox, 47 N. Y. 299.

A void agreement (because not in writing) in consideration of marriage and a settlement based on it, is void as to creditors. Dygert v. Remerschnider, 32 N. Y. 629.

A voluntary conveyance in consideration of blood, &c., is only presumptively fraudulent against creditors, and may be rebutted by circumstances. 8 Cow. 406; 5 Wend. 661; 8 *Id.* 9; 18 *Id.* 375; 6 Paige, 62; See, also, 4 Wend. 300; 1 Johns. Ch. 261; 5 Cow. 67.

A conveyance without consideration by an insolvent, is controlling evidence of fraud. Erickson v. Quinn, 47 N. Y. 410.

See, also, as to frauds against creditors, and the setting aside of conveyances, and who are "creditors." 4 John. 536; 18 *Ib.* 515; 4 Cow. 603; 3 J. Ch. 371; Mead v. Gregg, 12 Barb. 653; Shadbolt v. Basset, 1 Lans. 121; Clements v. Moore, 6 Wald. 299; Wood v. Hunt, 38 Barb. 303; Rankin v. Arndt, 44 Barb. 251; Bayard v. Hoffman, 4 Johns. Ch. 452.

As to marriage settlements, *vide* more fully, *ante*, p. 73.

As to when post nuptial settlements will be sustained in equity, so as to give a support for the wife, *vide* Wickes v. Clarke, 8 Pai. 161; Garlick v. Strong, 3 Pai. 452; Searing v. Searing, 9 Pai. 289; Partridge v. Havens, 10 Pai. 618; Bleecker v. Bingham, 3 Pai. 246; King v. Whitely, 10 *Id.* 465.

The creditor may move to set aside the conveyance when he has a judgment for his debt. Mohawk B'k v. Atwater, 2 Pai. 54.

Implied and Resulting Trusts.—As to when conveyances are treated as void against creditors, in cases where a grant for a valuable consideration shall be made to one person, and the consideration is paid by another, *vide ante*, pp. 277 to 282.

The provisions as to fraudulent conveyances do not preclude a party from establishing an implied or resulting trust recognized by the common law. Foote v. Bryant, 47 N. Y. 545.

Assignments for Benefit of Creditors.—As to these, *vide post*, ch. xxxi.

An assignment in trust, with a reservation in favor of grantor, would be void, but an assignment to creditors themselves, with a reservation to the assignor would not be. That operates as a mortgage, and any surplus might be reached. Leitch v. Hollister, 4 N. Y. 211.

As regards sales made by assignees of insolvent creditors, under assign-

ments which are subsequently declared fraudulent, the opinion is that such sales would be void only as to the creditors hindered, delayed, &c. Therefore such sales would be good as against the assignor, unless the creditors had actually taken proceedings to set them aside.

TITLE III. FRAUDULENT CONVEYANCES—MISCELLANEOUS.

The following provisions with respect to fraudulent transfers are also noted for reference.

The Terms "Lands, &c." Conveyance, &c.—The term "lands" in the above ch. vii, as to fraudulent conveyances, is to be construed as co-extensive in meaning with "lands, tenements, and hereditaments;" and the terms "estate and interest in lands" shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands, as above defined. Title iii, § 6.

The term "conveyance" is to be construed to embrace every instrument in writing, except wills, whatever its form, and however known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered. § 7.

The chapter is not to affect prior instruments or proceedings. § 8.

Fraud Punishable.—By the Revised Statutes of 1830, parties to the making of conveyances to defraud purchasers, or to hinder or defraud creditors, or those privy thereto, or willingly putting the same in use, as if made in good faith, shall be guilty of a misdemeanor. Title vi, ch. i, part iv, R. S.; *vide* 14 How. P. 11.

Executors, Assignees, Trustees, &c. may disaffirm Fraud of their Principals.—By Laws of 1858, ch. 314, any executor, administrator, receiver, assignee, or other trustee of an estate, or of the property of insolvent persons or corporations, may, for the benefit of creditors and others interested, disaffirm, treat as void, and resist all acts in fraud of the rights of any creditor, including themselves and others interested.

Fraudulent Intent.—The question of *fraudulent* intent, under the chapter, is one of fact, and not of law. No conveyance or charge, &c. shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a *valuable* consideration. § 4, Title iii.

See, as to fraudulent intent, and the burden of proof, Russel v. Lasher, 4 Barb. 232; Van Wyck v. Seward, 18 Wend. 375.

Fraudulent Trusts.—All trusts in land, created for the benefit of the grantor, are void as against creditors existing or subsequent.

By § 2 of the above Title iii, grants or assignments of trusts, unless in writing, subscribed by the party or his lawful agent, are made void. *Vide ante*, p. 284; also 10 Barb. 346; 5 Johns. Ch. 11.

Heirs, Assignees, &c.—§ 3. Instruments declared void in the chapter shall also be void as against heirs, successors, personal representatives, or assignees of the creditors, or purchasers.

Fraudulent Title.—An action will lie for a fraudulent representation as to title. Whitney v. Allaire, 1 N. Y. 304; Barber v. Morgan, 51 Barb. 116.

CHAPTER XXII.

CONVEYANCES, MISCELLANEOUS.

The following miscellaneous provisions as to conveyances are of importance to note:

Transfers to Receivers.—When a receiver of property is appointed by a court or judge in a judicial proceeding, he does not, by force of his appointment as receiver, become possessed of *real* property. A deed is necessary, or other conveyance of title. Moak v. Coates, 33 Barb. 498; Chatauque Bank v. Risley, 19 N. Y. 370.

But see head "Receivers under Supplementary Proceedings," under § 298 of Code, *post*, ch. xxxix.

Conveyances for Money Lost at Play, Lotteries, &c.—All things in action, judgments, mortgages, conveyances, or other securities, where any of the consideration is for money or value lost at play, or betting, or loans for the same, shall be void, except as to *real estate*, when they shall enure for the sole benefit of such person as would be entitled to such real estate if the grantor or person encumbering the same had died immediately upon the execution of such instrument, and shall be deemed to be taken and held to and for the use of the person who would be so entitled. All grants, covenants and conveyances for preventing such real estate from coming to or devolving upon the person hereby intended to enjoy the same as aforesaid, or in any way incumbering or charging the same, so as to prevent such person from enjoying the same fully and entirely, shall be fraudulent and void. 1 Rev. Stat. p. 663, 1st ed.; 1 R. L. 153; *vide* 19 Barb. 127; 3 Den. 342; 1 N. Y. 392.

For Lotteries or Games.—Every bargain, grant, conveyance, &c., or transfer of real estate, made pursuant to any lottery or game not authorized by law, or to assist or aid the same, are declared *void*. 1 R. S. p. 667; Laws of 1819, p. 259.

Absconding, Concealed, and Non-Resident Debtors.—All sales, assignments, transfers, mortgages, and conveyances made by them after first publication of attachment and judgments confessed, are absolutely void as against creditors. 3 Rev. Stat. 5th ed. p. 84; *vide, post*, ch. xxxi.

Conveyances by Guardians ad litem, by Order of the Court.—Such deeds must be executed in the name of the infants, per M. or N. the guardian. Hyatt v. Seely, 11 N. Y. 52.

Special Partnership Property.—Transfers of the effects, &c, of such a partnership, when insolvent or in contemplation of insolvency, with a view to give a preference to creditors, are made void. Also, judgments, liens, &c. 1 R. S. 766, 1st ed. pp. 766, 767; 9 Abb. 132; 16 Abb. 71; 28 N. Y. 491; 36 Barb. 262; 6 Pai. 581; 36 Barb. 262; 16 Abb. 71.

Usury Laws.—Conveyances, &c., taken in violation of the usury laws, are void. 1 R. S. p. 772, 1st ed. § 5.

CHAPTER XXIII.

MORTGAGES.

TITLE I. DEFINITION AND NATURE OF A MORTGAGE.

A mortgage is defined as the conveyance of an estate by way of pledge for the security of a debt; to become void on payment of the debt, as provided.

All estates and interests in property may become the subject of a mortgage, whether present, future, or contingent.

Vide supra, 221, fully, as to the transfer of expectant estates.

Whatever is annexed to the freehold, and would pass between vendor and vendee, passes with the mortgage. 6 Cow. 655; King v. Wilcomb, 7 Barb. 263.

Partnership Lands.—One partner may mortgage partnership property to secure the firm debts. Willet v. Stringer, 17 Abb. 152.

Mortgage on a Lease.—The mortgagee, under the present views of the courts, is not liable on covenants in the lease, *if he have not taken possession. Vide ante*, p. 187; Walton v. Cronly, 14 Wend. 63; Astor v. Miller, 2 Pai. 68; see same case, 2 Wend. 603.

A mortgage on a lease will attach to the renewals thereof. Gibbs v. Jenkins, 3 Sand. Ch. 130.

By Revised Statutes, a mortgagee of a lease may redeem within six months after judgment in ejectment against the tenant. 2 R. S. 1st ed. 506.

Future Advances.—The rule, as now declared by the courts, is, that a mortgage or judgment may be taken and held as security for future advances and responsibilities, to the extent of it, when this is a constituent

part of the original agreement; and the future advances would be covered by it in preference to the claim of a junior intervening incumbrancer, with sufficient notice, by record or otherwise, of the agreement.

Monnell v. Smith, 5 Cow. 441; Lansing v. Woodworth, 1 S. Ch. R. 43; Barry v. Merch. Ins. Co. *Id.* 280; Livingston v. McInley, 16 Johns. 165; Brinckerhoff v. Marvin, 5 John. Ch. 320; James v. Johnson, 6 *Id.* 417; 2 Cow. 246; U. States v. Hoe, 3 Cranch, 73; Shinas v. Craig, 7 *Id.* 34; Truscott v. King, 2 Seld. 147; Laurence v. Tucker, 23 How. U. S. 14; Milliman v. Neher, 20 Barb. 37.

But a parol agreement treating a mortgage as security for further advances would be void. Stoddart v. Hart, 23 N. Y. 56. The purpose of the security may be shown by parol. 2 Seld. 147, *supra;* Bank of Utica v. Finch, 3 Barb. Ch. 302.

A subsequent advance cannot be tacked to a prior security, to the prejudice of a *bona fide* junior incumbrancer. Craig v. Tappin, 2 Sand. Ch. 78; 2 Seld. *supra; ex parte* Hooper, 19 Ves. 477.

The agreement relative to the future advances should be recorded to be noticed. 2 Seld. 147, *supra;* St. Andrew's Ch. v. Tompkins, 7 John. Ch. 14.

Making the bond for further advances will not affect the mortgage. 23 N. Y. 556, *supra.* A mortgage for future advances unrecorded, will take preference over a subsequent judgment, unless there has been a fraudulent intent. Thomas v. Kelsey, 30 Barb. 268.

Tacking Mortgages.—It was a principle established by the English courts, that if a junior mortgagee acquired a first mortgage, he could tack his junior mortgage to the first mortgage, and gain preference thereby for a third mortgage, over an intervening mortgage or judgment. The principle was based upon the view that the *mortgagee* was owner of a conditional fee, which is no longer the view of the courts of this State. This doctrine of tacking, therefore, no longer prevails in this State, and liens are enforced according to the order of time in which they respectively attach.

After-acquired Interest.—As a general rule, a mortgage of all right and interest does not pass an after-acquired interest.

Watson v. Campbell, 28 Barb. 421.

If such was the intention of the parties, an after-acquired interest might pass in equity. Otis v. Sill, 8 Barb. 103; Seymour v. Can. R. R. 25 Barb. 284; Benjamin v. Elmira, &c. R. R. 49 Barb. 441.

Railroad Property.—A mortgage of railroad property and future acquisitions and changes would be good, and attach to the franchise or after-acquired lands and interests as designated, but subject to all liens on the after-acquired property. Seymour v. Canada, &c. R. R. 25 Barb. 284; also 49 Barb. 441, *supra;* Minnesota Co. v. St. Paul Co. 6 Wall. 742; Hoyle v.

Plattsburgh, &c. R. R. 51 Barb. 45; U. S. v. N. O. R. R. 12 Wall. 362; also Laws of 1850, p. 211.

Such mortgages may be executed at a meeting held out of the State of incorporation. Galveston R. R. v. Cowdrey, 11 Wall. 459; see this case as to foreclosure of such mortgages.

The Condition.—That which distinguishes a mortgage from other securities is the *condition* that if the debt be paid at a day specified, the conveyance is to be void; otherwise it becomes *absolute* at *law*, though subject, in *equity*, to the right of redemption.

Differs from a Pledge.—On a pledge, there is always a deposit of the security, in which the pawnee has only a special property, and it can be redeemed at any time before sale.

In a mortgage, technically, the whole title passes, subject to the *defeasance*. 9 Wend. 83; 2 Den. 170; see *post*, Title v.

Differs from a Conditional Sale.—A mortgage also differs from a *conditional sale, i. e.*, a sale with an agreement to repurchase within a given time, in which case, after the expiration of the time, the right to reclaim is gone. For the distinction between the two, *vide* Brewster v. Baker, 20 Barb. 364; 2 Barb. 28; Holmes v. Grant, 8 Pai. 243; Baker v. Thrasher, 4 Den. 493; Saxton v. Hitchcock, 47 Barb. 220.

If the debt remain, the transfer is a mortgage. See, also, 2 Edw. 138; 8 Pai. 243; 3 Hill, 95; 1 Pai. 617; *Ib.* 48; *Ib.* 263; Eckford v. De Kay, 8 Pai. 89; affi'd, 26 Wend. 31; and see, *post*, "Defeasance," Title ii.

The Amount Secured.—It has been held that the amount secured must be specified, and that otherwise the mortgage would be void as to creditors, &c. It is held, however, that if the mortgage be duly recorded, it will not be void as to purchasers or creditors for uncertainty, when, being conditioned to pay liabilities already incurred, it does not specify the amount. Young v. Wilson, 24 Barb. 510; reversed, 27 N. Y. 351.

Equitable and Constructive Mortgages.—*Agreements* may also be held as *equitable* mortgages—for instances of which see

1 Johns. Ca. 114; 1 Paige, 125; Stoddard v. Hart, 23 N. Y. 556; Stoddard v. Whiting, 46 N. Y. 627; Chase v. Peck, 21 N. Y. 581; Sahler v. Signer, 37 Barb. 329; Cooper v. Whitney, 3 Hill, 95.

An equitable mortgage may also be raised and upheld in equity by reason of a debtor depositing his "*title* deeds" with his creditor as security, although against the Statute of Frauds; under the principle that such deposit is evidence of an agreement to mortgage which may be enforced in equity. Rockwell v. Hobby, 2 Sand. Ch. 9; Jackson v. Parkhurst, 4 Wend. 36.

Where there are registry laws, however, such a deposit would not operate against *bona fide* purchasers or incumbrancers. 1 Johns. Ch. 308; 7 Paige, 38.

Such lien cannot be set up at law as a legal estate. 1 John. Ca. 114; 12 John. 418; Jackson v. Parkhurst, 4 Wend. 369.

Equitable mortgages will take precedence of judgments. Chase v. Peck, 21 N. Y. 581.

They do not require seals. Stoddart v. Whiting, 46 N. Y. 627.

Vendor's Lien.—An equitable mortgage also arises from the vendor having a *lien* on the estate sold for the purchase money; unless it be waived, or a different security be contemplated.

1 Johns. Ch. 308; 7 Paige, 382; Watson v. Le Row, 6 Barb. 484; Swartout v. Burr, *Ib.* 495; Champion v. Brown, 6 John. Ch. 402.

The lien would be upheld only against subsequent purchasers with notice, or who have paid no new value. 3 Barb. 267; Burlingame v. Robbins, 21 Barb. 327; Bayley v. Greenleaf, 7 Wheat. 46.

Taking certain securities may *waive* the lien, but not bonds, notes, or other mere evidences of the debt (1 Johns. Ch. 308; 2 Edw. 506; 7 Pai. 382); but collateral security, or the bond, &c. of a third person, will waive the lien, unless taken in part payment. Fish v. Howland, 1 Pai. 20; 6 Johns. Ch. 398; 8 Barb. 552; 21 *Id.* 327. Or a covenant to do some act in lieu of paying money. McKillip v. McKillip, 8 Barb. 552; see also, Vail v. Forster, 4 Com. 312.

The lien cannot be extended to third parties, but only to vendor and vendee, and their privies in law and estate. McKillip v. McKillip, 8 Barb. 552.

A vendor's lien is not such a mortgage within the statute, as charges mortgages of land descended or devised upon the heir or devisee. Wright v. Holbrook, 32 N. Y. 587; and see, as to vendor's lien, cases cited, *ante*, p. 473.

TITLE II. THE DEFEASANCE.

There is usually inserted in the mortgage deed the *defeasance* or condition upon which the land is conveyed, *defeating* the principal deed, on performance of the condition.

The defeasance may also be in a separate instrument, but should be recorded at the same time with the deed, to protect against subsequent purchasers and mortgagees.

Even if a conveyance be *absolute* on its face, if made with a defeasance which renders it a mere security, it is a *mortgage* (2 Cow. 324; 7 Johns. Ch. 40; 15 Johns. 205, 555; 3 Wend. 208; 2 Johns. Ch. 182); and if *intended* as a mortgage, it will be a mortgage, whether there is a written defeasance or not (2 Cow. 324), as between the parties. Brown v. Dewey, 2 Barb. 28; Villa v. Rodriguez, 12 Wall. 323; Saxton v. Hitchcock, 47 Barb. 220.

Bona fide holders will be protected, who have no notice that it is a mortgage. Newton v. McKean, 41 Barb. 285; Decker v. Leonard, 6 Lans. 265.

It is often a perplexed question whether a conveyance was intended to be *absolute* or as a *security* with right of redemption, &c. The character of the conveyances is generally determined by the clear intention of the parties, (2 Cow. 246; 9 Wheat. 489; 8 Paige, 243; 3 Hill, 95; 1 Sand. Ch. 57;

4 Denio, 493), and estates absolute at law may be held mortgages in equity. Elliott v. Wood, 53 Barb. 285; Binsse v. Paige, 1 Key. 87.

As to difference between a mortgage and an agreement to resell, *vide* Brown v. Dewey, 2 Barb. 28, and *ante*, p. 538.

Certain Deeds to be Deemed Mortgages.—The Revised Statutes, vol. 3, p. 45, § 3, provide as follows: Every deed conveying real estate, which, by any other instrument in writing shall appear to have been intended only as a *security* in the nature of a *mortgage*, though it be an absolute conveyance in terms, shall be considered as a *mortgage;* and the person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a *defeasance* of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed be also *recorded* therewith, and *at the same time.* [This section is taken from the Act Concerning Mortgages, 1 Rev. Laws, p. 372, and Laws of 1822, p. 262.]

The words "at the same time" were supplied by the Revision of 1830.

For a construction of this statute, *vide* Stoddard v. Rotton, 5 Bosw. 378, were held, that even if the defeasance is not recorded, *bona fide* purchasers from the grantee are protected.

The deed should be recorded as a *mortgage*, and if recorded as a *deed* only, the mortgagee is not protected against subsequent *bona fide* mortgagees or purchasers. The defeasance may be subsequently made and recorded with the principal instrument. White v. Morse, 1 Pai. 554; Brown v. Dean, 3 Wend. 208; Grimstone v. Carter, 3 Pai. 421: Day v. Dunham, 2 John. Ch. 188; James v. Johnson, 6 *Id.* 417; 2 Cow. 248.

If made subsequently it should be in writing, and formally executed.

Notice may be otherwise than by record, but it must be full and clear, otherwise subsequent *bona fide* purchasers, &c., are protected. Jackson v. Van Valkenburgh, 8 Cow. 260; Fort v. Burch, 6 Barb. 60; Cooper v. Whitney, 3 Hill, 95. See, also, 5 Barb. 652; 3 Wend. 208; 2 Cow. 324; 5 Pai. 111; 1 Pai. 553; 6 J. C. R. 417; 4 Pai. 551.

Parol Evidence.—In Equity, and since the Code, also at law, parol or other extrinsic evidence may be given to show that a deed, though absolute on its face, was intended as a mortgage.

Walton v. Cronly, 14 Wend. 63; Hodges v. Tenn. Ins. Co. 4 Seld. 416; Despard v. Walbridge, 15 N. Y. 374; overruling, 6 Hill, 219; Murray v. Walker, 31 N. Y. 399; Dobson v. Pierce, 2 Ker. 156; Crary v. Goodman, 2 Ker. 266.

Not so, however, if no defeasance was intended or agreed upon at the time. Taylor v. Baldwin, 10 Barb. 582; Cook v. Eaton, 16 *Ib.* 439; Horn v. Kettletas, 46 N. Y. 606; Barrett v. Carter, 3d Dep't, 1870.

TITLE III. THE BOND OR NOTE.

A bond or note creating a personal liability for the debt secured usually accompanies and is referred to in the mortgage deed. There is also usually inserted a *covenant* to pay the debt.

By the Revised Statutes, where there is no accompanying bond or separate instrument, nor any covenant to pay the debt, the mortgagee's remedy is confined to the *land* mortgaged, and the mortgage is not to be construed as a covenant to pay the money, and there is no personal liability.

Vol. 3, p. 29, § 159.

The covenant or agreement, however, to pay, need not be in express words. 2 B. Ch. 569; Elder v. Rouse, 15 Wend. 218; and it may be to do any act. Steward v. Hutchins, 13 Wend. 488; 6 Hill, 143; Coleman v. Van Rensselaer, 44 How. P. 368.

As to the presumption of the payment of the debt, *vide, post*, Title viii.

Obligations of a Vendee. If he purchase subject to the lien of a mortgage, and specially assumes its payment, and not otherwise, he becomes personally liable for the debt to the holder of the mortgage, and also indemnifies the grantor against it, and becomes liable to a decree for any deficiency on the foreclosure. The land is the principal fund to pay the debt.

Ferris v. Crawford, 2 Den. 595; Cornell v. Prescott, 2 Barb. 16; Russel v. Pistor, 3 Seld. 171; Trotter v. Hughes, 2 Ker. 74; Stebbins v. Hall, 29 Barb. 524; Halsey v. Reed, 9 Paige, 446; Flagg v. Thurber, 14 Barb. 196; Flagg v. Munger, 5 Seld. 483; Jumel v. Jumel, 7 Pai. 591; Marsh v. Pike, 10 Pai. 595; Hartley v. Harrison, 24 N. Y. 170, see this case where the mortgage was usurious.

The mere acceptance of the deed "subject to the mortgage, &c." does not, in default of other words, showing a personal obligation contemplated, make the grantee personally liable for a deficiency on foreclosure. Stebbins v. Hall, 29 Barb. 524; Belmont v. Coman, 22 N. Y. 438; Binsse v. Paige, 1 Key. 87; Dingledein v. Third Av. R. Co. 37 N. Y. 575. It would be otherwise, if the deed recite that the grantee is to pay the mortgage. Trotter v. Hughes, 2 Ker. 74.

But there would be no liability for deficiency if the grantor was not personally liable for the debt. *Ib.* See, also, as to liability for deficiency. Flagg v. Munger, 5 Seld. 483; Ricard v. Sanderson, 41 Barb. 179. See Thorp v. The Keokuck Co. 48 N. Y. 253, overruling King v. Whitely, 10 Pai. 465, and explaining Trotter v. Hughes, *supra*.

If one of two joint purchasers pay the mortgage debt and take an assignment of the mortgage, he has a right to be substituted in place of the mortgagee, and it will not be extinguished, but may be enforced against his co-purchaser. *Ib.* Halsey v. Reed, 9 Pai. 446.

See, also, as to the right of the mortgagor, as against the lands where he has been obliged, after transfer, to pay the mortgage debt. Marsh v. Pike, 10 Pai. 595.

A stipulation by a mortgagee to pay a prior mortgage does not impose on him a liability to the prior mortgagee. Garnsey v. Rogers, 47 N. Y. 233.

If the parties so stipulate, the whole amount will become due and may be collected, on non-payment of an installment or of interest, as provided. Malcolm v. Allen, 29 N. Y. 448.

And it is no excuse that the mortgagor was unable to find the mortgagee. Dwight v. Webster, 10 Abb. 128.

But it is, if he could not find an assignee, under certain circumstances. Noyes v. Clark, 7 Pai. 179.

Title IV. The Power of Sale.

A *power of sale* is generally inserted in the mortgage, which would enable the mortgagee to sell without a suit on default. This, however, would not foreclose the right to redeem, unless so provided by statute.

Power to pass by Assignment.—By the Revised Statutes, vol. 3, p. 29, § 153, where a *power to sell* lands shall be given to the grantee in any mortgage or other conveyance intended to secure the payment of money, the *power* shall be deemed a part of the security, and shall vest in and may be executed by any person who by assignment or otherwise shall become entitled to the money.

A power to sell in a mortgage is not divisible, and an assignment by a mortgagee of a part of his interest in the mortgage debt and estate, would not carry a corresponding part of the power. Wilson v. Troup, 2 Cow. 195; affirming 7 Johns. Ch. 25.

Such a power survives the mortgagor, and is irrevocable being coupled with an interest. Bergen v. Bennett, 1 Cai. Ca. 1; Knapp v. Alvord, 10 Pai. 205.

See further as to such a power, *ante*, p. 336.

Payment of a mortgage extinguishes the power of sale in it, and a subsequent foreclosure would be void. Cameron v. Irwin, 5 Hill, 572; partially overruling 10 Johns. 185; 5 Wend. 295.

But not if the first foreclosure was invalid. Stackpole v. Robbins, 48 N. Y. 665.

A power to mortgage includes a power to authorize a sale on default of payment, but not to make covenants in any deed given. Wilson v. Troup, 7 Johns. Ch. 25; affi'd 2 Cow. 195; *Vide* also *ante*, p. 345.

As to mortgages by tenant for life having power to make leases, or by a married woman by virtue of a beneficial power, *vide ante*, p. 338, and as to the extinguishment of such powers, p. 355.

Title V. The Estate of the Parties.

By the common law, a mortgage created an estate upon conditions, or a base or determinable fee, with a right of *reverter* attached to it, on performance of the

condition strictly at the time; which right was neither alienable nor devisable, but was confined to the mortgagor and his heirs.

If the mortgagor was in default, the estate became absolute in the mortgagee, without the right of redemption.

There were many refinements of the common law principles, relative to mortgages, based upon the equitable interference of courts, to avoid the operation of the strict common law rules, which it is unnecessary here to review.

Although by force of the mortgage the *legal estate*, at *common law* technically vested in the mortgagee, subject to defeasance on condition performed, and until defeasance the mortgagee had the right of entry and possession, and the mortgagor, if in possession, was considered there by permission and assent of the mortgagee, in *equity*, the mortgage was considered a mere *security* for the debt, and only a *chattel* interest, and until a decree of foreclosure and sale the *mortgagor continued the real owner of the fee.*

The courts of *law* of this State have gradually adopted the views of the subject long adopted by courts of equity, and a mortgage is now considered merely a chattel interest or chose in action by way of security for debt. The *mortgagor* in possession is considered the *real* or *legal* as well as the equitable owner of the freehold.

A mortgagee in possession is held as holding a pledge in possession, and may retain possession until the debt is paid, but the title is always in the mortgagor. 21 N. Y. 343; Jackson v. Willard, 4 Johns. 41; 6 Johns. 290; 15 *Id.* 319; 2 Cow. 195; 5 Wend. 603; 2 Paige, 68; 3 Barb. 347; 2 Pai. 536; 3 Hill, 95; 2 Barb. Ch. 119, 135; 23 N. Y. 556; 10 Pai. 49; 20 N. Y. 412.

Right to Possession and Rents.—The mortgagee has no right before forfeiture, unless by agreement, to the possession or rents, and has his remedy only in equity, where aid would be afforded if the rents became indispensable to his indemnity. Syracuse City Bank. v. Tallman, 31 Barb. 201; Astor v. Turner, 11 Paige, 436; Bank of Ogdensburgh v. Arnold, 5 Paige, 38; Bigler v. Waller, 14 Wall. 297; Zeiter v. Bowman, 6 Barb. 133; Walsh v. Rutgers Fire Ins. Co. 13 Abb. 33.

The mortgagor is entitled to the possession, and the rents and profits up to the time the purchaser under the decree of sale becomes entitled to

the possession. 5 Sandf. 447; 5 Pai. 38; 11 *Ib.* 436; Syracuse City Bank. v. Tallman, 31 Barb. 201.

If the mortgagee is in possession, he cannot commit waste and must keep the premises in repair. He will be accountable for the actual receipt of the rents and profits, and for those lost by his negligence, after deducting disbursements for taxes, necessary repairs, collection by an agent, if necessary, etc. He stands in the relation of trustee, and any renewal of a lease enures to the benefit of the estate, he can make no gain out of the estate. Van Buren v. Olmstead, 5 Pa. 9; Ensign v. Colburn, 11 Pai. 503; 4 Kent, 167; 10 Pai. 49; 2 Johns. Ch. 30.

The mortgagor might maintain trespass against the mortgagee or a person acting under his license. Runyan v. Mersereau, 11 Johns. 534; Hitchcock v. Harrington, 6 *Id.* 290; Coles v. Coles, 15 *Id.* 513.

The mortgagee, also may bring "waste" against the mortgagor or a purchaser. Van Pelt v. McGraw, 4 Com. 110; *Ib.* 3 Barb. 347.

A mortgagee of leasehold premises if he take possession, takes it, *cum onere*, *i. e.*, subject to all covenants. Astor v. Hoyt, 2 Pai. 68; as partially reversed, 5 Wend. 590.

Actual payments of prior incumbrances by a mortgagee entitles him, in equity, to hold the land until reimbursed. Cameron v. Irwin, 5 Hill. 272.

Ejectment.—It is provided (3 Rev. Stat. p. 599, § 50) that no action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises. *Vide* 27 Barb. 54; 9 Barb. 284; 13 Wend. 486; 11 *Ib.* 538; 31 N. Y. 199; 42 Barb. 401.

A mortgagor may have ejectment against a grantee of the mortgagee. Jackson v. Bronson, 19 Johns. 325; also 2 Cow. 195.

Title VI. The Equity of Redemption.

The mortgagor is allowed by the law, as it now exists, to *redeem* the estate by the performance of the condition, even after forfeiture of the condition by non-payment at the day.

18 Johns. 110; 26 Wend. 541; and Kortright v. Cady, 21 N. Y. 343.

This right to redeem is technically called the "*Equity of Redemption.*"

This equity of redemption is the real and beneficial estate, tantamount to the *fee* at law; and it is descendible by inheritance, devisable, alienable and subject to dower, and sale on execution, precisely as if it were an absolute estate of inheritance at law in the mortgagor.

The estate of the *mortgagee*, on the contrary, is not at least before entry and foreclosure, subject to sale on execution, even after forfeiture of condition. 4 Johns. 41.

Sale of Equity of Redemption.—Although an equity of redemption is vendible as real property on an execution at law, by the Revised Statutes, vol. 3, p. 649, § 45, the equity of redemption cannot be sold on execution under a judgment at law for the mortgage debt. *Vide* 6 Hill, 16; 7 Pai. 438; 2 Sand. Ch. 27; Trimm v. Marsh, 3 Lans. 509.

All collusion and dealings for the deprivation of the mortgagor of the equity of redemption are looked upon unfavorably by the courts, and will not stand in equity, if impeached as oppressive, within a reasonable time.

A fair contract for its purchase, however, may be made between the parties, and the mortgagee may become the purchaser at a sale under a decree. The equity of redemption is however an inseparable incident to the mortgage, and cannot be restrained or clogged by agreement. That which was once a mortgage is always a mortgage. 2 Cow. 324; 7. Johns. Ch. 40; 39 Maine, 110; see, also, Jencks v. Alexander, 11 Pai. 618.

Who may Redeem.—The equity of redemption exists not only in the mortgagor himself, but in his heirs and personal representatives, and in *every other person* who has an interest in or a legal or equitable lien upon the land, as grantee, reversioner, remainderman, tenant by curtesy or dower, incumbrancer, &c.

Redemption must be made by the heirs of the mortgagor, in case of his decease. Sutherland v. Barber, 47 Barb. 144.

Further as to who may redeem, *vide infra*, "Foreclosure of Mortgages," ch. 28.

Mortgages on Leases of Five Years unexpired and upwards.—When lessees of such terms are ejected, under summary proceedings, mortgagees, judgment-creditors, &c., may redeem within a year. Laws of 1842, ch. 240; repealing act of Ap. 25, 1840.

Redemption under mortgages to the State, *vide* Laws of 1836, ch. 457.

Redemption, how Made.—He who redeems must pay the mortgage debt and interest due, and he will then stand in the place of the party whose interest in the estate he discharges.

The power of enforcing the right of redemption is an equitable power residing in courts clothed with such powers.

As to redemption by a junior mortgagee, against a prior one, *vide* Pardee v. Van Auken, 3 Barb. 534.

Redemption by assignee of a lease. Averill v. Taylor, 4 Seld. (8 N. Y.), 44.

Equity of Redemption Barred by Time.—The right of redemption may be barred by length of time. In this State, twenty years' adverse possession gives an absolute title. (See Title "Adverse Possession," ch. 24.)

The lapse of twenty years would not bar the mortgagee's right to foreclosure, if any payment have been made within twenty years, or there have been acts recognizing the mortgage; and any purchaser of the land would take at his peril, and at the risk of such payment having been made, although the mortgage was presumptively discharged by lapse of time. *Vide* N. Y. Life Ins. v. Covert, 6 Abb. N. S. 154 (Court of Appeals); Calkins v. Calkins, 3 Barb. 305; 20 N. Y. 147; Borst v. Boyd, 3 Sand. Ch. 501.

In the case of Miner v. Beekman (reported in 50 N. Y. 337 the Court of Appeals holds that the cause of action to redeem mortgaged lands accrues only when the mortgagee enters into possession, claiming title, and that the action is not barred until such possession has continued ten years.

This case determines, also, that an action for redemption is one of purely equitable relief, and, since the Code, must be brought within ten years after the cause of action has accrued. And that, as a general rule, the right of action accrues upon maturity of the mortgage. The case also

holds that a foreclosure being void, as against the owner of redemption not made a party, no claim of adverse possession founded thereon can be valid, as against him. See also Hubfel v. Sibley, 50 N. Y. 468.

These cases set at rest a much vexed question as to the time allowed for redemption. *Vide* Peabody v. Roberts, 47 Barb. 91.

Title VII. The Assignment of Mortgages.

A mortgage is assignable as a chattel interest. It is not a "*conveyance*" within the Statute of Frauds, and would pass by delivery. The debt is considered the *principal*, and the land an incident; and even a *bona fide* assignee takes subject to all equities, unless the mortgagor is considered estopped. The assignee is affected, even by latent equities in favor of third persons.

2 Johns. Ch. 441; 2 *Id.* 479; 2 Cow. 246; 2 Pai. 202; 5 *Id.* 644; 7 *Id.* 316; 5 Den. 640; 11 Pai. 467; 11 Johns. 534; Ingraham v. Disborough, 47 N. Y. 421; Hartley v. Tatham, 1 Key. 222; Prouty v. Eaton, 41 Barb. 410; Hovey v. Hill, 3 Lans. 168; also, 22 N. Y. 535; 60 *Ib.* 61; 39 How. P. 329.

The assignment of the debt transfers at least an equitable title to the mortgage. The mortgage interest, however, as distinct from the debt created by the bond, has no determinate value, and is not a fit subject of assignment. The assignment, without the accompanying bond, whether by writing or parol, and as collateral or otherwise, is a nullity, and the assignee acquires no interest. Cooper v. Newland, 17 Abb. 342; Merrott v. Bartholick, 47 Barb. 253; affi'd, 36 N. Y. 44; Pattison v. Hull, 9 Cow. 747; Jackson v. Blodget, 5 Cow. 202.

The assignee of the assignee of a mortgage takes only the title of his assignor. Sweet v. Van Wyck, 3 Barb. Ch. 451; White v. Knapp, 8 Pai. 173; Bush v. Lathrop, 22 N. Y. 535.

An assignment of the bond and mortgage and the money due, &c., carries all collaterals. Belden v. Meeker, 2 Lans. 470; Craig v. Parkes, 40 N. Y. 181.

Infant.—An infant cannot assign a bond and mortgage. Peabody v. Farton, 3 Barb. Ch. 451.

Record of Assignments—Mortgages.—*Vide post*, ch. 26, as to the necessity of the record of assignments, so as to operate as notice.

Assignment to Mortgagor.—The legal effect of an assignment of a mortgage from the mortgagee to the mortgagor, is to extinguish it, so as to let in subsequent liens. Moore v. Hamilton, 48 Barb. 120; 42 N. Y. 334.

An assignee is an "incumbrancer," and is bound by a "*lis pendens*" notice. Hovey v. Hill, 3 Lans. 168.

Title VIII. Payment, Extinguishment and Discharge of Mortgages.

Provision was made by law of December 12th, 1753, and February 26th, 1788, re-enacted, by law of March 19,

1813, for the discharge of mortgages on record by clerks of counties on presentation of a certificate similar to the one below mentioned, the certificate to be signed in presence of two witnesses and acknowledged or proved as then required by law.

The Revised Statute, § 60, p. 527, vol. 3, 5th edition, provides as follows:

"Any mortgage that has been registered or recorded, or that may hereafter be recorded, shall be discharged *upon the record* thereof by the officer in whose custody it shall be, whenever there shall be presented to him a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged, or proved and certified as hereinbefore prescribed, to entitle conveyances to be recorded, specifying that such mortgage has been paid or otherwise satisfied and discharged."

It may be discharged by order of Supreme Court in certain cases, in case of death of mortgagees, or of dissolution of a corporation or association. Laws of 1862, p. 610; amended by Laws of 1868, ch. 798; amended, Law of 1873, ch. 551.

One of several joint mortgagees may discharge a mortgage, or one joint executor or partner. The People v. Keyser, Court of Appeals, 28 N. Y. 226; reversing, 39 Barb. 587; 2 Barb. Ch. 151; 17 Abb. P. R. 214; 23 How. Pr. 223; 3 John. 68; 37 Barb. 466; reversing, 32 Barb. 612; Stuyvesant v. Hall, 2 Barb. Ch. 151; Bogert v. Hertell, 4 Hill, 492.

This is the rule, whether the mortgagees held jointly as individuals or as executors; and the executors of a deceased mortgagee or assignee do not have to join. 28 N. Y. 226, *supra*, explaining, Peck v. Williams, 6 Seld. 509, and The People v. Miner, 32 Barb. 612. See, also, Babcock v. Beman, 11 N. Y. 200; Chouteau v. Suydam, 21 *Id.* 179; Carman v. Pultz, 21 *Id.* 550; as to trustees, *vide supra*, p. 291.

Return of the Mortgage.—When the debt is satisfied the mortgagor is entitled to have the mortgage and bond delivered up to him, and canceled. Matter of Coster, 2 Johns. Ch. 503.

Mortgages to the State.—As to the discharge of such mortgages, *vide* Rev. Stat. Vol. 1, p. 483, 496.

Mortgages to Loan Commissioners may be discharged also by the comptroller. Laws of 1868, ch. 693.

After Assignment.—After assignment recorded, the mortgage cannot be discharged by the mortgagee; and see, as to protection of *bona fide* purchasers, Belden v. Meeker, 47 N. Y. 308; Ely v. Scofield, 35 Barb. 330.

On Decease of Mortgagee.—His executors or administrators are the ones to acknowledge satisfaction. Ely v. Scofield, 35 Barb. 330.

The domestic administrator not a foreign one. Stone v. Scripture, 4 Lans. 186.

By Guardians of Infants.—Subsequent mortgagees or purchasers are bound to inquire by what authority a guardian discharges a mortgage,

and that every requisite has been performed. Swartout v. Curtis, 5 N. Y. 301.

By a Public Officer.—Parties must see that he had proper authority, and acted under the order of a court, where that is necessary. Walworth v. F. L. & T. Co. 1 Com. 433.

Record of Certificate of Discharge.—§ 61. Every such certificate, and the proof or acknowledgment thereof, shall be recorded at full length; and a reference shall be made to the book and page containing such record, and a minute of the discharge of such mortgage made by the officer upon the record thereof. 3 Rev. Stat. p. 58.

Taken from 1 Rev. Laws, p. 373, § 4. Before the revision of 1830, there was no provision that the certificate of discharge should be recorded.

Discharge by Payment or Tender.—By the Statute (vol. 3, p. 590), after the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to be extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period.

This would not apply if payments had been made within twenty years before commencement of foreclosure. N. Y. L. & T. Co. v. Covert, 6 Abb. N. S. 154; and *ante*, p. 545.

After twenty years, where no interest has been paid, and there has been no foreclosure or entry, the mortgage will be considered as paid. Jackson v. Wood, 12 Johns. 242.

A mortgage that has once been paid cannot be revived to the prejudice of subsequent incumbrances, &c. 6 N. Y. 449; *Ib.* 147; 23 N. Y. 556.

Payment extinguishes the power of sale, 5 Hill, 272; and the mortgage thereafter cannot be kept alive by any agreement. Kellogg v. Ames, 41 Barb. 211.

An uncancelled mortgage, sixty years old, is no lien. Belmont v. O'Brien, 2 Ker. 394.

Tender and Refusal.—At any time before foreclosure decree is equivalent to payment in respect of discharging the lien from the land mortgaged. 18 Johns. 110; 21 Wend. 466; 11 Wend. 533; 26 Wend. 541; 23 N. Y. 556; 21 N. Y. 343; reversing, 23 Barb. 490. See, also, 26 How. Pr. 158; Hartley v. Tatham, 1 Keyes, 222; 50 N. Y. 547.

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Tender, however, does not extinguish the debt, but removes the lien. It is not necessary to show a continued willingness to pay, nor to bring the money into court. Jackson v. Craft, 18 Johns. 110; Hunter v. Le Conte, 6 Cow. 728; Arnot v. Post, 6 Hill, 65; 2 Den. 344; Merritt v. Lambert, 7 Pai. 344; Edwards v. Farmers, &c. Co, 21 Wend. 467; 20 *Ib.* 541; Kortright v. Cady, 21 N. Y. 343; reversing, 23 Barb 490.

Decree and Sale.—A foreclosure decree extinguishes the mortgage lien although it is not docketed.

After a decree and sale, neither the mortgage nor the decree is a lien. The People v. McKnight, 1 Barb. 379.

Release of Part of the Premises.—This does not release the balance, and even if not under seal, it may be enforced in equity. Headley v. Goundry, 41 Barb. 279.

Merger.—The mortgage also may be removed, or discharged by merger and extinguishment.

If the mortgagor becomes the owner of the bond and mortgage, the lien is gone and cannot be revived. Angel v. Bonner, 38 Barb. 425; Kellogg v. Ames, 41 Barb. 218.

As a general rule, where the owner of the mortgage becomes owner of the fee, the mortgage is merged in the greater estate. This rule is modified by the intention of the parties, or in equity where the circumstances are such that it would be beneficial to one party and not injurious to others, to continue the mortgage, as also in the case infancy.

As an illustration of the rule and the above exceptions, *vide* James v. Johnson, 6 Johns. Ch. 417; Skeel v. Spraker, 8 Pai. 182; Gardner v. Adams, 3 John. Ch. 53; Starr v. Ellis, 6 Johns. Ch. 393; Forbes v. Moffat, 18 Ves. 384; Hill v. Pixley, 63 Barb. 200; Compton v. Oxden, 2 Ves. Jun. 261; James v. Mowry, 2 Cow. 246; *Ib.* 6 Joh. Ch. 420; see also ch. 26.

No merger takes place in equity where there is an intermediate mortgage. Millspaugh v. McBride, 7 Pai. 509.

And see more fully as to merger, *ante*, p. 203, and 42 N. Y. 334.

TITLE IX. MISCELLANEOUS PROVISIONS, MORTGAGES.

The following general provisions, it may be desirable to refer to, in connection with mortgages.

Lands Devised or Descended Subject to a Mortgage.—As to who is to pay the same, *vide ante*, pp. 388, 405.

Notice to Mortgagees, by purchasers under tax and assessment sales. In order to establish titles on lands sold for taxes, as against mortgagees, certain notices have to be served, as to the details of which, *vide* Laws of May 14, 1840, ch. 387; May 4, 1844, ch. 266; 1855, ch. 427; Apr. 17, 1862, ch. 285; 1870, ch. 280.

Dower in Mortgaged Lands.—Where a person seized of an estate of inheritance in lands, shall have executed a mortgage of such estate before marriage. his widow shall nevertheless be entitled to dower therein, as against every person except the mortgagee, and those claiming under him. 3 Rev. Stat. p. 31, § 4.

Where Lands are Mortgaged for Purchase Money.—§ 5, *Ib.* Where lands are so mortgaged the widow shall not be entitled to dower therein, as against the *mortgagee*, or those claiming under him, although she shall not have united in such mortgage, but she shall be entitled to her dower as against all other persons. This is the case even where the mortgage is given to a third person who advances the money. Kittle v. Van Dyke, 1 Sand. Ch. 76. See fully as to these provisions, *ante*, p. 159.

Mortgages to and by Aliens.— *Vide ante*, pp. 92 to 99. Their consideration money mortgages are valid, and only the equity of redemption is liable to escheat.

Mortgages to the State.—*Vide* 1 R. S. ch. 9, title 6.

Mortgages by Tenants for Life, and Married Women under a Power.—*Vide ante*, p. 338.

Adverse Possession.—Those having a just title to lands held under adverse possession, may execute a mortgage on such lands, which shall bind the lands from recovery of possession, and have preference over judgments and mortgages subsequent to the record of the above mortgage. 1 R. S. 739, 1st edit. See, also, 5 N. Y. 347; 41 Barb. 288.

Sale of Land for Taxes, Mortgages how Apportioned.—See Laws of 1855, ch. 427; 1 R. S. 5th edit. 937.

Purchasers of Lands Sold for Quit Rents.—See Act of Apr. 13, 1819; 1 Wend. 301.

Madison Co. Mutual Insurance Notes.—By-Laws of March 23, 1836. The deposit notes of said company when filed with a county clerk where the property is situated, are made a mortgage lien.

Consideration Money Mortgages a Prior Lien to Judgments.—Whenever lands are sold and conveyed and a mortgage is given by the purchaser at the same time to secure the payment of the purchase money, or any part thereof, such mortgage shall be preferred to any previous judgment which may have been obtained against such purchaser. 3 Rev. Stat. p. 39, § 5.

If both instruments are of the same date, the presumption is the mortgage is for the consideration. Such preference is given over judgments even if the mortgage is executed to a third person, who advances the money. Jackson v. Austin, 15 Johns. 477; Card v. Bird, 10 Paige, 46; Cunningham v. Knight, 1 Barb. 399; Coutant v. Servoss, 3 Barb. 128.

Effect of Partition.—Where a mortgage was given on an undivided share, on partition, the mortgage is to be considered attached to the divided share. Jackson v. Pierce, 10 Johns. 414.

Leases for Five Years or over.—Mortgagees, &c., may redeem within a year on removal of a lessee holding such a term. Laws of 1842, ch. 240.

Mortgages, when Void for Usury.—*Vide* Vickery v. Dickinson, 62 Barb. 272.

Order of Charge, when Lands are Sold.—When lands are contracted to be sold, or sold to different purchasers at different times, the residue, if any, is the primary fund for the payment of the original mortgage, and if a purchaser transfer different parcels, they are chargeable in the inverse order of sale. This right is an equitable, not a legal right. 8 Pai. 182; Crafts v. Aspinwall, 2 Com. 289; How. Ins. Co. v. Halsey, 4 Sand. 565, 4 Seld. 271; 46 N. Y. 627; Halsey v. Reed, 9 Pai. 446. See this case as to the rights of heirs and the various owners. Clowes v. Dickinson, 5 John. Ch. 235; Schryver v. Teller, 9 Pai. 173; Grosvenor v. Lynch, 2 Pai. 300; Guion v. Knapp, 6 Pai. 35; Snyder v. Stafford, 11 *Id.* 71; N. Y. L. Ins. Co. v. Milnor, 1 Barb. Ch. 353; Stuyvesant v. Hall, 2 *Id.* 151; Skeel v. Spraker, 8 Pai. 182.

As to obligation of mortgagees when releasing part of mortgaged premises to ascertain previous sales, *vide* How. Ins. Co. v. Halsey, 4 Seld. 271.

CHAPTER XXIV.

THE HOLDING AND TRANSFER OF REALTY BY CORPORATIONS.

TITLE I. GENERAL POWERS TO TAKE AND TRANSFER LAND.

The power to purchase lands, in the course of its lawful operations, is a power incident at common law to every corporation, unless specially or impliedly restrained by its charter, or by statute; and when an authority to *purchase* is allowed or conferred, the power to *sell* is necessarily implied. The law as to devises to corporations has been reviewed in a preceding chapter.

Vide Jackson v. Bowen, 5 Wend. 590; Angell & James on Corporations, 83, *et seq.;* Moss v. The Rossie Lead Co. 5 Hill, 137; De Ruyter v. St. Peter's Church, 3 Coms. 238; Barry v. Merchants' Ex. Ins. Co. 1 Sand. Ch. 280; Central Gold Co. v. Platt, 3 Daly, 263. A community not incorporated cannot purchase and take in succession. It has been so held with respect to the people of a county (8 Johns. 388), and of a town. 9 Johns. 73; 12 Johns. 199. The Revised Statutes have altered this restriction as to counties, towns, &c. 1 Rev. Stat. 364, 337; 2 *Id.* 701; and *post*, Title IX. See also, as to towns, Lorillard v. Town of Monroe, 1 Ker. 392; People v. Stout, 23 Barb. 338. As to counties, Hill v. Livingston Co. 2 Ker. 52; Jackson v. Hartwell, 8 Johns. 380. A change of name or extension of powers does not alter rights in property of a corporation. Girard v. Philadelphia, 7 Wall. 1.

A corporation, though incorporated for a limited period, may acquire title in fee to lands necessary for its use; and it would take such fee without words of succession, and pass it to others; and a grant to it *generally* would be a grant in fee.

Nicoll v. N. Y. & E. R. R. 12 N. Y. 2 Ker. 121; The People v. Mauran, 5 Den. 389; Owen v. Smith. 31 Barb. 641; 1 R. S. 1st ed. p. 600, § 9. See, also, 31 Barb. 411, 645; 30 *Ib.* 587; 7 J. C. R. 128; 10 Wend. 454; 5 Denio, 574; 46 Barb. 365; 42 *Ib.* 174.

States.—A statutory conveyance of property cannot strictly operate beyond the local jurisdiction, although its effect may be extended by State comity. Oakey v. Bennet, 11 How. 33; Van Horn v. Dollrance, 2 Dall. 304. See fully, also, as to transfers from the State by letters patent, charter, grant, and legislative act, *ante*, ch. i.

The United States.—The United States are a body corporate, having capacity to contract and to take and hold property in any of the States. When the United States purchase lands within the boundaries of a State, without the consent of the State, which they may do, the jurisdiction over the lands still continues, and the *lex rei sitæ* will govern. When the purchase is made for forts, docks, arsenals, &c., with the consent of the State, the land falls within the exclusive jurisdiction of Congress, and State jurisdiction is ousted. Dibble v. Clapp, 31 How. 420; The People v. Godfrey, 17 Johns. 225; Stearns v. U. States, 2 Paine, 300; U. S. v. Cornell, 2 Mass. 60; Constitution of U. S. Art. i. § 8: U. S. v. Ames, 1 Wood & M. 76; Irvine v. Marshall, 20 How. 558; U. S. v. Cornell, 2 Mass. 60; Act of Apr. 28, 1828; 5 Stat. at Large, 264; see, also, *ante*, p. 398, as to devises to the U. States.

Foreign Corporations.—A legally constituted corporation in another State, may hold land *ad libitum* in this State, provided it is authorized by charter. 2 Kent, p. 283.

By Revised Statutes of 1830, every corporation, as such, has power to *hold, purchase and convey* such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter; and also to make and use a common seal, and alter the same at pleasure.

Title 3, Ch. XVIII, Part 1, § 1. These provisions are applicable as well to future corporations. *Ib.* § 2; 5 Den. 577; 2 Cow. 664. Unless otherwise provided, a majority of its directors, &c., is to act, and a decision of a majority assembled as a board shall be a valid act. Rev. Stat. *ib.* § 6. Its corporate powers are to cease, unless it organize and transact business within a year from the date of incorporation; and its charter is subject to repeal, alteration or suspension by the legislature. *Ib.* §§ 7, 8; 5 Hill, 383; 14 Barb. 559; 10 Barb. 260; 17 Barb. 603; 8 Barb. 364. Where its charter specifies the objects for which it may hold real estate, it cannot take it for another purpose. Boyce v. St. Louis City, 29 Barb. 650; Central Gold Mining Co. v. Platt, 3 Daly, 263. A provision in the charter enabling a corporation to take land by purchase or *otherwise*, is an authority, within the statute of wills, to take by devise. Downing v. Marshall, 23 N. Y. 366.

Provision against Mortgaging.—A provision against mortgaging, does not preclude an equitable lien in favor of vendors of land to the corporation. Dubois v. Hull, 43 Barb. 26.

Unlawful Alienations may be Set Aside.—The Supreme Court is authorized to set aside and restrain all alienations of property, made by a corporation, contrary to law or its charter. 3 Rev. Stat. p. 762.

Transfers after Proceedings for Dissolution.—All conveyances, mort-

gages, assignments and transfers, &c., of real and personal estate made by a corporation after filing a petition for dissolution are *void* as against the receiver and creditors. 3 Rev. Stat. p. 770.

Increase beyond Amount Allowed to be Held by Law.—This cannot divest title, and the amount in excess is voidable only by the State. Chamberlain v. Chamberlain, 3 Lans. 348; Bogardus v. Trinity Church, 4 Sand. Ch. 663.

TITLE II. TRANSFERS, HOW MADE.

The real estate of a corporation can be conveyed by it only in its corporate capacity, and not by the individual members of the corporation or the stockholders; unless individuals have the title in their names. Nor can directors contract with themselves, as individuals, on behalf of the corporation.

Cammeyer v. United Lutheran Churches, 2 Sand. Ch. 186; Wilde v. Jenkins, 4 Pai. 481; De Zeng v. Beekman, 2 Hill, 489; Coleman v. 2d Av. R. R. 38 N. Y. 201; and see, *post*, "Religious Corporations."

The conveyance or mortgaging by corporations is effected by the signature of the instrument by the proper officer or agent of the corporation, under its direction, who has charge of the corporate seal, and by the impression of the seal, with a proper attestation thereof, and that the same was affixed by authority of the body.

The Affixing of the Seal is *prima facie* evidence that it was done by the authority of the corporation. 6 Paige, 54; 1 Denio, 520; 1 Seld. 355; 5 Wend. 575; 7 Hill, 91. If directors have been deprived of authority, except to close the concern, their conveyance would be void. Green v. Seymour, 3 Sand. Ch. 285. The instrument is usually signed by the president, and attested by the secretary. How far the authority to sign from the board, should be shown, where a previous direction is necessary, *vide* 3 Barb. Ch. 207; 5 N. Y. 320; 3 Bosw. 267, 285; 2 Black. 715; 7 Hill, 91. It is stated in 3 Bosw. 285, Hoyt v. Selden, that a company would be *estopped* from denying the authority of its officers to execute the instrument. So also, Philips v. Campbell, 43 N. Y. 271. An assignment of all its property without specific authority from the company would be void. Murray v. Vanderbilt, 39 Barb. 140. A treasurer cannot assign a mortgage without authority from the directors, 5 Wend. 572, nor the president and cashier. 5 N. Y. 321; 39 Barb. 140. The recitals showing authority are not conclusive evidence. Hoyt v. Thompson, 1 Seld. 220. The seal must be that of the corporation. Mann v. Pentz, 2 Sand. Ch. 257. Formerly its seal had to be on wax or some other tenacious substance. By recent laws the seal, when it is authorized by law, to be affixed, may be impressed on the paper. Laws of 1848, ch. 197. Proof by the president signing the deed that the seal is the corporate seal, and was affixed by its authority, entitles it to be recorded. 6 Paige, 54; 3 Barb. Ch. 207, 238. It should be affixed by the officer having custody, by the direction of the managing officers. In the absence of proof, courts would presume it was

affixed by authority of trustees, &c. Jackson v. Camp, 5 Wend. 575. See, also, Eustis v. Leavitt, 17 Barb. 309; Leavitt v. Blatchford, 17 N. Y. 541, as to Bonds of a Corporation. A temporary seal may be adopted if the corporation have none. South Bap. Soc. v. Clapp, 18 Barb. 36; Hunter v. Hud. Riv. Co. 20 Barb. 494. See the latter case as to an attestation by the treasurer, where the company had no seal.

Banking Associations under Law of 1838.—The president may assign mortgages under his own name. Valk v. Crandall, 1 Sand. Ch. 179.

Acknowledgment.—The officer who is intrusted with and affixes the seal is the one to acknowledge the instrument; stating his authority, that he knows the seal, and that the same was affixed by order of the board, and that he subscribed his name as witness. Lovett v. The Steam Saw Mill Ass'n, 6 Pai. 60; Johnson v. Bush, 3 Barb. Ch. 207.

Delivery.—The deed of a corporation, it has been said, does not need delivery, if the seal has been duly affixed with that intent, unless there is a direction to the contrary. Derby Canal Co. v. Wilmot, 9 East, 360.

TITLE III. MISCELLANEOUS PROVISIONS AS TO CORPORATIONS.

The following provisions are of importance to note:

Certain Transfers Void.—Any incorporated company that has refused the payment of any of its notes or evidences of debt, in specie or lawful money of the United States, cannot make any transfer of its property, &c. to any *of its officers or stockholders, directly or indirectly, in payment of a debt;* and no transfer, &c., in *contemplation of insolvency* to *any* person whatever shall be legal. And if insolvent for a year, or has neglected to redeem its notes, &c., or suspended business, &c., for a year, it shall be deemed dissolved. 1 R. S. 603, 1st edit. By the Rev. Stat. and law of 1871, ch. 883, this is qualified so as not to apply to *religious* corporations, or to *moneyed* corporations created or renewed after January 1, 1828. An assignment even to pay creditors *pro rata* would be void. Harris v. Thompson, 15 Barb. 62; Sibell v. Remsen, 33 N. Y. 95. *Vide infra* as to moneyed corporations and religious societies. Laws of 1825, 450; 3 Barb. 121; 11 Barb. 265; 30 Barb. 646; 5 Hilt. 221; 44 Barb. 631; 36 Barb. 261. Associations under the banking law are within the prohibition. Robinson v. Bank of Attica, 21 N. Y. 406. Otherwise than as above provided, a general assignment might be made of property, but not of the franchise. De Ruyter v. St. Peter's Church, 3 Com. 238; Hurlburt v. Carter, 21 Barb. 221. But it seems that a general assignment by the directors of a corporation of all its property would be void as against stockholders not consenting, whether the company were solvent or not. Smith v. N. Y. C. Stage Co. 18 Abb. P. 419.

Unauthorized Purchase or Loan.—A corporation cannot avoid an obligation on the ground that it was given for property which the corporation was unauthorized to purchase. Moss v. The Rossie Lead Co. 5 Hill, 137; State of Indiana v. Woram, 6 Hill, 33. If it loan in any manner unauthorized by its charter, the security is void. Life, &c., Ins. Co. v. Mechanics' Ins. Co. 7 Wend. 31; Bissell v. The In. M. R. *supra.* But the money may be recovered back. Steam Nav. Co. v. Weld, 17 Barb. 378. Mott v. U. S. Trust Co. 19 *Id.* 568; Moss v. McCullough, 7 Barb. 279.

Legislature may Confirm Void Grant.—The legislature has power to confirm a grant attempted to be made by a corporation, but void for irregularity. The People v. Law, 34 Barb. 494.

Reverter of Lands on Dissolution.—On the dissolution of a corporation without having aliened its lands, it was formerly the law that the title to land not transferred by it, would *revert* to the original grantor or his heirs, unless there was provision to the contrary in its charter or by statute. Property undisposed of would now belong to the corporators.

The People v. Maman, 5 Denio, 389; Owen v. Smith, 31 Barb. 641; Tinkham v. Borst, 31 Barb. 407; Mahon v. N. Y. C. R. R. 24 N. Y. 658, is to the contrary so far as a turnpike franchise is concerned; the company having but an easement. The case of Bingham v. Weiderway, 1 Com. 509, also intimates that there would be a reverter to the original grantor on a dissolution. As to plank roads, *vide* 50 N. Y. 302.

Change of Name of Corporations.—By act of April 21, 1870, ch. 322, corporations, except those created by special charter, and banks or banking associations, trust companies, and insurance and railroad companies, may have their names changed on complying with the provisions of the act.

Proceedings against Corporations by Injunction and to Obtain Receivers.—See an important act, April 7, 1870, ch. 151.

Presumed Dissolution.—If an incorporated company remain insolvent for a year, or for that time has refused to pay its notes, &c., or for one year has suspended its ordinary business, it shall be adjudged dissolved. 2 R. S. p. 463, § 38.

Purchase of Franchises and Property of Corporations Sold by Mortgage, and Reformation of Companies.—Act of May 9, 1873, ch. 469.

Amended Certificate.—By law of April 5, 1870, ch. 135, where corporations are organized under general acts, and the original certificate is defective, an amended one may be filed; and the corporation shall be deemed created from the time of filing the original certificate.

Transfers to Stockholders.—Moneyed corporations cannot make dividends except from surplus profits, nor transfer to stockholders, nor reduce the capital stock, without the consent of the legislature. 1 R. S. 1st edit. p. 589, § 1. This is also made applicable to any incorporated company. *Ib.* p. 601, § 1.

Corporations to Acquire Land in other States.—By law of March 28, 1872, ch. 146, corporations organized here, and transacting business in several States, may acquire and convey in such States, with the consent thereof, real estate requisite for the convenient transaction of their business.

Devises to Corporations.—See fully as to this, *ante*, pp. 421 to 424.

Title IV. Religious, Educational and Charitable Corporations.

Religious coporations do not have the common law rights of other corporations to alienate their real property, but are under restrictions imposed by the Legislature.

Act of 1813.—The trustees of every "religious

society" incorporated under the Statute of 1813, originally enacted, are authorized to take into their possession all its real estate and other temporalities, and to *purchase* and hold other real and personal estate, and to *demise, lease, and improve* the same for the use of the church, &c., *or other pious uses*, so that its whole real and personal estate should not exceed the annual value or income of $3,000.

The Reformed Protestant Dutch Church of the city of New York, by said law, might have an income of $9,000; the First Presbyterian Church of the city of New York, $6,000; St. George's Church, of the city of New York, $6,000; the Reformed Dutch Church of Albany, $10,000. The provision allowing an income of $3,000 was altered to $6,000 for the churches in the city of New York. Laws of 1819, ch. 33. Formerly religious corporations in this State, although authorized to purchase, take and lease lands, were not authorized to sell the same. The first general act for incorporating religious societies was passed April 6, 1784, 1 Green. 71; altered for Dutch Churches, March 7, 1788, 2 Gr. 132, amend. 1806, ch. 43. The general act now existing was passed in substance April 5, 1813, (2 Rev. Laws, p. 212), and re-enacted by the Revised Statutes. The Act of 1813 was amended in various particulars, by laws of 1801, ch. 79; 1814, ch. 1; 1819, ch. 33; 1822, ch. 187; 1825, ch. 303; 1826, ch. 47; 1844, ch. 158; 1850, ch. 122; 1866, ch. 414; 1867, ch. 656, and as hereafter stated. The Supreme Court (23 Barb. 327), formerly the chancellor, also County Court (Code, § 30, and Law of Dec. 14, 1847, ch. 470, amending act of May 12, 1847), in any case deemed proper, on application from a *religious* corporation, may make an order for *sale* of real estate belonging to it. [This act not to extend to any lands granted by this State for the support of the gospel.] The County Courts are to act on lands in the county. Rev. Stat. part 1, ch. 18, title, 6; Laws of 1806, ch. 43; 2 Laws of 1813, p. 218. The vice-chancellor had the same power as the chancellor. The conveyance cannot be made *gratuitously*. 45 Barb. 356. The court cannot order a *gift* or *surrender* (19 Abb. 105.), but may order an exchange or union with another society; but not unless there is a corporate consolidation on either side, so as to amount to a sale. Mad. Av. &c. Church v. The Bap. Church, 30 How. 455; 3 Rob. 570; 11 Abb. N. S. 133; 1 Abb. N. S. 214; partially reversed, 46 N. Y. 131.

"*Pious Uses.*"—As to what are pious uses under the laws of 1813, and how far the law of 1813, is within subsequent general statutes as to trusts, *vide*, *ante* p. 305.

The Sale.—The trustees cannot sell, &c., except as provided by the act of 1813, or other acts. They have no power to make an absolute sale of a pew without reservation of rent, nor to sell without consideration, even if so ordered by the court. Voorhees v. Presb. Ch. 8 Barb. 135, and 17 Barb. 103; Abernethey v. Ch. of Puritans, 3 Dal. 1; The Mad. Av. Ch. v. Bap. Ch. 46 N. Y. 131; overruling, 3 Rob. 570; 30 How. 455. Nor to make a sale closing the existence of the church. 16 Barb. 237; 18 N. Y. 395; 2 Sand. Ch. 186; 11 N. Y. 94; 9 How. 132. Nor can the court compel the trustees to sell. *Ib.* They may remove the church edifice without application. Second Bap. Soc. 20 How. P. 324. A deed taken virtually in trust for a religious corporation, *i. e.*, a naked trust, either express or implied, even without written declaration, will vest the legal title in the

corporation, if it be afterwards incorporated. Voorhees v. The Presb. Ch. 8 Barb. 135; The Elder, &c. v. Witherill, 3 Pai. 296; The Refd. D. Ch. v. Mott, 7 Pai. 77.

Pews.—*Vide ante*, p. 107; and Voorhees v. Presb. Ch. 8 Barb. 135, and 17 Barb. 103; The Elders, &c. v. Witherill, 3 Pai. 196; also 12 Barb. 135; as to changes in the church edifice, and the rights of pew owners. Also Abernethey v. Church of Puritans, 3 Dal. 1.

Legislative Authority.—An authority given by a general law to a religious corporation, to sell, for its own benefit, its real estate, impairs the obligation of no contract, and violates no law, although its charter forbids the alienation of its real estate. Burton's Appeal, 57 Penn. St. 213.

Interference of Courts.—As to how far courts may interfere with the internal action of a religious society, *vide* Robertson v. Bullions, 9 Barb. 64; aff'd, 11 N. Y. 243; Youngs v. Ransom, 31 Barb. 50; Burrill v. Associate, &c., Ch. 44 Barb. 282. As to how far a donation to it may be restricted in its use; and confined to the purposes for which it was given, *vide* same cases; also The People v. Dilcher, 6 Lans. 172, as to the rights of a corporator, reversing 3 Lans. 434.

Alienation, by Whom.—All the trustees may execute a mortgage without previous resolution. S. Bap. Soc. v. Clapp, 18 Bar. 36. But the power to make sales is in the court, and it may make them through a referee. De Ruyter v. St. Peter's Church, 3 Com. 238. And a sale of lands, &c., would not carry the franchise. *Ib.* In the case of The Mad. Av. Bap. Ch. v. The Baptist Church, 46 N. Y. 131, it is held, that the trustees are the proper persons to take steps under § 11, to make the sale, and their acts are binding without the assent of a majority of the corporation, overruling Wyatt v. Benson, 23 Barb. 327; and s. c. 4 Abb. 182. The trustees of a religious corporation are not its corporators, but its managing agents, to make applications for sale or mortgaging, &c. St. Ann's Church, 14 Abb. 424; Robertson v. Bullions, 9 Barb. 64; aff'd, 11 N. Y. 243; Cammeyer v. United German Church, 2 Sand. Ch. 186. Under the act of 1813, a religious corporation may mortgage its property without the order of the court. Manning v. Moscow P. Society, 27 Barb. 52; 5 Baptist Soc. v. Clapp, 18 Barb. 35.

Law of 1868, *Amending the Act of* 1813.—The above act of April 5, 1813, was extensively modified by the act of May 9, 1868, ch. 803.

By said act, the churchwarden and vestrymen, and their successors and the rector, if any, are to be a body corporate and trustees under the name expressed in the certificate. The rector is to be present at all meetings affecting realty. The general provisions of the act are to apply to Protestant Episcopal churches in the State, incorporated under the act of 1813, or its amending acts. Also to the various acts for the incorporation of religious societies, passed April 6, 1784; March 27, 1801; and March 17, 1795; and also to societies incorporated by special charter, before or after July 4, 1776, whereof the vestry shall, by regular meeting, vote to adopt the same, and it be ratified by a majority vote of all qualified votes, as provided; provided a certificate of the resolution passed, &c., be filed with the county clerk, as in the act required. This act also repeals § 1 of act of March 5, 1819; also § 3 of February 15, 1826, is not thereafter to apply to any Protestant Episcopal churches in the State. Inconsistent acts are repealed.

The following acts supplementary to the act of 1813, are also noted for reference:

True Reformed Dutch Church.—*Vide* laws of 1825, ch. 303. May be incorporated under the act of 1813.

Reformed Protestant Dutch Church—*Vide* law of April 15, 1835, ch. 90.

Names of Corporations may be Changed.—Act of June 4, 1853, ch. 323.

Burial Places Acquired by Religious Corporations.—See *post*, Title viii.

Other Lands may be Acquired.—See laws of March 3, 1850, ch. 122; April 10, 1860, ch. 235, as to acquisition of other lands for churches, chapels, schools, rectories, &c. Record of certificate in the city of New York, as to errors in, *vide* law April 29, 1863, ch. 287.

Greek Churches.—Laws of 1871, ch. 12.

Reformed Presbyterian Churches or Congregations.—By law of April 7, 1866, ch. 447, they may incorporate under the law of 1813 and 1822, *supra*.

Educational Institutions—also for Worship, Parsonages and Rectories.—Laws of 1870, ch. 57.

Parsonages, &c., for Elders of Methodist Churches.—Act of April 5, 1867, ch. 265; amended by act of May 9, 1868, ch. 784.

Roman Catholic Churches.—Act of March 25, 1863, ch. 45. They may incorporate under the act of 1813. The whole real and personal estate in value, exclusive of the church edifice, parsonage and school houses, and the land therefor, and burying places, shall not exceed annually $3,000. The act is not to be construed to alter or repeal the act of 1860, ch. 360, as to devises to religious corporations, &c. The act confirms conveyances theretofore made to the use of the corporation.

Free Churches.—They may hold real estate, as in the case of "*benevolent, charitable, &c., societies*," under the act of April 12, 1848, and Apr. 7, 1849, *vide infra*, except that the limitation as to value shall not apply to any church edifice or lot for the same owned or occupied in the city of New York. Laws of 1854, ch. 218. No real estate of a free church can be *sold* or *mortgaged* without the direction of the Supreme Court, to be given as in cases of religious corporations. See, also, as to free churches or chapels, law of Apr. 23, 1867, ch. 657.

Religious Societies.—By law of Apr. 10, 1872, ch. 209, religious societies are allowed to be incorporated under "the act for the incorporation of benevolent, charitable and missionary societies" of Apr. 12, 1848, *infra*. By act of Apr. 27, 1872, ch. 424, religious societies may be dissolved by the Supreme Court, except in the city and county of New York, on application of a majority of trustees, and a sale of their property decreed. Law of 1871, ch. 776. This act extends the rights and powers, under the law of April 5, 1813, to all religious corporations, the value of any school-house or rectory to be not computed in any valuation.

General Provisions of Statute as to Corporations.—Religious societies and moneyed corporations created or renewed after January 1, 1828, are excluded from operation of Title iv, ch. 18, Part 1, of Rev. Stat. relative to corporations generally.

Ecclesiastics.—The act of 1855, ch. 230, prevented conveyances, &c., to those holding ecclesiastical offices, or for religious purposes, except under certain conditions. It was repealed by law of April 8, 1862.

Benevolent, Charitable, Scientific and Missionary Societies.—Act April 12, 1848, ch. 319. They may take, re-

ceive, purchase and hold real estate for the purposes of their incorporation only, to an amount not over $50,000, and personal not over $75,000; the clear income of both not to exceed $10,000. See, also, the restriction as to their taking by devise or bequest. § 6, and *ante, Devises*, p. 422.

By act April 7, 1849, ch. 273, the trustees of such societies, by conforming to the requisites of the 1st section of the act of 1848, may re-incorporate themselves for the time limited, and the property, &c., of the existing corporation shall vest in the re-incorporation. The act was amended as to real property, &c., May 11, 1872, ch. 649.

Sunday School, Mission, Religious Knowledge or Opinion.—Amended so as to include corporations for such purposes, May 11, 1872, ch. 649. The act was amended so as to include *historical, literary and art societies* (Laws of 1860, ch. 242; 1862, ch. 302); also *orphan asylums.* Laws of 1861, ch. 58.

Sales and Mortgages.—The Supreme Court, upon the application of any *Benevolent, Charitable, Scientific or Missionary* Society, incorporated by law, may make an order for the *mortgaging* of any real estate belonging to said corporation, and direct application of proceeds. Laws of 1854, ch. 50. See also laws of 1861, ch. 58, allowing *sales or leases* through the Supreme Court on application of three-fourths of trustees; also including orphan asylums. No purchase, lease, or sale of real estate, however, shall be made, unless two-thirds of the whole number of trustees are present at the meeting ordering it. See laws of 1853, ch. 487, as to the above and as to the trustees generally.

Fine Art Associations.—Such associations may be incorporated under the law of April 12, 1848, and amending acts. As to what property it may take, *vide* laws of 1860, ch. 242. Under the above act of 1848, a corporation for business purposes, although for the interest of others as well, cannot be incorporated. The People v. Nelson, 46 N. Y. 477.

Corporations to establish Educational Institutions, Chapels, or Places of Worship, Parsonages, Rectories, Residences of a Bishop or Ministers.—The law of Apr. 12, 1848, *supra*, was, by law of March 8, 1870, ch. 51, extended to societies for the above purposes.

Property to be Held.—By law of March 8, 1870, ch. 51, any university or college incorporated under said act of 1848, or of 1870, may hold by gift, grant, devise or bequest, property or endowment not exceeding $1,000,000, subject to the restrictions of the act of 1860, Apr. 13, as to devises. The act was in other respects amended.

Academies and Colleges.—By the Rev. Stat. Vol. I, 1st ed. p. 460, colleges have power to take and hold by gift, grant and devise any real or personal property, the yearly revenue or income of which shall not exceed the value of $25,000. To sell, mortgage, let and otherwise use and dispose of such property, in such manner as they shall deem most conducive to the interest of the college. Similar provisions are made as to academies (*Ib.* p. 463), except that the limitation is $4,000.

Trusts in favor of Charitable and Educational Corporations, &c.—*Vide ante*, p. 422; also, trusts for charitable uses, p. 293. The only power in educational and charitable corporations to hold property in perpetuity in trust, is by virtue of their charters and the acts of 1840 and 1841. *Ante*, p. 422; *vide* Adams v. Perry, 43 N. Y. 487; also *ante*, p. 314.

Trustees of Charitable and Benevolent Institutions.—By law of March 12, 1872, ch. 91, no trustee or director of any charitable or benevolent institution organized either under a general act or special charter, shall receive any salary or emolument.

School-houses, taking Lands for.—*Vide* law of 1866, ch. 800; law of May 9, 1867, ch. 819.

TITLE V. MONEYED CORPORATIONS.

By Rev. Stat. part 1, ch. 18, title 2, no conveyance, assignment, or transfer of *real estate*, &c., by a *moneyed corporation*, over the value of *one thousand dollars*, shall be valid without previous *resolution* of its board of *directors*. But conveyances in hands of *bona fide* purchasers for value are protected.

§ 8, 1st ed. Rev. Stat. p. 549. As to who are *bona fide* purchasers as above, *vide* Curtis v. Leavitt, 15 N. Y. 9. It was held in Gillet v. Campbell, 1 Denio, 520, that this provision only applied to corporations that had a board of directors or trustees by their charters. See, also, Gillett v. Moody, 3 Com. 486, partially overruling the above; Leavitt v. Blatchford, 17 N. Y. 521, partially reversing the latter case. An assignment, though made without previous resolution, may be made valid if ratified by a subsequent one. 15 N. Y. 9. The provision does not apply to banking companies under ch. 260, Laws of 1838. Belden v. Meeker, 47 N. Y. 307; see Gillet v. Moody, 3 Com. 479; Leavitt v. Blatchford, 17 N. Y. 521. "Moneyed corporation" is construed to mean those having banking powers, or to make loans upon pledges or deposits, or to make insurance, created since Jan. 7, 1828; or whose charter is renewed or extended since that time, unless expressly exempted by their charters or amendments. 1 R. S. 1st ed. p. 599, §§ 51, 52; Act of Dec. 10, 1828, § 15; 16 N. Y. 424; 9 N. Y. 591; 7 N. Y. 328; 4 N. Y. 444; 26 How. P. 271. The above provision, § 8, does not apply to a sale of mortgages or securities pledged to secure a loan, made to realize the money secured by the pledge. The Corn Bank v. Ten Eyck, 48 N. Y. 305. As to who may object to the transfers as illegal, *vide* Eno v. Crooke, 10 N. Y. 60; Elwell v. Dodge, 33 Barb. 336. The latter case is partially overruled in Houghton v. McAuliffe, 26 How. P. 270. As to the above section 8, see, also, 13 N. Y. 118; 12 N. Y. 227; 13 N. Y. 118; 12 *Ib.* 227; 9 N. Y. 591; 32 Barb. 313; 17 Barb. 309; 5 Barb. 185; 1 S. Ch. 209; 1 Du. 129; 7 Hill, 93; 3 S. S. C. 144; 2 *Ib.* 187; 26 N. Y. 414; 26 How. Pr. 271.

No such conveyance, assignment, &c., made by any such corporation, or any *judgment* or *lien* created by any *such* corporation when *insolvent* or in *contemplation* of insolvency with a view of creating a *preference* to creditors, shall be valid.

Rev. Stat. *Ib.* § 9. When a friendly suit amounts to such an assignment. *In re* Bowery Bank, 16 How. P. 56. An assignment to pay creditors *pro rata*, not made to officers, has been held valid. 3 Wend. 13; 16 Barb. 280; 21 Barb. 221; Curtis v. Leavitt, 15 N. Y. 9. The section held

to apply to insurance companies. *Ib.* As to whether this provision applies to associations organized under the banking law, *vide* 1 Denio, 520; compare 3 Coms. 479, and Leavitt v. Blatchford, 17 N. Y. 521. This law applies to *mutual insurance companies* (16 Barb. 280) and to banks. 5 Abb. 415. The *intent* to prefer must be shown under an insolvency that *exists* or is *expected*. 15 N. Y. 9; 17 N. Y. 521. In order to avoid the transfer, it is immaterial whether the creditor has knowledge or not of the *status* of the corporation. Brower v. Harbeck, 5 Seld. 59; see, also, 9 N. Y. 591; 17 Barb. 316; 5 Barb. 15, 185; 1 S. Ch. 209; 4 Edw. 170; 1 Du. 129; 3 S. S. C. 523; 3 Com. 16 How. P. 57; 31 N. Y. 45.

Conveyances, &c., for its benefit, to be valid, must be made to a moneyed corporation *directly* and *by name*. Conveyances or assignments for the benefit of creditors are excepted.

1 Rev. Stat. p. 549, 1st ed. This provision does not apply to *foreign corporations*. 10 Barb. 97. An assignment to the president of a banking corporation for the corporation would be good. 4 Duer, 1.

Miscellaneous Provisions.—Moneyed corporations, having power to *convey*, may mortgage real estate for their debts, and may sell what they take in payment of debt. Jackson v. Brown, 5 Wend. 590.

Receivers of Banks.—Sales of real estate by receivers of banks are to be under the advice and direction of the Supreme Court, at public auction, who may enlarge the time for sale. 2 Rev. Stat. 5 ed. p. 549.

Banking Association.—A banking association may hold real estate: 1. Necessary for its immediate accommodation in the convenient transaction of its business. 2. Such as shall be mortgaged to it in good faith as security for loans and debts. 3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. 4. Such as it shall purchase at sales under judgments, decrees or mortgages held by it. They shall not purchase, hold, or convey real estate in any other case or for any other purpose. And all conveyances of such real estate shall be made to the *president*, or such other officer as shall be indicated for the purpose in the articles of association; and which president or officer, and his successors from time to time, may *sell, assign and convey* the same, free from any claims thereon, against any of the shareholders, or any person claiming under them. 2 Rev. Stat. p. 561. These provisions are in the act of April 18, 1838, ch. 260, establishing banking associations. By Laws of 1849, ch. 313, an *association* formed by assent of all stockholders, *to take* the place of any incorporated bank whose charter has expired, or is about to expire, may hold such additional real estate as has been received by it in payment of debts due said bank, or purchased by said bank under judgments in its favor. As to whether the provision of the Revised Statutes relative to assignments with preference, and relative to transfers of property over the value of $1,000 are applicable to banking associations, *vide ante*, p. 560. See also, as to transfers made by them, p. 554, Title 3, and 1 Sand. Ch. 207; *Ib.* 179; 2 Sand. Ch. 239; 3 *Ib* 485; 15 N. Y. 9; 19 N. Y. 245; 1 Den. 520; 3 Ker. 114; 10 N. Y. (6 Seld.) 550. As to the incorporation of banking associations under the law of April 18, 1838, *vide* Gifford v. Livingston, 2 Den. 380; overruling DeBow v. The People, 1 Den. 9. See also Burrows v. Smith, 10 N. Y. 520; Valk v. Crandall, 1 Sand. Ch. 179.

General Provisions of Statute.—By Rev. Stat. and law

of 1871, ch. 883, religious societies or moneyed corporations created or renewed after Jan. 1, 1828, and which are subject to Title II, are excluded from the operation of Title IV, ch. 18, of Rev. Stat. Part I. This relates to implied dissolutions; to transfers in view of insolvency, as to loans, discounts, elections, &c.

Title VI. Insurance Corporations.

The following are some of the most important acts relating to insurance companies as regards their realty.

Fire, Marine and Life Insurance Companies.—By law of April 10, 1849, such companies may hold and convey real estate, as is provided for banking associations, *ante*, p. 561. Other real estate not required as above shall be sold and disposed of in five years after acquisition, unless the "comptroller" give a certificate to the contrary.

Law of June 24, 1863, *ch.* 263.—*Life and Health Companies.*—This law contained similar provisions as in the above law of April 10, 1849. Certain sections of the latter act were repealed. See also amendment, April 8, 1865, ch. 328, extending the law to every kind of insurance except fire, marine, and life. See also law April 12, 1866, ch. 525, as to their investments; amended as to annual statements, April 24, 1866, ch. 785.

Act of June 25, 1853, *ch.* 466, for the incorporation of fire insurance companies. Similar provisions as in the law of 1849; the 3d subdivision being modified that they are to take real estate for debts previously contracted in their legitimate business or for moneys due. Companies incorporated under the act of 1849 are brought under the provisions of the act, and the act of 1849 is partially repealed as to fire and inland navigation insurance companies. As to investments on mortgage, *vide* law of April 29, 1863, ch. 242; also ch. 263; also May 4, 1864, ch. 563; March 25, 1865, ch. 451.

Life and Health Insurance Companies in New York city. Restricting investments on mortgage to certain property.

Town Insurance Companies.—Law May 21, 1873, ch. 561, amending prior law.

Title VII. Railroad Corporations.

The following of the many general acts relating to railway corporations are designated for reference as bearing more or less on their real estate:

Ap. 23, 1839, ch. 218. To contract for the use of other roads.

May 7, 1847, ch. 222.—To connect tracks of different companies.

May 12, 1847, ch. 272. To alter lines and to acquire title to land. Nov. 27, 1847, ch. 404. To alter routes and to acquire title to lands. Nov. 27, 1847, ch. 405. To lay second tracks. Ap. 2, 1850, ch. 140. A general act. The acquisition of the title to lands. Amended, Ap. 15, 1854, ch. 282; Ap. 14, 1857, ch. 444; 1851, ch. 19; Feb. 13, 1851, ch. 637. To use a common track. 1853, ch. 53. As to acquiring lands, &c. 1854, ch. 282. As to acquiring lands.

Railroads in Cities.—Act of Ap. 4, 1854, ch. 140; and *ante*, p. 44.

Ap. 12, 1855, *ch.* 302.—As to railroads under lease and the acquisition of stock of another company. *Vide* Fisher v. The N. Y. C. & H. R. R. 46 N. Y. 644.

Ap. 14, 1857, *ch.* 444.—Purchases on mortgage sales, and as to acquisition of special lands.

May 5, 1864, *ch.* 582.—As to fences, railways over highways, taking lands for railway purposes.

Ap. 20, 1866, ch. 697. Railroads operating by stationary power, &c.

Ap. 3, 1867, *ch.* 254.—In relation to railroads held under lease.

Ap. 22, 1867, *ch.* 515.—Proceedings to obtain lands for the road.

Ap. 25, 1867, *ch.* 775.—Corporate existence to cease, unless the road is begun in five years, and ten per cent. of capital expended, and the road operated in ten years from formation.

May 9, 1868, *ch.* 779.—Mortgages need not be filed as chattel mortgages.

Ap. 17, 1869, *ch.* 237.—As to acquiring additional real estate and the use of waters.

May 20, 1869, *ch.* 917.—Authorizing the consolidation of railroad companies. Land may be taken for depots, and other conveniences for railroads, under the general railroad act and amendment of 1869, ch. 237, even though the company is a lessee. *In re* N. Y. & H. R. R. v. Kip, 46 N. Y. 546. The lands when taken are taken free of judgment liens, under certain statutes, when "owners" have to be made parties. Judgment creditors are not "owners." Watson v. N. Y. C. R. R. 47 N. Y. 157. The use of the track by a railroad is a franchise in the nature of a contract, and inviolable, except under the general power of the State to alter or repeal the charter. *In re* Central Park, 63 Barb. 282. See, as to taking land *in invitum*, *in re* Norton, 63 Barb. 77.

Mortgages by Railroads of the Franchise and Property.—Such mortgages must be recorded in the several counties where the road is laid. The track and fixtures may be mortgaged, without the franchise.

See, as to such mortgages, Seymour v. The Canandaigua, &c. R. R. 25 Barb. 284; Stevens v. Buffalo, &c. Co. 31 Barb. 590; overruled, 47 Barb. 104; Beardslee v. Ontario Bk. 31 Barb. 619; Pennock v. Coe, 23 How. U. S. 117; Farmers' Loan, &c. Co. v. Hendrickson, 25 Barb. 484; overruled, 47 Barb. 104. See, also, law of 1854, p. 608, allowing a new company to be formed after sale; also, *ante*, p. 555. Also, law of 1868, p. 1747. See, also, *ante*, p. 537, as to mortgages of franchises and after-acquired property; and Pennock v. Coe, 23 How. 117. See, also, as to the taking of land by railroad corporations, "Eminent Domain," *ante*, ch. ii.

Railroads Held under Lease.—*Vide ante*, p. 212.

TITLE VIII. CEMETERIES AND BURIAL CORPORATIONS.

The following acts with reference to corporations or associations of the above character, are designated for reference:

By Rev. Stat. of 1830, land used as a burying ground for fourteen years before January 1, 1830, is declared to be vested in the town so using it. 1st ed. p. 333. Act April 11, 1842, ch. 153, allowing religious corporations to acquire lands for burial purposes. Act of 1842, April 11, ch. 215, restricting mortgages of burial grounds by religious corporations.

1847, *ch.* 85.—As to exemption of burial lots from execution. April

27, 1847, ch. 133. Rural cemetery ass'ns.—Makes provision as to the acquisition and transfer of their realty, and the use thereof. This act was amended April 14, 1852, ch. 280; also April 5, 1853, ch. 122; April 14, 1852, ch. 238; April 5, 1860, ch. 163; also 1869, ch. 708; law of 1870, ch. 760, and 1871, ch. 696; May 8, 1873, ch. 452. The association owns the fee, the lot owners have the usufruct of their lots. The Buff. C. Cem. v. City of Buf. 46 N. Y. 503. This act was amended April 20, 1873, ch. 361; see also act of 1871, ch. 378, as to sale of vacated lots; also law of 1871, ch. 419.

May 7, 1847, *ch.* 209.—Cemeteries may be purchased and established in incorporated villages, and lands acquired therefor; amended law of April 2, 1864, ch. 117.

March 30, 1850, *ch.* 122.—Allowing religious societies to acquire land for burial purposes; also, cities, &c., by trusts, *ante*, p. 313.

Private and Family Cemeteries.—April 1, 1854, ch. 112; amended March 6, 1871, ch. 68.

Monument Associations, to perpetuate the memory of Union soldiers. March 30, 1866, ch. 273.

National Cemeteries.—Act of Congress, 22d February, 1867, ch. 61, and July 1, 1870, ch. 200.

To Sell Unoccupied Grounds of Cemeteries, &c.—April 12, 1871, ch. 419.

Cemeteries in Villages.—May 14, 1872, ch. 696.

Burying Grounds.—March 5, 1873, ch. 46.

Taxes on Lot Owners of Rural Cemeteries.—*Vide* law of April 27, 1868, ch. 402; and Buff. City Cen. v. City of Buffalo, 46 N. Y. 503 and 506, showing that assessment should be against cemeteries, and not lot owners; and that such associations, though exempt from taxes, are liable to assessment for local improvements. Mortgaging and foreclosing on cemetery lots, *vide* Lantz v. Buckingham, 11 Abb. N. S. 64.

TITLE IX. OTHER SPECIAL CORPORATIONS.

Other general acts have been from to time to time passed for the formation of corporations, for specified purposes, under them. The principal of these acts, with such amendments to them as are deemed desirable to notice, as affecting the powers of such corporations with respect to real estate, are below briefly indicated.

Corporations for Manufacturing, Mining, Mechanical or Chemical Business.—Act of Feb. 17, 1848, ch. 40. The above act has been amended as follows: June 7, 1853, ch. 333, as to places of business; and the corporation may issue stock for property acquired. Feb. 16, 1857, ch. 29, as to salt companies; and as to term of existence and place of business. Ap. 11, 1860, ch. 269. As to number of trustees; Ap. 12, 1861, ch. 170. As to place of business. May 2, 1864, ch. 517, allowing change of place of business, and an amended certificate therefor; and to mortgage property for past or future debts contracted in its business. Feb. 21, 1866, ch. 73, as to increase of capital stock. Ap. 25, 1866, ch. 799, amended so as to read before "chemical" the words, "*or other.*" May 7, 1869, ch. 706, as to taking stock in other companies. Apr. 20, 1871, ch. 657, as to judgments against trustees.

Powers as to Real Estate.—Companies, organized under the above general act, may purchase, hold and convey any real and personal estate whatever, which may be necessary to carry on their operations as designated in the certificate of incorporation. They cannot make a general assignment (33 N. Y. 97) in contemplation of insolvency. By law of 1853, ch. 333, they may purchase mines, manufactories and other property necessary for their purposes, and issue stock in payment. 36 Barb. 329, affirming, 30 *Ib.* 644. By a law of March 22, 1811, ch. 67; amended 1815, ch. 47, manufacturing companies might be formed, and hold and convey lands necessary for their operations. This act was extended for other purposes, 1816, ch. 58; 1817, ch. 223; 1818, ch. 67; 1819, ch. 102; 1821, ch. 14; 1822, ch. 213. This last act gave power to mortgage on assent of two-thirds in value of stockholders. By laws of 1848, p. 54, these companies could not mortgage their lands for any purpose; by law of May 2, 1864, ch. 517, they can do so only to secure an existing debt, or one which may be contracted in the business for which it was incorporated, on filing with the county clerk assent of two-thirds of the capital stock owners in value. It was held in the case of the Central Gold Mining Co. v. Platt, N. Y. Com. Pl. Sep. 1869, that the debt must have been already so contracted to authorize the execution of a mortgage to secure it. The general term however reversed the decision, and held valid a mortgage given by the company to secure coupon bonds. 3 Dal. 263. Corporations formed under the act of 1848, may not issue new stock in addition to capital stock, and any increase thereof in payment for property required; but they may apply the whole capital stock for such purposes; and when so paid, the owner thereof is not liable to creditors of the company, under § 10, act of 1848. Schenck v. Andrew, 46 N. Y. 589. And when the stock is so paid, and the certificate filed, stockholders are released from personal liability, unless there be fraud. But the stock paid must be for or represent the actual value of the property acquired. Boynton v. Hatch, 47 N. Y. 225. The above act of 1848, has been extended to corporations for the following purposes. (*Vide* Law of May 7, 1869, ch. 706, as to filing assent of the corporation to mortgage its lands beyond the State.)

Agricultural, Horticultural, Medical or Curative, Mercantile and Commercial.—Apr. 28, 1866, ch. 838.—The act had been extended to agricultural companies, also by law of March 29, 1865, ch. 234; as to curative purposes, see, also, act of 1866, ch. 799. See, also, as to agricultural and horticultural societies, law of 1855, ch. 425; and *post*, p. 567.

Constructing and Using Machines for the Raising of Vessels and other Heavy Bodies.—Feb. 7, 1851, ch. 14.

Salt Companies.—Feb. 16, 1857, ch. 29.

Printing and Publishing Companies for Books, Pamphlets, or Newspapers.—Ap. 6, 1857, ch. 262; Ap. 20, 1871, ch. 657.

Bottling and Selling Natural Mineral Water.—March 31, 1863, ch. 63.

Towing and Wrecking Companies.—Ap. 23, 1864, ch. 337.

Buying, Selling, and Transporting Coal and Peat.—Ap. 6, 1865, ch. 307.

Hotels, Museums, or for Curative Purposes.—Ap. 25, 1866, ch. 799.

To Supply Water for Mining Purposes.—Ap. 4, 1866, ch. 371.

Skating Rinks, Companies for Fairs, Meetings, Exhibitions, Entertainments, and Amusements.—May 9, 1868, ch. 781.

Elevating, Warehousing, Storing, or Milling.—May 9, 1868, ch. 781; May 5, 1869, ch. 605; Ap. 22, 1867, ch. 509.

Ice Companies.—Ap. 12, 1855, ch. 301.

Real Estate Companies.—1871, ch. 535.

Erecting Buildings and Hotel Keeping.—1866, ch. 799; and Ap. 20, 1871.

Preserving and Dealing in Meats.—Ap. 20, 1871, ch. 657; Ap. 27, 1872, ch. 426.

Dairy Products, Church Sheds, and Laundry Purposes.—Ap. 27, 1872, ch. 426.

Joint Stock Companies and Associations.—By Law of Ap. 9, 1867, ch. 289, *any* joint stock company or association may purchase, hold and convey real estate for the following purposes, and no other: 1. Such as shall be necessary for its immediate accommodation in the convenient transaction of its business. 2. Such as shall be mortgaged to it in good faith for loans made or debts due to it. 3. Such as it shall purchase at sales under judgments, and mortgages held by it. All conveyances are to be made to the president (as such), who and his successors may sell, assign and convey the same, free from all claims by shareholders or those under them. See Act of Ap. 22, 1868, ch. 290, as to reducing the capital of such associations. See Act of Ap. 15, 1854, ch. 245, as to continuation of such associations on the death of shareholders, and as to the appointment of managers.

Medical or Surgical Colleges and Institutions may hold real and personal property to the extent of $200,000. Laws of 1853, ch. 184. Under the Law of Ap. 10, 1813, ch. 94, they could hold for county, $1,000, and for State societies, $5,000. See, also, Law 1866, ch. 838.

Homœopathic Medical Societies.—Act of Ap. 13, 1857, ch. 384.

Savings Banks.—Laws 1857, ch. 136; 1853, ch. 32; 1867, ch. 257; 1868, ch. 845; 1869, ch. 213.

Social and Recreative Corporations.—Ap. 11, 1865, ch. 368; Ap. 25, 1867, ch. 799; amended, Law of May 6, 1869, ch. 629; Law of 1870, ch. 668; 1871, ch. 705; and *post*, p. 567.

Odd-Fellows.—Law May 6, 1873, ch. 417.

Free Masons and Knights Templars.—Law of Ap. 2, 1866.

Grand Commanderies, &c.—1869, ch. 176; Ap. 22, 1873, ch. 254.

Bridge Companies.—Ap. 11, 1848, ch. 259; Ap. 16, 1852, ch. 372.

Libraries.—The earliest act was Ap. 1, 1796, ch. 43. The recent act is Law of 1853, ch. 23. See, also, as to devises to, 1853, ch. 295.

As to trusts for literary institutions, *vide ante.* See, also, Adams v. Perry, 43 N. Y. 487; and *ante*, Trusts for Charitable Purposes, p. 340.

Telegraph Companies.—Law of April 12, 1848, ch. 265; April 8, 1851; June 29, 1851, ch. 471, amending act of 1848; April 22, 1862, as to extending lines, and joining lines with other corporations or associations; Law of May 13, 1845, ch. 243, are allowed to place poles in the waters in the State, so as not to interrupt navigation.

By law of 1870, ch. 568, they may sell or lease their property or franchises to, or purchase those of another company, on a three-fifths' vote by the directors, and by written consent of three-fifths in interest of its shareholders.

Skating Ponds and Sporting Grounds.—April 8, 1861, ch. 149.

Fire and Hose, &c., Companies.—May 2, 1873, ch. 397.
Trades' Union and Working Men.—1871, ch. 875.

Municipal Corporations.—As to restrictions on their power to make loans, borrow money, and make contracts. Rev. Stat. part 1, ch. 18, title 5, vol. 2, p. 603; law of July 21, 1853, ch. 603. Such a corporation may, at common law, purchase and hold real property necessary for its powers. Patterson v. The Mayor, 17 N. Y. 449. But the land must be within its boundaries, so far at least as its governmental powers are concerned. Riley v. City of Rochester, 9 N. Y. 64 (5 Seld.), reversing 13 Barb. 321. Such a corporation has not the power to make a contract or covenant that would embarrass or impede its legitimate powers or duties. Brick Church v. The Mayor, 5 Cow. 538; Stuyvesant v. Mayor, 7 *Id.* 588; Davis v. Same, 4 Kern. 506; Costar v. Brush, 2 Wend. 68. Those dealing with such a corporation must see that it acts within the restrictions of its charter. Brady v. The Mayor, 20 N. Y. 312. See as to special powers to each municipal corporation, their respective charters; see also, *ante*, p. 14, as to transfers from the State to municipal corporations; see also as to the powers of such corporations in holding and transferring realty, The People v. Platt, 17 Johns. 195; Britton v. The Mayor, 21 How. P. 251; Davidson v. The Mayor, 27 How. P. 342; The People v. Morris, 13 Wend. 325; Benson v. The Mayor, 10 Barb. 225; Dartmouth College v. Woodward, 4 Wheat. 697; Hooper v. Scheimer, 23 How. U. S. 235; The People v. Lowber, 28 Barb. 65; The People v. Brennan, 39 Barb. 522. As to the powers of supervisors, *vide* 1 R. S. 5th ed. p. 846; and as to their rights to the realty of a county, *Ib.*

Counties, Towns, and Villages.—As to the right of towns and villages to take and hold lands, *vide* 1 R. S. p. 337, 1st ed., and laws of December 7, 1847, ch. 426; 1851, ch. 519; April 20, 1870, ch. 291; March 18, 1873, ch. 92; May 22, 1873, ch. 585. Formerly counties were not esteemed a corporate body, and a community not incorporated could not take by succession. By the Revised Statutes, each county is made corporate, with a right to take and hold lands within its limits. Jackson v. Corry, 8 Johns. 388; Hornbeck v. Westbrook, 9 *Id.* 73; 1 R. S. 364, 1st ed.; 1 R. S. 5th ed. 846. See as to the power of counties and towns to take lands, and how they are to be conveyed, People v. Stout, Hill v. Supervisors, 23 Barb. 338, 2 Ker. 52; Baker v. The Mayor, 9 Abb. 82; Lorillard v. Town of Monroe, 1 Ker. 394; Denton v. Jackson, 3 John. Ch. 320. It is supposed that neither a county or town can hold lands out of their respective limits, nor for purposes not connected with their duties or the use of the inhabitants. Dickson v. Hartwell, 8 Johns. 422; and see *ante*, p. 314.

Companies for the recovery of stolen cattle, &c., and to catch thieves, &c., and to insure against loss, and to prevent horse stealing.—April 7, 1859, ch. 168; April 22, 1862, ch. 438.

Gaslight Companies.—February 16, 1848, ch. 37; April 15, 1854, ch. 312; April 20, 1867, ch. 480; April 25, 1871, ch. 697.

Agricultural and Horticultural Societies.—April 13, 1855, ch. 425; April 12, 1856, ch. 183; June 8, 1853, ch. 339. See also, *ante*, Law of 1848, p. 565; and April 28, 1866, ch. 838, *ante*, p. 565.

Guano and Fertilizing Companies.—Act of May 15, 1847, ch. 546. They are made subject to the provisions of the Revised Statutes.

Societies or Clubs for Social or Recreative Purposes.—April 11, 1865, ch. 368; amended Laws of 1866, ch. 457; Laws of 1869, ch. 629. Amended so as to include societies for "social, temperance, benefit, gymnastic,

athletic, musical, yatching, hunting, batting, or lawful sporting purposes. May 1, 1865, ch. 668; also, 1871, ch. 705; and *ante*, p. 566.

Dental Societies.—April 7, 1868, ch. 152.

Stoge Coach Companies.—August 6, 1867, ch. 974.

Co-operative and Industrial Unions.—June 24, 1867, ch. 971.

Companies to navigate Lakes and Rivers.—April 15, 1854, ch. 232, § 2; amended March 10, 1857, ch. 83, amending § 1 and extending it; amended February 18, 1858, ch. 10, as to dissolution, &c.; amended April 12, 1862, ch. 205; May 11, 1865, ch. 691; amended April 15, 1861.

Caloric Engine Ocean Navigation Companies.—April 12, 1852, ch. 228; amended law April 5, 1853, ch. 124; amended April 2, 1866, ch. 322; amended April 17, 1867, ch. 419.

Navigation of Lake George.—Act, April 14, 1854, ch. 3.

Turnpike and Plank Road Companies.—Act of April 18, 1838, ch. 262; toll bridges and turnpikes are to become highways on dissolution of the corporation. Act of May 7, 1847, ch. 210, providing for the formation of companies to construct plank or turnpike roads, and how the land is to be acquired. Act of November 24, 1847, ch. 398. Act of July 10, 1851, ch. 487. See also act of April 17, 1869, ch. 234. Act of April 15, 1857, ch. 482, as to sales on execution of their lands. Act of May 20, 1872, ch. 780, as to presumed dissolution, *vide* 50 N. Y. 302.

Building, Mutual Loan, and Accumulating Fund Associations.—Act of 1851, ch. 122; as to building companies, 1873, ch. 616.

Homestead Companies.—1871, ch. 535; May 22, 1872, ch. 820.

For Erection of Buildings, Villa Plots, &c.—Act April 5, 1853, ch. 117; amended April 22, 1867, ch. 509, to include companies for the construction or leasing of elevators and warehouses for storage or elevating grain, or for making, constructing, and selling materials for the construction of buildings. Amended by law of May 10, 1870, so as to include corporations for laying out and dividing lands into building lots or villa plots, and the improvement or sale thereof; and amending the act of 1867; 44 Barb. 631.

Ocean Steamship Companies.—Law of April 5, 1853, ch. 124.

Ferry Companies.—Act of April 9, 1853, ch. 135.

Companies to Navigate Long Island Sound.—April 15, 1861, ch. 238.

Driving, Park, and Agricultural Associations.—April 11, 1872; May 9, 1872, ch. 609; April 16, 1872, ch. 248.

For Improving Breed of Horses.—Act of April 15, 1854, ch. 269; amended April 15, 1857, ch. 768; March 28, 1864.

CHAPTER XXV.

ESTATES OF INFANTS, LUNATICS, IDIOTS AND DRUNKARDS.

TITLE I. ALIENATION, &C., BY INFANTS.

By Revised Statutes, "*idiots, persons of unsound* mind, and *infants*" are not allowed to alien real estate.

Deeds of an infant were also void at common law, and were voidable on arrival at full age, not only by themselves but by their heirs.

15 Wend. 631; 17 Wend. 119; 5 N. Y. Surr. 1 Red. 498; 1 R. S. 1st. ed. 719; 1 Hill, 121; 25 Barb. 399; Chapin v. Shafer, 49 N. Y. 407. They are good, however, until disaffirmed. 6 Paige, 335; Hill's Supplement, 260. If *grantees*, they may also, when of age, disagree to any deeds, and waive any estates conveyed to them during infancy, or may affirm the same. Jackson v. Carpenter, 11 Johns. 539; Jackson v. Burchin, 14 *Ib.* 124; Tucker v. Moreland, 10 Pet. 73; Walsh v. Powers, 43 N. Y. 23. A ratification may be implied by not dissenting, and by acts of ownership, or otherwise; and would relate back to the original instruments. Irvine v. Irvine, 9 Wall. 618; Flinn v. Powers, 36 How. P. 289; Bool v. Mix, 17 Wend. 119; Henry v. Root, 33 N. Y. 526; Jones v. Phœnix Bk. 4 Seld. 228; Dominick v. Michael, 4 Sand. 374; Voorhies v. Voorhies, 24 Barb. 150; Spencer v. Carr, 45 N. Y. 406; Taft v. Sergeant, 18 Barb. 320; Palmer v. Miller, 25 Barb. 399. A subsequent conveyance would be a disaffirmance of a prior conveyance made during infancy. Tucker v. Morland, 10 Pet. 58; Boole v. Mix, 17 Wend. 119. The deed being voidable only, it can only be impeached by the infant when of age, or privies in blood or estate, and not by a stranger. Dominick v. Michael, 4 Sand. 374; Irvine v. Irvine, 9 Wall. 618; Bool v. Mix, 17 Wend. 119. It is binding on adults with whom he dealt, so long as it is not rescinded by the infant. Smith v. Bowen, 1 Mod. 25; Holt v. Ward, Str. 937; Warwick v. Bruce, 2 Maule & Sel. 205; Brown v. Caldwell, 2 Serg. & Rawle, 114.

Infant Heirs to Convey.—Provision is also made in the Revised Statutes for infant heirs or others to perform contracts made by a deceased ancestor relative to lands,

on the petition of any parties interested, or the representatives of the deceased.

The contract must have been legally binding on the ancestor. Knowles v. McCamley, 10 Pai. 342. Where the infant is a lunatic, *vide* Swartout v. Burr, 1 Barb. 495. The contract will not be enforced unless for the infant's benefit. Sherman v. Wright, 49 N. Y. 227. They will not be obliged to covenant in the deed. Hill v. Ressegieu, 17 Barb. 162; see, also, *ante*, pp. 481, 485.

Conversion of real estate of an Infant.—See fully as to this, *ante*, pp. 369, 370, and *post*, title iii, as to the nature of the converted lands.

Partition of Infant's Lands.—*Vide post*, ch. xxx.

Collusive Recovery by Dowress.—Infant's rights on, *vide* p. 171.

Infant Trustees and Mortgagees.—May be made to convey, &c., and the court has power over them, independent of statute. *Ante*, p. 293; 2 R. S. 1st ed. p. 194; Anderson v. Wood, 44 N. Y. 249; Wood v. Mather, 38 Barb. 473; 2. R. S. 1st ed. 184. As to the practice on the application, *vide ex parte* Quackenboss, 3 Johns. Ch. 408; Wood v. Mather, 38 Barb. 473; see, also, 11 N. Y. 56; 6 Barb. 499; 2 Edw. 416; 4 J. C. R. 378.

Title II. Guardians of Infants.

The following statutory provisions, as to the guardianship of infants, affect the realty belonging to them. The father, as a general rule, if a proper person, is the natural guardian of his infant children. In many cases, however, courts will dispose of the care and custody of the children to the mother or others. As guardian by nature, a father has no control over the property of his child. On the death of the father, the mother is the guardian by nature, by the common law. As to modifications by our laws, of the above rules, *vide infra*.

The People v. ———, 19 Wend. 16; Fonda v. Van Horne, 15 Wend. 663; Wilcox v. Wilcox, 4 Ker. 575.

Statutory Guardians as of Socage.—The father, and if none, the mother, or, if none, the nearest and eldest relative of full age and legal capacity, males being preferred as between those of the same consanguinity, is guardian of an infant's real property, with the rights, powers and duties of guardians in *socage*. To such guardian statutory provisions relative to guardians in socage are to apply. But the authority of such guardian is superseded whenever a guardian is appointed under the proceedings provided for in title iii, ch. 8, *i. e.*, by deed or will or by the Surrogate. 1 R. S. 1st ed. p. 718, §§ 5 to 7. Previous to the Rev. Stat. a father could not be guardian in socage of his child. Fonda v. Van Horne, 15 Wend. 631. Such guardianship continues if no other guardianship succeeds. Jackson v. DeWaltz, 1 Johns. 157; Byrne v. Van Hoesen, 5 Johns. 66. Such guardian in socage has the custody of the land, and is entitled to the profits for the infant's benefit. Beecher v. Cruise, 19 Wend. 306; and may bring ejectment. Holmes v. Seely, 17 Wend. 75. And collect rents, and sue for injuries to the possession. Sylvester v.

Ralston, 31 Barb. 286. A lease made in the guardian's own name, will bind the infant; a general guardian has the same power. Such lease is assignable. Thacker v. Henderson, 63 Barb. 271; see, also, as to leases by, and when they expire, *ante*, p. 183. He may lease for so long as his guardianship continues, or within the minority of the ward, subject to the appointment of another guardian, and the latter's election to avoid it. Emerson v. Spicer, 55 Barb. 428; 46 N. Y. 594; Putnam v. Ritchie, 6 Pai. 390; Field v. Schieffelin, 7 Johns. Ch. 154. See further as to such guardianship, 30 Barb. 635; 7 Cow. 38; 5 Pai. 41; and also, *infra*, this title.

Guardians by Deed or Will.—A father, whether of full age or a minor, of a child likely to be born, or of a living minor child unmarried, may, by deed or will, dispose of the custody and tuition thereof, during its minority, or for a less time, to any person or persons, in possession or remainder; which shall be effectual as against every other person. Such guardian is to take the profits of the realty and the management of the personalty, and bring actions, as might a guardian in socage. Rev. St. part 2, ch. 8, title 3. This section was amended by law of Feb. 10, 1871, ch. 32, by allowing the mother to make the appointment, if the father is deceased and has not done so. The law of 1860, ch. 90, made the wife joint guardian with the husband. This act was repealed by law of 1862, ch. 172, making the same provision, and that the father should not create a testamentary guardian without assent of the mother. A married man could not, under the married woman's act of 1860, ch. 90, *supra*, appoint a testamentary guardian of his child without the consent of his wife, nor could he do so now under the act of 1862, ch. 172, *ante*. In both cases the power survived to the wife on his death. People v. Boice, 39 Barb. 307.

Guardians Appointed by Surrogates.—By the above ch. viii, Title iii, if no guardian has been appointed, by deed or will, the surrogate where the minor resides may appoint one, on the minor's application, if over 14; or, if under, on that of another person. In the latter case, notice is to be given to relatives, and the guardian is to continue such until discharged, or until another is appointed. A bond is to be given as prescribed. §§ 4 to 10. See, also, Laws of 1837, ch. 460, as to notice to relatives; and also 22 Barb. 186; 8 Cow. 307; 7 Barb. 641; 9 Pai. 206; 8 How. P. R. 99; Laws of 1830, ch. 320, § 31.

The surrogate has no jurisdiction, unless the minor resides in his county. Brown v. Lynch, 2 Brad. 214.

Powers of such Guardian.—He is to have the same powers as a testamentary guardian. § 10. See, also, as to their duties in the care of the infant, Clark v. Montgomery, 23 Barb. 464.

By Laws of Ap. 22, 1870, ch. 341, surrogates have the same power as has the Supreme Court, and may appoint a guardian for an infant whose father is living, and they shall ascertain the amount and value of the estate. Amending § 6, 3d Title, ch. 8, Part 2 of R. S. § 7 was repealed by Laws of 1830, ch. 320, § 31. The same provision is in the Law of Ap. 25, 1871, ch. 708, with addition as to the notice to be given.

Guardians Appointed by the Supreme Court.—The Supreme Court, succeeding to the functions of the Court of Chancery, has power, as a branch of its general jurisdiction over minors and their estates, to appoint guardians for infants who have no testamentary or other guardian. By our statutes, the powers and jurisdiction of the Court of Chancery are made coextensive with those of the Court of Chancery in England, except as modified by the constitution or by law. 2 R. S. p. 173, 1st ed.; *in re* Nicoll, 1 Johns. Ch. 25; Wilcox v. Wilcox, 14 N. Y. 575.

Accounting and Removal.—Provision is made in said Title iii as to the accounting of such guardians appointed by the surrogate, both voluntary and compulsory. Also, as to the removal for waste, misconduct, &c., or in case of removal from the State, or insufficiency of sureties; and for the appointment of another. Also, for appeals to the Supreme Court. §§ 11 to 19. And see Laws of 1837, ch. 460, §§ 45, 49; Ap. 25, 1867, ch. 782; 1871, ch. 482, as to removal of guardians generally, and their accounting. Also, Seaman v. Duryea, 10 Barb. 523; affi'd, 11 N. Y. 325; Diaper v. Anderson, 37 Barb. 168; People v. Delamater, 15 Abb. 323.

The Supreme Court has power to change the guardian appointed for the custody of the child, if for the benefit of the child, and may make the order at chambers (so called). Wilcox v. Wilcox, 4 Kernan, 575.

County of New York.—As to the removal and accounting of guardians in, *vide* Laws of 1870, ch. 354.

Acts and Purchases by.—Guardians cannot purchase the ward's property for themselves. *Vide* surrogates' sales, *ante*, p. 461, and 1 R. S. 1st ed. 104. Such sale is merely voidable, however. Bostwick v. Atkins, 3 Com. 53; White v. Parker, 8 Barb. 48. They cannot convert the personal property into realty, or *vice versa*, nor use the ward's money. All advantages will enure to the ward. They cannot build on the ward's land without order of the court, nor contract for sale of his land. White v. Parker, 8 Barb. 48; Hassard v. Rowe, 11 Barb. 22; Thacker v. Henderson, 63 Barb. 274.

Guardians holding over after determination of particular estate. *Vide ante*, p. 248.

Duties of Guardians.—By the Revised Statutes, every guardian in socage, and every general guardian, whether testamentary or appointed, is to safely keep the ward's property and inheritance, and is to prevent waste, sale, or destruction thereof; to keep up and sustain the houses, gardens, and other appurtenances of the lands, with the issues and profits thereof, or other moneys of the ward, and deliver the same up in good order, &c., and account for issues and profits. They are allowed their reasonable expenses, and the same compensation as executors. If they commit waste, sale, or destruction, they forfeit custody of the inheritance and triple damages. 2 R. S. p. 153, 1st ed. See fully, as to the guardian's duties, White v. Parker, 8 Barb. 48. A guardian cannot rebuild destroyed buildings under the above powers. Copley v. O'Neill, 1 Lans. 214. Nor sell the real estate, nor lease over the period of the ward's majority. Emerson v. Spicer, 55 Barb. 428; and 46 N. Y. 594. They are bound to keep moneys invested. Depeyster v. Clarkson, 2 Wend. 77. They are under the control of the court. Wood v. Wood, 5 Pai. 596; Putnam v. Ritchie, 6 *Ib.* 391. They can reap no benefit from the estate. Lefevre v. Laraway, 22 Barb. 168. The general guardians of infants have the same powers as a testamentary guardian. They may collect the profits and income of real estate, and give discharges therefor, and may discharge mortgages of record. Chapman v. Tibbets, 33 N. Y. 289.

Security.—No guardian to receive property of an infant until he give security. Code, § 420; Supreme Court Rules, 63, 71; 10 Abb. 41; 2 Abb. 11.

Guardians ad litem.—There are various provisions of statute as to the appointment of guardians of infant parties to actions. The general rule is, that an infant may sue or be sued in actions relating to real property. If plaintiff, he appears by a next friend; if defendant, a guardian *ad litem* is to be appointed, and security is to be given. The details of these proceedings are matters of practice. They will be found in R. S. Part iii, ch. 2; Title iv, ch. 8; Title ii, ch. v.; Part iii, Title vii. Also, in the "Code," §§ 471, 116. As to guardians in partition suits, Law of 1833, ch. 227;

1852, ch. 277; and see *post*, ch. xxx, "Partition." The above § 116 of the Code was amended by Laws of 1851, ch. 479; 1852, ch. 392; 1862, ch. 460; 1863, ch. 392; 1865, ch. 615. As to guardians *ad litem*, and for proceedings in Surrogates' Courts, see sales by surrogates, *ante*, ch. 18; and Laws of 1867, ch. 782. A guardian *ad litem* cannot make a settlement of the whole matter in controversy, so as to bind his ward. Morgan v. Morgan, 39 Barb. 589.

Indigent Children.—As to the appointment of trustees of orphan, &c. asylums, as guardians of indigent children, by the parent or by the court, *vide* laws April 27, 1870, ch. 431; also as to the care and binding out of such children, laws of 1855, ch. 159; 1857, ch. 61; 1853, ch. 185.

Marriage of a Female Ward.—This terminates the guardianship. Brice's estate, 15 Abb. 12.

Surplus Moneys Paid into Surrogate's Court.—As to guardians obtaining these, *vide* law of April 11, 1870, ch. 170, amending act of April 23, 1867.

Compensation of Guardians.—*Vide* Morgan v. Hannas, 49 N. Y. 667; 13 Ab. N. S. 361; Morgan v. Morgan, 39 Barb. 20; Clowes v. Van Antwerp, 4 Barb. 416; affi'd, 2 Seld. 466; Vanderheyden v. Vanderheyden, 2 Pai. 287; and *ante*, this Title, p. 572.

Non-resident guardians may obtain property in this State belonging to their wards resident in other States or territories. Law of March 10, 1870, ch. 59. As a general rule, foreign guardians have no extra-territorial authority, and letters of foreign guardianship afford no title within this State. M'Loskey v. Reid, 4 Brad. 334.

Title III. Sale of Lands of Infants.

Authority for the care, disposal, and protection of infants' estates, is considered to be inherent in the Supreme Court of the State, as successor to the Court of Chancery, independent of any statutory proceedings. The powers conferred by statute, hereinafter referred to, relate only to lands of which the infant is *seized*, and not to equitable interests.

See the cases, Cochrane v. Van Surlay, fully reviewed, *ante*, p. 310; Pitcher v. Carter, 4 Sand. Ch. 1; Onderdonk v. Mott, 34 Barb. 106; Anderson v. Wood, 44 N. Y. 249; Wood v. Mather, 38 Barb. 473; Fonda v. Van Horne, 15 Wend. 663; Wilcox v. Wilcox, 4 Ker. 575. The cases of Rogers v. Dill, 6 Hill, 415; and Baker v. Lorillard, 4 Com. 266; and Onderdonk v. Mott, 34 Barb. 106, are to the effect that the whole power of the court to direct the sale of lands of infants is derived from the statute below given; and that there is no such original jurisdiction in a court of equity.

Sale of Lands of Infants.—By the Revised Statutes, part 3, ch. 1, title 2, art. 7, any infant *seized* of any real estate, or entitled to any term of years in any lands, may, by his next friend or by his guardian, apply to the Supreme Court or a county court for its sale or disposition.

The petition should be by the general guardian, if he have one. 3 Paige, 265. But may be by the natural guardian. *In re* Whitlock, 32 Barb. 48. It must be to the *court*. 21 Barb. 348. The original act authorizing sales of infants' estates through the chancellor was passed April 9, 1814, ch. 108; also, Laws of 1815, ch. 106; 3 Johns. Ch. 408.

County Courts.—As to the power and jurisdiction of county courts in such proceedings, *vide* Code, § 30, sub. 6; and Stiles v. Beman, 1 Lans. 90.

Guardian.—A guardian shall be appointed, who shall give a bond as the court may direct, to be filed with the clerk. *Vide* Rules 63 to 71 of Supreme Court, as to mode of appointing a guardian and sureties, and the proceedings before the referee. The guardian cannot be appointed at chambers. 21 Barb. 348; also, 3 Pai. 265; 2 *Id.* 412; 4 *Id.* 44.

Sale, &c.—If it appear necessary and proper for the support and maintenance of the infant, or for his education, or that his interests require it, after report of referee or on the facts by determination of the court (15 Abb. 91), the court may order the leasing, sale or other disposition of the real estate or interest by the guardian; but not so as to conflict with the provisions of any will or conveyance under which the infant received the estate. Also in Laws of 1814 and 1815.

The court shall direct a conveyance to be executed on the sale, &c., being reported on oath and confirmed; which sales, leases, or dispositions, if *bona fide*, when *confirmed*, shall be effectual and valid. The proceeds are to be invested or applied under the direction of the court; and they shall be deemed real estate of the same nature as the lands, &c., sold; and the infant is to have no other estate therein. The conveyance should be executed by the guardian *ad litem*, by subscribing the name of the infant, and adding "by ——, his guardian *ad litem*." *In re* Hyatt v. Seeley, 1 Kern. 52. By statute of May 6, 1872, ch. 524, sales made as above, before Jan. 1, 1872, are confirmed, notwithstanding the deed may be erroneously signed.

Proceeds.—As to the nature of the proceeds continued as realty, and for how long, *vide* Foreman v. Foreman, 7 Barb. 215; Davidson v. Freest, 3 Sand. Ch. 456; Shumway v. Cooper, 16 Barb. 556; Sweezy v. Thayer, 1 Duer, 286, and *ante*, p. 370; Foreman v. Marsh, 1 Ker. 243.

Seizin Necessary.—Under the above statutory proceedings, the infant's estate must be *vested;* he must be *seized* to make the sale valid. A *vested remainder*, however, may be sold. The legal estate must be in the infant. Baker v. Lorillard, 4 Coms. 257; also, 2 Barb. Ch. 22; Rogers v. Dill, 6 Hill, 415; Wood v. Mather, 38 Barb. 473.

Statute to be Strictly Followed.—Any sale of an infant's real estate made by order of a court, contrary to the provisions of the statute, are utterly *void*. The power of the court to direct a sale is derived entirely from the statute.

Rogers v. Dill, 6 Hill, 415, and *supra*, p. 573. Any *order* in the proceedings fraudulently obtained will also make them void. Rogers v. Dill,

6 Hill, 415; Clark v. Underwood, 17 Barb. 202. It seems that courts of equity have an inherent jurisdiction, independent of statute, to order a sale of the *equitable* interests of infants. The statutory proceedings apply only to *legal* estates. Wood v. Mather, 38 Barb. 473. *In re* Turner, 10 Barb. 552.

Infants Unborn.—In has been questioned whether the estates of infants unborn could be divested by the courts under the above proceedings. See Bowman v. Tallman, 27 How. P. 212; Baker v. Lorillard, 4 Com. 257. See, however, as to the power of the legislature to pass acts affecting such interests, *ante*, pp. 310 and 313, and *post*, chs. 28 and 30.

Power.—The Revised Statutes also provide that on such sale, on the consent of a party entitled to dower in the lands, the court may award a gross sum or direct an investment of a sum for such dower, on a release thereof being given. Laws of 1815, 103.

The Code.—Section 471 expressly retains in force these statutory proceedings relative to the estates of infants, lunatics, &c.

Devises by Infants, Idiots and Lunatics.—Such devises are not allowed.

Ante, p. 394; Shumway v. Cooper, 16 Barb. 556.

Accumulations for Minors (*vide ante*, pp. 236, 267) and as to moneys for their support.

Partition of Infants' Estates without Action.—*Vide post*, Ch. XXX.

Also, 2 R. S. 193, and *in re* Congdon, 2 Pai. 566.

Security by Guardian before Proceeds are Paid to Him.—*Vide* Code, § 420, and Supreme Court Rules, 63, 71.

Private Act of Legislature.—A private act of the Legislature, authorizing the sale of an infant's estate, is valid.

See the cases of Cochran v. Van Surlay; Towle v. Forney, and Williamson v. Suydam, *ante*, pp. 310, 311; Leggett v. Hunter, 19 N. Y. 445; Powers v. Bergen, 2 Seld. 258. So, also, acts rendering valid defective proceedings. Marshall v. Marshall, 4 Bush. (Ky.) 248. See as to taking lands of infants for public purposes under an act therefor. Battell v. Burrill, 50 N. Y. 667; *vide*, also, *ante*, pp. 310 to 313.

TITLE IV. ESTATES OF LUNATICS, IDIOTS AND DRUNKARDS.

By the common law, idiots or lunatics are incapable of binding themselves by a deed; but mere imbecility, not amounting to idiocy, will not avoid it, and *sanity* is presumed until the contrary is shown.

4 Cow. 207; 26 Wend. 298; 3 Den. 37. The acts of a lunatic before office found were not void, but voidable. 2 Cow. 552. A mortgage exe-

cuted by a lunatic is only voidable at his election or those claiming under him. 9 N. Y. 45. Lunacy does not revoke a power of attorney until the fact is judicially established. 2 Hall, 495. Deeds of a lunatic are not set aside as matter of course, but only on equitable principles. Canfield v. Fairbanks, 63 Barb. 462.

By the Revised Statutes, idiots, persons of unsound mind, and infants, are excepted from those who are authorized by law to alien lands.

It is also provided that the Supreme Court (formerly chancellor) shall have the care and custody of all *idiots*, lunatics, and habitual drunkards, and of their real and personal estates, and shall provide for their safe keeping and maintenance, and for the maintenance of their families and the education of their children out of their personal estates, and the rents and profits of their real estates.

Law of March 20, 1801; 1 Rev. L. 148; 2 R. S. 1st ed. p. 52, § 1. By § 3, the Common Pleas were to have the powers of the Court of Chancery over the real and personal estate of an habitual drunkard. Laws of 1821, 99. *Vide*, also, 8 N. Y. 388; 28 Barb. 51; 16 Barb. 313; 8 Barb. 552; 1 Barb. 441; 2 Barb. Ch. 326; 7 Pai. 237; 6 Pai. 11; 5 Pai. 122; 3 Pai. 201; 1 Pai. 580; 6 J. C. R. 440; 1 J. C. R. 601; 3 Ed. 381; 24 Wend. 86; 1 Ab. 110; 1 Hill, 226; 3 How. P. 220; 6 *Ib.* 248; 30 *Ib.* 448; 39 How. P. 329, as to the estates of the above classes of persons generally.

Application for Sale of Lands.—By title 2, ch. 5, part 2, of Revised Statutes, it is provided that when the *personal* estate of such a person is insufficient, his committee may apply to the court by which they were appointed, or when the personalty and income of realty is insufficient to the Supreme Court, or the court having jurisdiction, for permission to mortgage, lease, or sell so much of his real estate as may be necessary to pay his debts, or for the maintenance of himself or family, or for the education of his children. The proceedings for so doing are given at length in succeeding sections of said chapter. The court may thereupon direct the mortgage, leasing, or sale of the whole or such part of the real estate as may be necessary.

The proceedings would not be regular unless the application was to raise money for the *above purposes*, and unless the *personalty* was insufficient. *In re* Petit, 2 Paige, 596.

The Conveyance.—By §§ 18, 22, all conveyances, &c., executed by the committee under the direction of the court, shall be as valid as if executed

by the lunatic, &c., when of sound mind. No conveyance shall be executed, however, until the sale shall be reported on the oath of the committee, and *confirmed* by the court.

Leases, &c.—By § 23, such real estate shall not be leased for more than *five* years, nor mortgaged, aliened, or disposed of, except as above.

When Lunatic, &c., is a Trustee, &c.—If the lunatic, &c., is seized of any estate as trustee, mortgagee, &c., the court may also direct a proper conveyance to be made to the persons entitled.

Restoration to Sanity.—If he become of right mind, the real estate, &c., of such person is to be restored to him. § 24.

Sales of Lunatics' Lands under Laws of 1864.—By Laws of 1864, ch. 417, *lunatics*, whether married or not, may apply by committee, or by a husband, if married, to the Supreme Court, for the sale of their real estate, and any and all interest therein. The committee shall give bonds, and the court may order a reference, and decree a disposition of such estate, not inconsistent with the provisions of any will or conveyance by which the lunatic obtained the estate. The court may also order specific performance of contracts. The court, under this law, is to be the judge of the expediency and necessity of the sale. The sale is to be confirmed by the court before the deed is to be given.

Proceeds.—Proceeds are to be deemed realty, and dower or other interests are to be ascertained and provided for, and the lunatic is to have the same interest as he had in the realty.

Descent of Real Estate of Lunatics, &c.—As to this, *vide ante*, p. 370.

Idiots and those of Unsound Mind.—By Law of May 6, 1869, ch. 627, the provisions of the above act of 1864 were extended to "idiots and persons of unsound mind." So, also, by act of March 2, 1870, ch. 37.

Contracts made when Sane.—Specific performance by their committees may be adjudged. Swartout v. Burr, 1 Barb. 495; Matter of Ellison, 1 Johns. Ch. 261; 2 R. S. p. 55, 1st ed.

Receivers.—Receivers of lunatics and habitual drunkards, appointed by a court of chancery, may take and hold real estate, on such trusts and for such purposes as the court shall direct, subject to its order. And receivers and committees of such persons appointed by the court may sue claims in their own names, as also may purchasers of claims sold. Act of Ap. 28, 1845, ch. 112. See, as to transfers to such receivers, Wilson v. Wilson, 1 Barb. Ch. 592.

Suits by and against Lunatics, &c.—All suits by or against them should be in their individual names.

McKillip v. McKillip, 8 Barb. 552; Petrie v. Shoemaker, 24 Wend. 85; Love v. Schermerhorn, 1 Hill, 97. Under § 113 in the Code, however, the committee may sue to set aside a deed made by the lunatic. Pierson v. Warren, 14 Barb. 488.

CHAPTER XXVI.

THE ACKNOWLEDGMENT, PROOF, AND RECORD OF INSTRUMENTS.

TITLE I. THE ACKNOWLEDGMENT AND PROOF OF DEEDS.

Acknowledgment or Attestation of Grants in Fee, why Necessary.—By the law of this State, every grant in *fee* or of a *freehold* estate, if not duly *acknowledged* previous to its delivery, shall have its *execution* and *delivery* attested by at least *one witness;* or if not so attested, it shall not take effect as against a *purchaser* or *incumbrancer* until so acknowledged.

See *ante*, p. 514, as to decisions under this provision, and as to how far the grant is good as between the parties; and 62 Barb. 272.

Acknowledgments Necessary before Deed can be Recorded.—Conveyances also have to be acknowledged in order to be *recorded* with the clerk or register of the county. The object of the record is to give constructive legal *notice* to subsequent purchasers or incumbrancers, and to make the record evidence. The law provides that, to entitle any conveyance to be recorded, it shall be *acknowledged* by the party or parties executing the same, or shall be *proved* by a subscribing witness thereto before any one of certain specified officers.

1 Rev. Stat. p. 756, § 4, 1st ed.

Knowledge of the Party.—§ 9, *Ib.*: "No acknowledgment of any conveyance having been executed shall be taken, unless the officer taking the same shall *know or have satisfactory evidence that the person making such acknowledgment is the individual described in and who executed such conveyance.*" The identification of the grantor need not be by the subscribing witness, but by a third person, and his residence need not be stated. Dibblee v. Rogers, 13 Wend. 537. But if not known to him, the Commissioner must take proof of the identity, or the certificate will be a nullity. Watson v. Campbell, 28 Barb. 421. The knowledge which the officer is to have is a question for his own conscience, and the means of his obtaining knowledge are not essential. Wood v. Bach, 54 Barb. 34; reversing Jones v. Bach, 48 *Id.* 568. It is sufficient if the officer state that he knew the grantor to be the one who executed the deed, without the words "described in." Thurman v. Cameron, 24 Wend. 87. The words "to me known," alone held sufficient, where the other words, viz.: "to be the person described in and who executed, &c." were omitted. Jackson v. Gumaer, 2 Cow. 552, in 1824. If there is an omission of words of acknowledgment of the execution of the conveyance, the certificate is not sufficient. The People v. Harrison, 8 Barb. 560. The certificate is only *prima facie* evidence, and may be rebutted. Thurman v. Cameron, 24 Wend. 87. See also, as to this section, Duval v. Covenhoven, 4 Wend. 561.

Acknowledgments by Married Women in the State.—The acknowledgment by a married woman residing in the State is, in addition to the above requisites, to state that she acknowledged "*on a private examination apart from her husband;* and that she executed such conveyance *freely*, and without any *fear* or *compulsion* of her husband." The statute provides that *no estate of any such married woman shall pass by any conveyance not so acknowledged.* § 10. This provision was enacted as early as 1771. 2 Van Schaick, 611. It was contained in the Law of 26th February, 1788, 2 Green, 99; and in Law of April 6th, 1801, 1 Web. 478; and 1 Rev. Laws of 1813, p. 369.

Substantial Compliance.—If the statute is *substantially* complied with, it would be sufficient. Sheldon v. Stryker, 42 Barb. 284. So held where the words "private" and "freely" were omitted from a married woman's acknowledgment, and "separate and apart" and "without fear, &c." substituted. Dennis v. Tarpenny, 20 Barb. 371. So held where the words used were *without any fear, threat or compulsion*, in lieu of the statutory words, the word "freely" being omitted. Meriam v. Harsen, 2 Barb. Ch. 232; affirming 4 Ed. 71. Her acknowledgment cannot be established by parol, by examination of the officer after his term had expired. Elwood v. Klock, 13 Barb. 50. As to when and how far the acknowledgment of a married woman was necessary to pass title in this State, *vide* fully, *ante*, pp. 74 to 78. The above provision as to private examination only applies to a married woman residing in the State. Andrews v. Shaffer, 12 How. 441. A *contract* to convey had also to be acknowledged by her. Knowles v. McCamley, 10 Pai. 342.

Not Necessary under Acts of 1848 *and* 1849.—Since the passage of the Laws of 1848 and 1849 relative to the powers of married women to convey lands, as if single, no private examination is held necessary relative to property acquired since April 7, 1848, nor acknowledgment. Andrews v. Shaffer, 12 How. 441; Blood v. Humphrey, 17 Barb. 660; Yale v. Dederer, 18 N. Y. 271; Wiles v. Peck, 26 N. Y. 42; Richardson v. Pulver, 63 Barb. 67.

Acknowledgments by Married Women out of the State.—§ 11, *Ib.* The Revised Statutes further provide that "when any married woman *not residing in this State* shall join with her husband in any conveyance of any

real estate situated *within* this State, the conveyance shall have the same effect as if she were *sole;* and the *acknowledgment or proof* of the execution of such conveyance by her may be the same as if she were *sole*." This provision was also contained in the Law of April 6, 1801, and in the law of 1813. 1 R. L. p. 370.

As to Acknowledgment of Powers of Attorney by Married Women out of the State, *vide* "Powers of Attorney," *ante*, p. 360. It will be observed that "residence" is necessary. If the woman were a mere sojourner the acknowledgment as above would doubtless be insufficient.

Proof of the Execution.—§ 12, *Ib.* "The *proof* of the execution of any conveyance shall be made by a subscribing witness thereto, who shall state *his own place of residence*, and that he *knew the person described in* and who *executed* such conveyance; and such proof shall not be taken unless the officer is *personally acquainted* with such subscribing witness, or has *satisfactory evidence* that he is the same person who was a subscribing witness to such instrument." This was, in substance, originally in the Laws of 1801. 1 Web. 478. As to the proof under the former law, *vide* Jackson v. Osborn, 2 Wend. 555; Jackson v. Gould, 7 *Id.* 364; also, 1 J. R. 498, and *post*, Title iv; also, 1 Wend. 406. A statement that the officer knew the witness is sufficient. Sheldon v. Stryker, 42 Barb. 284. Where the witnesses are dead, then the conveyance may be proved before any of the officers above enumerated except Commissioners of Deeds and County Judges (not Counsellors of the Supreme Court), by proof of the decease of said witnesses, and of the handwriting of one of them, and of the grantor. The evidence and the names and residences of the witnesses are to be set forth in the certificate. The conveyance may be then left for record, if the original is left on deposit, and the record becomes constructive notice. §§ 30, 31, 33, *Ib.* But neither the conveyance nor the record is made evidence. *Vide* 20 Barb. 404. See also as to proof when the witness is deceased. Borst v. Empie, 1 Seld. 33; Brown v. Kimball, 25 Wend. 259; reversing 19 *Id.* 437. The grantee cannot prove the execution by the grantor. Goodhue v. Berrien, 2 Sand. Ch. 630. As to what makes a subscribing witness, *vide* Hollenback v. Fleming, 6 Hill, 303; Norman v. Wells, 17 Wend. 136; and *ante*, p. 515.

Acknowledgments by Corporations.— *Vide*, *ante*, pp. 553, 554.

Certificate to be Indorsed.—By § 15 R. S. p. 759, "Every officer who shall take the acknowledgment or proof of any conveyance, shall *indorse* a *certificate* thereof *signed* by himself *on* the conveyance; and in such certificate shall set forth the matters hereinbefore required to be *done*, *known* or *proved*, on such acknowledgment or proof, together with the *names* of the witnesses examined before such officer, and their *places of residence*, and the substance of the *evidence* by them given." By § 17 the certificate is made only presumptive proof, and may be rebutted and contested, and the witness shown to be interested or incompetent. See, also, 5 Hill, 36; 2 *Ib.* 54; 3 Du. 95. The words "*and their places of residence*," were introduced by the Revised Statutes on the previous law. The residence of the subscribing witness is to be set forth when he is *examined*, but not necessarily that of other witnesses examined. Dibble v. Rogers, 13 Wend. 536. The identity of the grantor need not be proved by the subscribing witness, when the grantor acknowledges it, but by any third person. *Ib.* It will be observed that the certificate is to be *indorsed on the conveyance*, and not merely *annexed;* but if the certificate is *subjoined*, it has been held sufficient. Thurman v. Cameron, 24 Wend. 87. The certificate should state that the subscribing witnesses were present at the execution. Norman v. Wells, 17 Wend. 136. It is not necessary that the precise words of the statute should be used. Sheldon v. Stryker, 42 Barb. 484.

Certificate—what to State as to Time and Locality.—The certificate of

the officer taking acknowledgments out of the State must state the *day*, and *city*, *town* or *county*, within which the acknowledgment or oath was taken; and the commissioner must take the proof or acknowledgment *within the city* or *county* for which he was appointed, otherwise it is void. Laws of 1850, ch. 270, § 4; 3 Rev. Stat. p. 49, § 12, act of 1859, ch. 222. The certificate should state, when the acknowledgment is taken out of the State, all that is required by the statutes, without recourse to extrinsic proof. People v. Register of N. Y. 6 Abb. 180.

Conveyances so Acknowledged or Proved to be Recorded.—§ 16, *Ib.* "Every conveyance acknowledged or proved, and certified in the manner above prescribed by any of the officers before named, may be read in evidence, without further proof thereof, and shall be entitled to be recorded." Law of April 6, 1801, 1 Wend. 478; 1 Rev. Laws, 1813, p. 369.

Certificates on Conveyances to be Recorded in another. County.—§ 18, *Ib.* Conveyances to be recorded in another county than where the commissioner or county judge, unless a counsellor, resided who took the acknowledgment, must be authenticated by the county clerk of the county where the officer resided. Laws of 1818, p. 44; Campbell v. Hoyt, 23 Barb. 55, as modified by Laws of 1867, p. 1515. Conveyances executed by the agents of the *Holland* Land Company or *Poultney* estate are excepted. *Ib.* §§ 1, 9. County judges' certificates, since 1847, do not have to be authenticated by the county clerk. People v. Hurlburt, 44 Barb. 126; Laws of 1847, vol. 2, p. 643. As to its being requisite before that time, *vide* Wood v. Weiant, 1 Com. 77. See as to recording such certificates, *post*, Title iii.

Certificate of Secretary of State.—Where the acknowledgment is before a commissioner appointed for this State residing in another State, his certificate must be authenticated by a certificate of the Secretary of this State. Laws of 1850, ch. 270.

Reacknowledgment.—If a deed which is void for want of a proper acknowledgment is reacknowledged it is made good. Doe v. Howland, 8 Cow. 277; Osterhout v. Shoemaker, 3 Hill, 513.

The term "Real Estate" Defined.—§ 36, *Ib.* The term "*real estate*," as regards the proof and record of deeds, is to be construed as co-extensive in meaning with "*lands, tenements* and *hereditaments*;" and as embracing all *chattels real, except leases* for a term not exceeding *three* years. This would include "growing timber." Voreback v. Roe, 50 Barb. 302; Warren v. Leland, 2 Barb. 613; Goodyear v. Vosburgh, 57 Barb. 243.

Wine Plants.—As between tenant and landlord, are chattels. Winternute v. Light, 46 Barb. 278.

Defective Acknowledgment.—The defective acknowledgment of deeds may be made good by statute. 8 Pet. 88; 3 McLean, 383; *Ib.* 230.

Ancient Deeds.—It may be remarked that a deed appearing to be of the age of thirty years proves itself, and is allowed in evidence as presumptive before the courts, provided possession has accompanied it, or there are corroborating proofs. Jackson v. Thompson, 6 Cow. 178; Wilson v. Betts, 4 Den. 201; Staring v. Bowen, 6 Barb. 109; Troup v. Hurlburt, 10 Barb. 354; Clark v. Owens, 18 N. Y. 434. And with Wills. Staring v. Bowen, 6 Barb. 109.

TITLE II. BEFORE WHAT OFFICERS INSTRUMENTS MAY BE ACKNOWLEDGED OR PROVED.

By the statutes now in force (July, 1873,) the acknowledgment and proof may be before the following officers.

1. *When Taken within the State.*—Before a justice of the Supreme Court, a county judge, surrogate, mayor, or recorder of a city, justice of the peace in towns. 1840, ch. 238. Commissioners of deeds for a city or county, or notary public. 1 Rev. Stat. 756, § 4; Laws of 1840, 187, ch. 238. Laws of 1859, ch. 360; and of 1863, ch. 508; and 1864, ch. 29, as to notaries. And probably justices of the New York Superior Court, as Supreme Court commissioners. See 1 Rev. Stat. 754, § 4; 1 Laws of 1847, 281, ch. 255, § 7; Renaud v. Hargous, 13 N. Y. 3 Kern. 259; affirming s. c. 2 Duer, 540. The office of Supreme Court commissioner was abolished by the Constitution of 1846. *Vide* the People v. Hurlburt, 44 Barb. 126.

Commissioners of Deeds and Justices of the Peace.—As to early acts appointing commissioners of deeds, *vide* laws of 1818, ch. 55; this act rendered Masters in Chancery incompetent; repealed in 1828. See also as to commissioners of deeds, acts of 1823, p. 243; 1829, ch. 52; 1833, ch. 28; 1837, ch. 439; 1846, ch. 35; 1848, ch. 158; 1851, July; also 1 R. S. pp. 100, 101. Various local acts also created commissioners for certain towns and cities. By act of 1840, ch. 238, the office of commissioners of deeds of the towns in the State were abolished; and their duties were to be executed by the justices of the peace of the towns. Commissioners of deeds are local officers, and are confined in the execution of their duties, to the county for which they were appointed. 1 R. S. 1st ed. 100; Law of 1854, ch. 92. By law of 1848, ch. 75, they are to be appointed by the common councils of the cities of the State, and vacancies so filled. Amended 1848, ch. 158; 1848, ch. 161. By the Revised Statutes, Part ii, ch. 3, no county judge or commissioner of deeds shall take any proof or acknowledgment of deeds out of the city or county for which he was appointed. 1 R. S. 1st ed. p. 756.

Jurisdiction of the Officer.—The notary cannot act out of his county. 33 How. Pr. 312. Nor a judge out of his State. Jackson v. Humphreys, 1 Johns. 498. Acts of notaries since April 15, 1859, were confirmed by laws of 1860, ch. 443; 1861, ch. 246. The officer will be presumed to have acted within the limits of his jurisdiction. People v. Snyder, 41 N. Y. 397; Carpenter v. Dexter, 8 Wal. 513.

2. *When taken without the State, but within the United States.*—Before a judge of the United States Supreme or District Courts, or of the Supreme, Superior, or Circuit Court of a State or Territory, or before a judge of the United States Circuit Court in the District of Columbia; but such acknowledgment must be taken at a place within the jurisdiction of such officer. Or before the mayor of any city. 1845, ch. 109. Or a New York commissioner. May 13, 1840; 1850, ch. 270. The certificate of a New York commissioner must be accompanied by the certificate of the Secretary of State of the State of New York, attesting the existence of the officer, and the genuineness of his signature; and such commissioner can only act within the city or county in which he resided at the time of his appointment. 1 Rev. Stat. 757, § 4, subd. 2; Laws of 1845, 89, ch. 109; Laws of 1850, ch. 270; amended, 2 Laws of 1857, ch. 788. The certificate of a New York commissioner, residing out of the State, must be under his seal of office, and is wholly void unless it specify the day on which, and the city or town in which, it was taken. Laws of 1850, ch. 270. This act repealed the law of May 13, 1840, and gave power to take affidavits by said commissioners. See also act of 1859, ch. 222, amending act of 1850. When made by any person residing out of the *State*, and *within the United States*, it may be made also before any officer of the State or Territory where made, authorized *by its laws* to take proofs or acknowledgments. But no such acknowledgment is valid, unless the officer taking the same *knows* or has satisfactory evidence, that the person making it is *the indi-*

vidual described in and who executed the instrument. And there must be attached or subjoined to the certificate of proof or acknowledgment, a certificate under the name and official seal of the clerk, register, recorder, or prothonotary of the county in which such officer resides, or the clerk of any court thereof having a seal, specifying that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that such clerk, register, recorder, or prothonotary, is well acquainted with the handwriting of such officer, and verily believes his signature genuine. Laws of 1848, ch. 195, as amended by Laws of 1856, ch. 61, repealing Law of 1853, p. 637; 1867, ch. 557. When taken without the State, where the grantor is dead, *vide* Laws of 1858, ch. 259.

3. *When taken without the United States.*—When the party is in other parts of North or South America, or in Europe, before a *minister plenipotentiary*, or *minister extraordinary*, or *charge d'affaires*, of the United States, resident and accredited there; or before any *United States consul* resident in any port or country; or before a *judge* of the *highest court* in *Upper* or *Lower Canada*. 1829, ch. 222, and by Law of 1870, ch. 208, before the judge of any court of record, or the mayor of any city therein, to be certified in a certain way. In the *British* dominions, before the Lord Mayor of *London*, or Chief Magistrate of *Dublin*, *Edinburgh* or *Liverpool*. Laws of 1829, 348, ch. 222; 1 R. L. 370; 1817, 58; 1854, ch. 206. Extended to vice and deputy consuls and consular agents, and commercial and vice-commercial agents. Laws of 1863, ch. 246; 1865, p. 776. Their previous acts are confirmed if in form. *Ib.* Acknowledgment may be also made before a person specially authorized by the Supreme Court of the State, by a commission issued for the purpose. 1 Rev. Stat. 757, § 8; Law of March 8, 1817. The Governor of New York is also authorized to appoint commissioners of deeds, not exceeding three in each, for the following cities: *London*, *Liverpool*, *Glasgow*, *Paris* and *Marseilles*. Laws of 1858, ch. 308. Extended to *Dublin*, *Belfast*, *Cork* and *Galway*, by Laws of 1862, ch. 283; and the Governor in his discretion may appoint a *commissioner* for any *other* foreign State. *Ib.* They may take affidavits and give certain certificates. See amendment as to that, Law of 1865, ch. 421.

Persons in Military Service.—By Laws of 1862, ch. 471, it was provided that persons in the actual volunteer military service of the State or of the United States, might make an acknowledgment before a colonel or higher officer and also before a commissioned officer in said service being a counsellor at law of this State, if such officer is out of the State.

During the war in Mexico before officers of the army.—By soldiers or officers of the army of the United States. Law of 1847, ch. 170.

Relationship to Parties.—Relationship to parties does not invalidate the acknowledgment. Lynch v. Livingston, 2 Seld. 422.

As to oaths and affirmations taken before officers in foreign countries, *vide* Law of 1854, ch. 206.

Notaries in New York and Kings Counties may perform official acts in both counties. Law 1872, ch. 703. See, also, Law 1873, as to Richmond, Queens and Westchester.

Title III. Of the Recording of Instruments.

The existing provisions for the record of instruments are found in the Revised Statutes. It is therein provided that every *grant* shall be *conclusive* as against sub-

sequent purchasers from a grantor or from his heirs claiming as such, *except* a subsequent purchaser in good faith, and for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been *first duly recorded.* In Part i, ch. 3 of the Revised Statutes, 5th edition, are contained most of the statutes now in force relative to the record of instruments.

Conveyances to be Recorded, or to be Void, &c.—It is provided that "every conveyance of real estate within this State hereafter made shall be *recorded* in the office of the clerk of the county where such real estate *shall be situated;* and every such conveyance not so recorded shall be *void* as against any subsequent purchasers in *good faith*, and for a *valuable* consideration, of the same real estate, or any portion thereof, whose conveyance shall be *first duly recorded.*"

Rev. Stat. vol. i, p. 756, 1st. edit. § 1. This section is founded on Rev. Laws, pp. 362–372; Laws of 1819, p. 269; of 1821, p. 127; of 1822, pp. 261–284; of 1823, p. 412. The statute protects none but innocent and *bona fide* purchasers. Schutt v. Large, 10 Johns. 462; 17 Wend. 25; 6 Barb. 373; Harris v. Norton, 16 Barb. 264. Those who take for a precedent debt are not so considered except to the extent of the value they part with. Dickerson v. Tillinghast, 4 Pai. 315; Evertsen v. Evertsen, 5 Paige, 644; Woodburn v. Chamberlin, 17 Barb. 446; Merrit v. N. R. R. 12 Barb. 605; Pickett v. Baron, 29 Barb. 505. The want of record does not avoid the deed as between the parties or those having actual notice. 8 Wend. 620; 9 Cow. 945; 10 Johns. 457; Jackson v. West, *Ib.* 466. "Subsequent purchasers" means those from the same vendor. Raynor v. Wilson, 3 Hill, 469. The purchaser must also be one in *good faith*, and not one merely whose rights lie in executory contract. Ring v. Steele, 3 Keyes, 450; Villa v. Rodriguez, 12 Wall. 323.

An Unrecorded Conveyance, however, divests the owner of any interest, so that a subsequent sale on execution against him passes nothing. 4 Cow. 599; 9 *Id.* 120.

Books to be Provided.—§ 2, *Ib.* provides that the clerks of counties shall provide different sets of books, properly *indexed;* one for *conveyances absolute*, the other for *mortgages*, or *conveyances intended to operate as such*, or as securities. See as to form of index, laws of Apr. 18, 1843, ch. 199.

Defeasance to be Recorded.—§ 3, *Ib.* Any instrument of *defeasance*, showing that a deed is intended to be a *security*, must be recorded with the mortgage, and at the same time, *to operate* for the advantage of the person for whose benefit the deed is made. *Vide ante*, p. 539; Grimstone v. Carter, 3 Pai 421.

Deeds proved in another State.—Deeds proved in another State or Territory may also be recorded in this State, when the officer and grantor are both deceased. Laws of 1858, ch. 239.

Certificates to be Recorded.—All *certificates* of acknowledgment and proof, and any *certificates* required of the authentication of any officer,

must be recorded with the conveyance. Unless so done, neither the record or transcript thereof shall be evidence. § 20.

Former Conveyances.—§§ 22, 23, *Ib.* Conveyances theretofore (before 1830) proved or acknowledged under laws then in force may also be recorded and read in evidence. Those not acknowledged shall have the like effect, when acknowledged and recorded, as those acknowledged and recorded under the present law.

Order of Recording.—§§ 24, 25, *Ib.* Conveyances are to be recorded in the *order*, and as of the time of *delivery* to the clerk, who shall certify the time, book, and page, in the record and on the conveyance.

Record to be Evidence.—As to this, *vide* §§ 16, 20, 27.

Instruments in Secretary of State's Office, relating to real estate, may be recorded in any county clerk's office, or in the Registry of N. Y. 1839, ch. 295.

When Witnesses are Deceased.—§§ 30, 33. Conveyances proved under these circumstances, and deposited for record, shall be constructive notice from the time of record and deposit. *Ante*, p. 580.

No Instrument to be Recorded (§ 34) *unless duly Acknowledged, or Proved and Certified*, under a penalty against the county clerk, as for a misdemeanor.

The term Real estate, vide ante, p. 581.

To be Recorded in the proper Book.—Care must be taken that the instrument be recorded in liber of Deeds or Mortgages, according to its tenor and effect. If recorded wrongly, the record is not notice. Gillig v. Maas, 28 N. Y. 196; also *infra*, this title.

The term "Purchaser" (§ 37) is held to embrace *grantee of any real estate or* INTEREST *therein for a valuable consideration*, and every *assignee* of a *mortgage*, *lease*, or other *conditional* estate.

The term Conveyance (§ 38) is stated to embrace *every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged* or *assigned*, or by which the *title* to any real estate may be *affected* in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale and purchase of land. Loan Commissioners' mortgages are within the recording acts, when entered on their books, and then become notice. Tefft v. Munson, 63 Barb. 31. A covenant passing an equitable title may be recorded. Hunt v. Johnson, 19 N. Y. 279. To entitle a document to be recorded, it must directly operate on the land and affect the title. Ludlow v. Van Ness, 1 Bos. 178; Gillig v. Maas, 28 N. Y. 191.

Powers of Attorney and Contracts for Sale of Land.—§ 71. The above section, 38, is not to apply to them, but when duly proved or acknowledged, they *may* be recorded and read in evidence.

As to Powers of Attorney, vide ante, 359, and 3 Barb. Ch. 207; as to Contracts, *ante*, p. 474, and 5 Lans. 160, and Merithew v. Andrew, 44 Barb. 201, showing that when a purchaser has actual or constructive notice of such a contract, he takes subject to the rights of parties under it.

Instruments improperly or incorrectly recorded, are not available as notice; and there must be actual notice by the record to make it notice. Shepherd v. Burkhalter, 13 Geo. 443; Brown v. Lunt, 37 Maine, 423; Johnston v. Slater, 11 Gratt, 321; James v. Morey, 2 Cow. 246; Frost v. Beekman, 1 John. Ch. 300; Cook v. Travis, 22 Barb. 338; Gillig v. Maas, 28 N. Y. 191.

The above Provisions as to Mortgages.—Mortgages and assignments of mortgages are embraced in the word

"*conveyance*" in the registry acts now in force. The clerks of the respective counties are required to keep distinct books for the record of mortgages and securities in the nature of mortgages. The record of a mortgage is not indispensable, except to secure its prior lien. (2 Johns. Ch. 603; 8 Cow. 266; 28 Barb. 42.) Its records become notices to all subsequent mortgagees and purchasers, of the lien created.

Record in Different Counties.—If the mortgage is on property in different counties, it must be recorded in each county. 47 Barb. 416.

Conveyance and Defeasance.—It has been seen above (p. 539), that any conveyance and the separate instrument of defeasance constituting a mortgage, must be recorded together as a mortgage. Otherwise it has no more effect than an unrecorded mortgage, and subsequent *bona fide* purchasers from the mortgagor are protected against it. 3 Rev. Stat. p. 45, § 3; 3 Wend. 208; 1 Paige, 554; 2 Johns. Ch. 188; *Id.* 417; 2 Cow. 248; 3 Pai. 421; 8 *Id.* 260; 11 Pai. 459; and *vide ante*, p. 539. If the mortgage is recorded improperly or in the wrong place, it is no notice. Gillig v. Maas, 28 N. Y. 191. A deed by way of security, recorded without defeasance, may, by circumstances, become valid as a deed absolute. Warner v. Winslow, 1 Sand. Ch. 430; see also as to the effect of a defeasance not being recorded, Mills v. Comstock, 5 John. Ch. 214; Stoddart v. Rotton, 5 Bos. 378.

Preference of Unrecorded Mortgage.—An unrecorded mortgage has preference over a subsequent general assignment, though the latter is first recorded (11 Paige, 564), and over a subsequent grantee or mortgagee with notice. 16 How. Pr. R. 119; 5 Denio, 187; 6 Barb. 373; 8 Cow. 266; even though the latter may first register his deed, &c. Butler v. Viele, 44 Barb. 106. If improperly discharged, a subsequent recorded deed takes preference. Ely v. Scofield, 35 Barb. 330. A prior unregistered mortgage is superior to a subsequent unregistered deed, even, if the latter was taken *bona fide* and for value. *Ib.* If one purchase land *bona fide* for value, a prior unregistered mortgage cannot be enforced against him. Jackson v. McChesney, 7 Co. 360 (1824); Jackson v. Campbell, 19 John. 281 (1822).

Junior Mortgagee.—A junior mortgagee, with notice of a *prior* unrecorded mortgage, cannot gain priority by recording his mortgage, nor can a *bona fide* assignee of such a mortgage without notice, unless his assignment be recorded before the prior mortgage. Forth v. Burch, 5 Den. 187. As to the time when a junior mortgage would take effect as against a prior one, *vide* Strong v. Dollner, 2 Sand. 444. The lien of a first mortgage will be presumptively lost in favor of a second mortgage first recorded, unless it can be overcome in the manner sanctioned by law. Peabody v. Roberts, 47 Barb. 91.

Subsequent Alienations by Mortgagor.—A mortgagee releasing part of mortgaged premises, is not bound to take notice of alienations by the mortgagor, unless he have notice to put him on inquiry. How. Ins. Co. v. Halsey, 4 Sand. 565, and 4 Seld. 271; Stuyvesant v. Hone, 1 Sand. Ch. 419.

2 John Ch 603

Preference over Judgments.—A mortgage, though unrecorded, has preference over a subsequent docketed judgment. 2 Johns. 216; 1 Ed. 562; 30 Barb. 268. But, should the land be sold by the sheriff under the judgment, prior to the registry of the mortgage, a *bona fide* purchaser would be

protected. 4 Johns. 216; 13 *Id.* 471; 4 Cow. 599; 1 Ed. Ch. 652; 9 Pai. 132; see *post*, ch. 38.

For Consideration Money.—Mortgages for consideration money have also preference over prior judgments against the mortgagor. 3 Rev. Stat. p. 39, § 5. Even if the mortgage is given to a third person who advances the consideration. Jackson v. Austin, 15 Johns. 477; and *ante*, p. 550.

Bona Fide Purchaser.—The receiving a conveyance in payment of a pre-existing debt will not give preference over a prior unrecorded mortgage. 20 Johns. 637; 2 Barb. 493; 4 Paige, 215; 17 Barb. 446. There must be a new consideration at the time of the purchase, or the relinquishment of some security. Jessup v. Hulse, 29 Barb. 539; also, p. 584.

Mortgage Given before a Deed Taken.—A mortgage by purchaser before he receives a deed is merely an equitable lien, and recording it before the date of the deed is not constructive notice to subsequent purchasers. Farmers' Loan Co. v. Maltby, 8 Paige, 361.

Recitals of a Mortgage.—The recital of a mortgage in another deed is no notice of its existence as an outstanding mortgage. Jackson v. Davis, 18 Johns. 7.

Two Mortgages Recorded Simultaneously.—When two mortgages are recorded simultaneously, the intention of the parties governs the time. 2 Barb. Ch. 440. Or neither has the preference. Rhoades v. Canfield, 8 Pai. 545. Otherwise the priority must be determined by equitable rules. Stafford v. Van Rensselaer, 9 Cow. 316.

Record of Assignments of Mortgages.—Under the former laws the recording acts did not apply to assignments of mortgages; and no notice of the assignment was necessary to protect the assignee of the mortgage against a subsequent assignee or persons claiming under him.

James v. Mowrey, 2 Cow. 246.

The recording statutes now apply to assignments of mortgages. (3 Rev. Stat. 59.) They should be recorded in order to operate as notice, but otherwise it is not indispensable.

Purdy v. Huntington, 46 Barb. 389; Vanderkemp v. Shelton, 11 Pai. 38; Hoyt v. Hoyt, 8 Bos. 577; explained, Belden v. Mecker, 2 Lans. 471; N. Y. Life Ins. Co. v. Smith, 2 Barb. Ch. 82; The Trustees, &c. v. Wheeler, 59 Barb. 585. The case of Purdy v. Huntington, 42 N. Y. 334, exemplifies the necessity of not relying on the doctrine of *merger*, in the case of outstanding mortgages. The court there holds that the assignee of a recorded mortgage on lands which were conveyed by the mortgagor to the mortgagee after the assignment, had a valid lien thereon as against a purchaser from such mortgagee who purchased without knowledge of the assignment, although the conveyances both from the mortgagor to the mortgagee, and from him to the purchaser, were recorded prior to the recording of the assignment. The court holding that the conveyance to the mortgagee after assignment was not a merger of the mortgage. A subsequent assignee for value, whose assignment is first recorded, has preference over a prior assignment not recorded. Pickett v. Baron, 29 Barb. 505. The record is not sufficient notice to the mortgagor so as to invalidate payments made by him to the mortgagee, § 41. 2 Barb. Ch. 82; 10 Paige, 409; 11 Pai. 37;

2 Cow. 288; 35 Barb. 334. If a junior mortgagee *with* notice assign to one *without* notice, who records his assignment before the *prior* mortgage, he is entitled to a preference. Forth v. Burch, 5 Den. 187. If a junior mortgagee in a recorded mortgage, without notice of a prior mortgage unrecorded, assign to another with notice, the assignee will have preference. A *purchaser* of a mortgage is not a "purchaser" of real estate within the meaning of the recording act, and a subsequent assignee of a mortgage, who records his assignment, does not obtain a valid title against a prior unrecorded assignment of the same mortgage. Hoyt v. Hoyt, 8 Bos. 511; but see Trustees v. Wheeler, 59 Barb. 585. Where the assignment of a mortgage is recorded, the record is notice to all the world, except the mortgagor and his representatives. Ely v. Scofield, 35 Barb. 330. And if the assignee (whose assignment is recorded) of a junior mortgage is not made a party to a foreclosure, he is not bound by a sale under the decree. Vanderkemp v. Shelton, 11 Pai. 28. The record of the assignment is notice to the grantee of the mortgagor that the mortgagee cannot release the mortgage. Belden v. Meeker, 47 N. Y. 307. The assignee, to protect himself, must see that the assignment is definite and is noted on the record of the mortgage, or else he must give actual notice to the mortgagee. More v. Sloan, 50 Barb. 442.

Other Instruments to be Recorded.—The copy of a record or a recorded deed if lost. Laws of 1843, ch. 210.

Patents for Lands.—1845, ch. 110. Wills of real estate, *vide ante*, p. 435. Judgments in partition. Act of May 11, 1846, ch. 182; 1851, ch. 277. Assignments by the comptroller. 1841, ch. 319. Assignments by the superintendent of insurance. 1859, ch. 336. Assignments for creditors. 1860, ch. 348. Of insolvent debtors. 2 R. S. 1st ed. p. 38.

Treasurer of Connecticut.—As to instruments by, *vide* Laws of 1825, 35; and 1 R. S. 1st ed. 760.

Holland Land Co.—As to records thereof and title papers, *vide* Law of 1839, ch. 295.

Montgomery and Hamilton Cos.—As to records therein, *vide* Laws of 1840, ch. 4.

Other Written Instruments except Promissory Notes and Bills of Exchange and Wills.—Such instruments may be acknowledged or proved and read in evidence. Laws of 1833, chapter 271; see 1 N. Y. 77; 23 Barb. 558; 17 *Ib.* 599.

Leases in Certain Counties.—The provisions of ch. iv, as to the acknowledgment and record of deeds are not to extend to leases for life or lives or years in Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware and Schenectady. *Ib.* § 42; Laws of 1823, 413.

Revenue Stamp.—The Laws of 1863, ch. 456, provide that the officer shall record any *stamp* affixed to any instrument.

TITLE IV. OF THE ACKNOWLEDGMENT AND RECORD OF INSTRUMENTS, BEFORE THE REVISED STATUTES.

The following summary may be useful for reference.

Under the Dutch Government.—The practice of acknowledging and recording conveyances existed. The deed was acknowledged or proved in the presence of some public officer.

The Colonial Goverment.—Prior to the act of 1710, there was a usage or common law of the colony sanctioning the record of deeds upon proof by a subscribing witness, as well as upon acknowledgment by the grantors. Van Cortlandt v. Tozer, 20 Wend. 423; Hunt v. Johnson, 19 N. Y. 279. The first act under the English colonial government was passed October 30, 1710. Under this act conveyances might be recorded in the secretary of State's office, or in the county records, and the practice continued of recording in either office until the year 1811. Under the colonial administration, there was no prescribed form for the certificates. It was the practice to acknowledge or prove deeds before a member of the council (act of December 12, 1753; act of February 10, 1771; .2 Van Shaick, 611), a judge of the Supreme Court, or a judge of a Court of Common Pleas where the land lay, mayors of cities, or master in chancery; and *feme coverts* were required to make a separate acknowledgment. The certificate was to be indorsed on the deed. Law of February 16, 1771; 2 Van Shaick, 611, 765. This act provided no form of the acknowledgment, but to entitle the deed to be recorded in any of the public offices, it had to be duly acknowledged by the grantor, before one of the council, a judge of the Supreme Court, a master in chancery, or judge of the County Court not a Mayor's Court, or proved by one of the subscribing witnesses, or if deceased, by proof of the handwriting. As to right of members of the council to take acknowledgments, *vide* 19 N. Y. 279. Previous to the act of 1771, *any* judge of a Court of Common Pleas might take acknowledgments, even if the land was not situated in his county. 17 Wend. 338; 20 *Id.* 338. As to acknowledgments by married women before the act of 1771, *vide ante*, p. 75; their acknowledgment then and subsequently became necessary to pass title, *vide ante*, p. 75.

Act of 1787.—By the law of March 1, 1787, 2 Jones & Varick, 92; 1 Green, 325, an act was passed making effectual and valid all conveyances executed after July 9, 1776, and prior to November 25,1783, and acknowledged before persons acting under authority of the king of Great Britain, as usual in cases of like nature, when the State was a colony.

Persons Abroad.—By law of March 8, 1773, 2 Van S. p. 765, provision was made as to the acknowledgment of deeds by persons abroad, and as to the acknowledgment of deeds by married women abroad, for which see *ante* p. 76.

Act of 1788.—By law of February 26, 1788, 2 Jones & Varick, 266; 2 Greenl. 99, instruments to entitle them to be recorded in the office of Secretary of State or clerk of the county, had to be acknowledged, &c., before a justice of the Supreme Court, Master in Chancery, or judge of the Supreme Court or of the U. S. (law of April 6, 1792, and of 1813), or a judge of the court of Common Pleas of the county where the lands were, or the mayor of New York, Albany, or Hudson (subsequently Schenectady also), if lands therein situated. A similar law was passed on same day relative to mortgages, 2 Green. 100, to have priority according to date of registry; and no mortgage, or deed in the nature thereof, made since March 19th, 1774, should affect *bona fide* purchases, unless registered with the clerk of the county. This act also required the separate examination of married women to pass title.

Act of March 9, 1793.—By this act, acknowledgments might be taken before the Mayor of London.

Law of 1797.—By law of February 11, 1797; 3 Green. 218, no acknowledgment could be taken unless the officer *knew or had satisfactory evidence* that the person who acknowledged was the person "described in and who had executed such deed;" nor take proof from a subscribing wit-

ness, unless he should then know such person, or have satisfactory evidence that he was the subscribing witness; nor unless he shall have satisfactory evidence that such witness knew the person who executed, &c.: all of which to be inserted in the certificate, and names and the substance of the evidence of witnesses. This seems to be the first act that prescribed the form of the acknowledgment, or contents of the certificate. Previous to the Act of February 17, 1797, it was unnecessary for the certificate to state that the officer knew the witness or the witness the grantor. Bradstreet v. Clark, 12 Wend. 673; Hunt v. Johnson, 19 N. Y. p. 279.

Act of 1801.—A further act was passed on April 6, 1801; 3 Green. 328, enacting the same provisions as the above act of 1797, as to the knowledge of the party, proof and certificate, and as to the acknowledgments of married women, and re-enacting the above provisions of the act of April 3, 1798. It also repeals so much of the act of January 8, 1794, as makes any provision for the acknowledgment, &c. of deeds different from those of the act. This act of 1801 was amended by law of 1806; 4 Web. 615, allowing acknowledgments, &c. to be taken before any judge of a Court of Common Pleas of the State. It also provided that deeds theretofore duly acknowledged, &c. might be recorded, except those relating to bounty lands. Under this law of 1801 the words "to me known," are held sufficient without the words "to be the person described in and who executed," &c. 2 Cow. 552; 24 Wend. 87. As also, the words "known to be the persons described in," &c. were held sufficient. Hunt v. Johnson, 19 N. Y. 279. A similar act was passed also, April 6, 1801, relative to mortgages (1 Web. 480), requiring them to be registered with the clerks of counties. By act of January 29, 1811, judges of territories might take acknowledgments the same as judges of the Supreme Court. By act of April 9, 1811, a judge of the Supreme or Superior Court of any State. This act of 1811, also allowed a conveyance or record of any conveyance, executed before July 4, 1776, and acknowledged, &c., according to law, to be read in evidence, or a sworn copy thereof; also act of March 8, 1817, ch. 69, as to lands out of the State.

Law of 1813.—A further act was passed April 12, 1813, entitled an act "Concerning deeds," 1 Rev. Laws, 369, re-enacting the above acts of 1801 and 1806. Deeds might also be acknowledged before a first judge of the District of Columbia, or any judge of a Court of Common Pleas; also mayor of London, and United States Minister there; or the mayor or recorder of the cities of New York, Albany or Hudson, or mayor of Schenectady. Any U. S. minister in Europe, by law of April 12, 1816; also the recorder of Troy, law of March 8, 1817. § 7. Deeds not duly acknowledged were not to be recorded, and deeds duly proved before April 6, 1801, might be recorded, excluding those relating to bounty lands. By laws of 1812, this section, so far as it relates to certain bounty lands, was repealed. See also, as to *Bounty Lands*, act of 1794, 3 Web. 45; also of 1798, April 4, 1820; 10 Pai. 188; 8 Wend. 620. Under the act of 1813, a certificate has also been held good where the words "to me known to be the parties who executed the deed" were omitted. 19 N. Y. 279. Under this act also, the certificate need not state that the officers personally knew the witness. 11 Johns. 434; 1 Wend. 406. The words "*described in*" were first introduced on the Revision of 1830. The certificate before that did not state that the *grantor* was known to the witness "to be the person *described in* and who executed," &c., but merely "that such witness knows the person who executed the same." 24 Wend. 87. See also as to proof by a witness under the law of 1813; Gillet v. Stanley, 1 Hill, 121; Jackson v. Gould, 7 Wend. 364.

Record of Deed Made Notice.—It was not until the act of April 3, 1798,

that deeds were in any case required to be recorded under the penalty of being adjudged void as against subsequent purchasers or mortgagees. This act was confined to the Western counties, but was subsequently extended to other counties. As early as the laws of December 17, 1753, however, mortgages were required to be registered with the clerks of counties. The act making deeds void as to subsequent purchasers, &c., unless recorded in the county clerk's office, was passed as to Steuben, Tioga, Herkimer, Oneida, Chenango and Otsego counties, April 3, 1798; 3 Green. 403; as to Rensselaer county, April 13, 1819, ch. 207; as to Greene, Clinton, Franklin, Delaware, Herkimer, parts of Onondaga and Cayuga counties, on March 23, 1821, ch. 136; as to Saratoga, Kings and Sullivan, April 17, 1822, ch. 284, repealed, general repealing act, as to Ulster and all other counties in the State, by law of April 23, 1823, ch. 263, excepting certain leases in certain counties. The act relating to the city of New York was passed March 30, 1811. 6 Webster, 484, repealing act of April 5, 1810. By law of 1823, the provisions of the existing registry acts were stated not to apply to leases for life or years, in the counties of Albany, Sullivan, Ulster, Herkimer, Dutchess, Columbia, Delaware and Schenectady. A general recording act was passed in 1813, vol. 2, p. 45. See as to the effect of the statutes of 1813, on prior deeds, Varick v. Briggs, 22 Wend. 543; Varick v. Briggs, 6 Pai. 323.

Early Acts as to Record of Mortgages.—The early statutes of the State required the "registry" of mortgages, and of the defeasance thereof, but did not require them to be *recorded* at length. Under former registry acts, there was a distinction drawn between the registry or record of mortgages and that of other conveyances. By a colonial act, passed Dec. 12, 1753; 2 Smith & L. 19, all mortgages executed after June 1, 1754, were to be registered with the clerks of cities and counties, and to have priority as registered. The act of Feb. 26, 1788; 2 Green. 99, required all mortgages executed after March 19, 1774, or executed after the passage of the act, to be registered, or else they should be ineffectual as against *bona fide* purchasers. The act of April 6, 1801, made similar provisions, and gave priority to those first registered, and required *defeasances* to be registered with the deed. The act of March 19, 1813, 1 Rev. Laws, p. 372, had similar provisions. An act was passed April 17, 1822, providing for the keeping of books of record of mortgages by clerks of counties, and enacting similar provisions as the law of 1813. The repealing act of December 10, 1828, repeals in terms the previous recording acts relative to both deeds and mortgages. The rules of *priority*, as respects deeds and mortgages, under the above statutes prior to 1830, were different. A mortgage not registered was absolutely *void* as against a subsequent *bona fide* purchaser, although the mortgage had been subsequently registered before the recording of the conveyance to the purchaser. 19 Johns. 282; 7 Cow. 360. But in all cases between two deeds, as well as between two mortgages, the deed or mortgage first registered was entitled to priority. Another distinction was that a mortgage *not bona fide*, or for value, as to subsequent purchasers, &c., was *absolutely* void, and an *innocent* assignee of the mortgage was not protected. 6 Barb. 67.

Effect of the Revised Statutes on Former Unrecorded Instruments.—The general repealing act of December 10, 1828, establishing the provisions of the Revised Statutes, it has been held did not affect the former acts as regards the order of the priority of prior unrecorded deeds or mortgages. 6 Barb. 60; 4 Cow. 605.

TITLE V. THE DOCTRINE OF NOTICE.

The general doctrine is, that whatever is sufficient to put a party *fully* upon an *inquiry*, amounts to notice, provided the party is under a legal obligation to inquire, as in the case of purchasers and creditors, and provided the inquiry *would lead to a knowledge of the requisite fact*, through ordinary diligence and understanding. The question, however, is not whether the party *had the means of obtaining*, and might by prudent caution have obtained the knowledge in question, but whether his not obtaining it was an act of gross or culpable negligence. He is bound to make inquiry as to facts brought to his notice affecting the title.

A notice which is barely sufficient to put a party on inquiry, or a suspicion of notice is not enough. Griffith v. Griffith, 1 Hoffman's Ch. R. 153, 166; Brush v. Ware, 15 Peters U. S. Rep. 93; Wilson v. Wall, 6 Wall. 83; 8 Cow. 260; Fort v. Burch, 6 Barb. 60; Cambridge Bk. v. Delano, 48 N. Y. 327.) Mere notice is not sufficient, if, with due diligence, the purchaser could not discover the prior title. Williamson v. Brown, 15 N. Y. 354. Notice of a deed is notice of its contents, and if there is a general notice of the existence of liens, &c., and the circumstances are sufficient to put a prudent man upon inquiry, it would be sufficient notice. Baker v. Bliss, 39 N. Y. 70; Tardy v. Morgan, 3 McLean, 358; Reed v. Gannon, 50 N. Y. 345. A purchaser is chargeable with notice of every fact referred to or recited in the deeds forming the chain of his title. Cambridge v. Delano, 48 N. Y. 326; Howard Ins. Co. v. Halsey, 4 Seld. 8 N. Y. 271; affirming 4 Sand. 556; Acer v. Westcott, 1 Lans. 193. A paper recorded, but not entitled to be, or one improperly recorded, is not constructive notice. Gillig v. Maas, 28 N. Y. 192, and *ante*, p. 585.

The following principles have been enunciated by the courts of this State, with respect to the efficacy of the record of an instrument as notice.

A Prior Deed, not Acknowledged or Recorded, will not prevail against subsequent deeds acknowledged and recorded (Clark v. Crego, 47 Barb. 599; Jackson v. Humphrey, 8 Johns. 137); but if the grantee had full notice of a prior *unrecorded* deed, he will not have preferenee under a prior recorded deed, and the subsequent record of the prior deed is notice to all purchasers under the first recorded deed. Jackson v. Post, 15 Wend. 588; Van Rensselaer v. Clark, 17 Wend. 25; Jackson v. Elston, 12 Johns. 452; Ring v. Steel, 3 Keyes, 450; Barnes v. Camack, 1 Barb. 392. The recording is equal to actual notice. Schutt v. Large, 6 Barb. 373. A prior deed not fully delivered will be postponed to a subsequent mortgage. Parmlee v. Simpson, 5 Wall. 81. A purchaser for value will not be protected if, previous to the conveyance to his grantor, the lands were conveyed to a third person and the latter's deed be recorded anterior to the last purchase, although the deed to the purchaser's grantor be first recorded. 15 Wend.

supra; 17 *Ib.* 25, *supra.* This case of Jackson v. Post (15 Wend. 588) was explained in Hooper v. Pierce (2 Hill, 650), where it was held that if one purchase lands unaffected by a prior deed, and record his conveyance, the record will inure to vendees under him, however remote; and no record of a deed subsequent to the first will operate to deprive such vendees of the rights of *bona fide* purchasers. A purchaser with notice, from a purchaser without notice, is protected; and a purchaser without notice, from a purchaser with notice, is equally protected as if no notice had been given. 8 Cow. 260; 3 Barb. 652; 8 Johns. 137; Varick v. Briggs, 6 Paige, 323, and 22 Wend. 543; Wood v. Chapin, 3 Ker. 509. See, as to the protection of one holding under a contract of sale, Boon v. Chiles, 10 Pet. 177. To constitute a *purchaser without notice*, it is not sufficient that the contract or deed should be made without notice, but that the *purchase money should be paid before* notice. Wormley v. Wormley, 6 Brockenbrough, 330; 8 Wheat. 421; Harris v. Norton, 16 Barb. 265. A purchaser with notice, even without value, from a *bona fide* purchaser who is protected under the recording acts, has the same benefit as the latter. Webster v. Van Steenburgh, 46 Barb. 211.

Actual Notice.—Priority of registry is held of no avail against *actual* notice of a previous unregistered conveyance. 2 Johns. 603; 9 Johns. 163; Barnes v. Camack, 1 Barb. 392; Webster v. Van Steenbergh, 46 Barb. 211; Tuttle v. Jackson, 6 Wend. 213; Jackson v. Burg, 10 Johns. 457; Jackson v. Cowen, 9 Cow. 94; Same v. Post, *Ib.* 120; Butler v. Viele, 44 Barb. 166;—and in Wood v. Chapin, 3 Kern. 509, a *bona fide* purchaser for value, whose deed is first recorded, is held protected against a prior unrecorded conveyance, although his grantor purchased with notice.

Record of Deed from one not having Recorded Prior Conveyance.—A purchaser is not bound to take notice of the record of a deed from a person to whom there is no recorded conveyance. Thus, where a deed to a vendor is not recorded, the record of a mortgage given by his vendee, is not notice to a subsequent purchaser. *Vide* Loosey v. Simpson, 3 Stock. N. J. 246; Cook v. Travis, 22 Barb. 338; affirmed, 20 N. Y. 400; and *infra.*

Notice to Agents, &c.—Notice to an agent is notice to a principal while the agent is concerned for the principal. Ingalls v. Morgan, 10 N. Y. 178.

Sheriffs' Sales.—As to purchasers under sheriffs' sales, *vide* ch. 38.

Purchasers of Partnership Lands.—Where a purchaser has notice of lands belonging to a partnership, they will be chargeable in his hands with the partnership debts, although he had no notice of such debts. Hoxie v. Carr, 1 Sum. 173.

Improvements.—A *bona fide* purchaser for value may enforce a lien against the true owner for improvements put upon the land. Bright v. Boyd, 1 Story C. C. 478; 2 *Id.* 605.

Mistakes in Registry.—A party is only bound by the actual registry in the proper place of the record, in default of other notice.

Military Bounty Lands.—As to the several acts concerning the registry of deeds, &c., relative to such lands, *vide* Laws, January 8th and March 27th, 1794; April 8, 1813; 1 R. S. pp. 209, 211, 303; February 4, 1814; April 13, 1819; April 14, 1820, ch. 245; February 4, 1814; April 12, 1818; April 14, 1820.

Notice not Retrospective.—Notice by the recording acts is not retrospective, so as to affect existing vested rights, and the recording of a deed or mortgage is not notice of its existence to a prior mortgagee. How. Ins. Co. v. Halsey, 4 Seld. 271; affirming 4 Sand. 565; Stuyvesant v. Hone, 1 Sand. Ch. 419; and *supra.*

Possession is Notice.—The general rule is, that *posses-*

sion of land is constructive notice to a purchaser, mortgagee or others, of the occupant's title and equities, and when an estate is in the possession of tenants, the purchaser is chargeable with notice of the extent of their interest as tenants. It is also a rule that the possession of real estate is *prima facie* evidence of the highest estate in the property, viz., *a seizin in fee.* Possession however, to operate as constructive notice, must be by occupation, or by open and visible improvement, in distinction from mere fencing, pasturing, cutting timber, &c.

Under this head, *vide* Grimstone v. Carter, 3 Paige, 421; The Trustees v. Wheeler, 5 Lans. 160; 5 Johns. Ch. 29; 6 Wend. 213, 226; 10 Barb. 47, 254, 454; 6 Cush. 170; 43 Maine, 519; 5 Barb. 53; 2 Stock. N. J. 419; 21 How. U. S. 493. The rule is not universal; the notice is merely inferential, and in some cases may not arise, or may be repelled or be restricted to some particular title or claim. Cook v. Travis, 22 Barb. 338; affirmed, 20 N. Y. 400.

CHAPTER XXVII.

SUCCESSION DUTIES AND STAMPING OF INSTRUMENTS UNDER THE UNITED STATES REVENUE LAWS.

Various laws have been passed by Congress, since July 1, 1862, requiring instruments transferring real estate to be stamped as provided, and that in default thereof, they were neither to be recorded nor read in evidence. Acts also were passed, imposing the payment of a duty or tax by those "succeeding" to real or personal property. Such duties or taxes were to be liens on "property" or real estate, in some instances for five, in others for twenty years, until they were paid. The succession might arise by deed, will or descent. By law of July 14, 1870, such succession duties were abolished, with the reservation of such as had accrued, or might accrue under the repealed acts. It is not considered necessary, therefore, in this treatise to review the above laws, as in case of future succession they are not applicable. It may be well to state however, that the United States officials still claim, that the law is in force so far as applicable to successions that may take effect at any future time, no matter how distant, provided that the right to the succession became vested at any time before the abolition of the acts, imposing the duty—no matter at how remote a past period, and *even before the repealed acts were passed.* Such a view is evidently not within either the letter or spirit of the repealing act of 1870, as will be clear from its inspection, and would doubtless be not sustained, before any tribunal competent in legal learning, to pronounce upon the subject. As regards the provisions requiring the affixing and cancelling of revenue stamps on instruments to give them validity, such provisions have also been abolished by United States law of June 6, 1872, to take effect on

the 1st of October, then ensuing. Such repeal of the laws requiring the affixing of stamps to instruments would not act retrospectively so as to affect instruments executed while the laws were in force; and, in that view it would be desirable to review their provisions, if the imposition of such stamps were considered a matter of legal necessity in order to give validity, to instruments on which the stamps were directed to be imposed. The question, however, under the recent views of the tribunals of this State is no longer one affecting title to reality, but one merely of taxation, as between the government and the individual taxed. As such it is not appropriate to this volume. The recent views of courts of this State, are substantially to the effect, that in no case would the omission to affix a revenue stamp to an instrument requiring a stamp invalidate the instrument, unless there was an intention to defraud the government of the stamp duty, and that instruments requiring a stamp, might be stamped and used in evidence, in the absence of any such intent. In the case of More v. More (*infra*), the Court of Appeals have also determined that it was not within the constitutional power of Congress, to prescribe for the States a rule for the transfer of property within them; and that therefore, no deed would be invalid, as an instrument transferring realty, because it had not been stamped as required by the United States laws.

Vorebeck v. Roe, 50 Barb. 302; Frink v. Thompson, 4 Lans. 489; More v. More, 47 N. Y. 467; overruling, Davy v. Morgan, 56 Barb. 218; see, also, Coppernell v. Ketcham, *Ib.* 111; Howe v. Carpenter, 53 Barb. 382.

The Seizure and Sale of Land for non-payment of Internal Revenue Taxes.—The act of July 1, 1862, provided for the *seizure* and *sale* of real estate for non-payment of taxes. *Vide* § 21. Redemption may be made in a year from record of deed. Taxes were to be a lien on all property. The collector is to keep record of sales of lands. *Vide* also law of 1864, ch. 173, § 30; also law of March 3, 1865, providing that taxes under the Internal Revenue laws shall be *liens* on all *property* of the person, &c., assessed; also law of July 13, 1866, making provision of sale of real estate of party taxed, how deed is to given, and redemption; also law of March 2, 1867, § 4. These liens do not take precedence of existing liens. Decision of Commissioner Rollins. By § 106, of law of 1868, provision is made for a bill in equity to enforce the lien against real estate, making all persons having liens parties.

CHAPTER XXVIII.

TITLE THROUGH FORECLOSURE OF MORTGAGE.

The *equity of redemption* which exists in the mortgagor after default in payment, may be *foreclosed* by action and sale, whether the mortgage contains a power of sale or not. The object of an action of foreclosure is to enable the mortgagee to have the mortgaged premises sold, in order to obtain his money, interest, and expenses; and that the mortgagor, and all persons claiming under him, be barred of all equity of redemption in the mortgaged premises, the purchaser taking a clear title to the land sold.

If the mortgage be to secure unliquidated damages, or if there be no power of sale in the mortgage, it can only be foreclosed in a court of equity. Ferguson v. Kimball, 3 Barb. Ch. 616; Same v. Ferguson, 2 Com. 360; or if the mortgage have to be proved by parol. Hart v. Ten Eyck, 2 Johns. Ch. 62. The foreclosure and sale must take place according to the statute in force when the mortgage was given, so far as the substantial rights of the mortgagor are concerned. Cohoes Co. v. Goss, 13 Barb. 137; Calkins v. Calkins, 3 Barb. 305; aff'd, 20 N. Y. 147; Brown v. Kinzie, 1 How. U. S. 311. But as to changes in the statutes regulating the mere proceedings, *vide contra*, James v. Stull, 9 Barb. 482; see, also, Calkins v. Calkins, *supra*, as to terms of redemption when the mortgagee has gone into possession without foreclosure.

Limitation.—Lapse of time may bar the action of foreclosure. If the mortgagor has been permitted to hold the land without account, or payment of principal or interest, or claim therefor for twenty years, the mortgage debt is considered extinguished, and a reconveyance of the legal estate from the mortgagee may be presumed. 7 Johns. 278; 12 *Id.* 242. The presumption, however, may be rebutted. Proceedings of fore-

closure commenced will rebut such presumption. 13 Johns. 539; Calkins v. Calkins, 3 Barb. 305; Calkins v. Isbell, 20 N. Y. 147. See, also, *ante*, p. 545, and Miner v. Beekman, 11 Abb. N. S. 147. While the suit is pending, and after judgment, no recovery can be had at law for the recovery of the debt, except by order of court; and when a judgment has been obtained at law, there can be no foreclosure unless execution is returned unsatisfied. 1st ed. 2 R. S. 191; 8 Pai. 70; 9 *Ib.* 137. As to execution for the mortgage debt, *vide* ch. 38. As to effect of a tender in removing the lien and right to foreclose, *vide* The Farmer's &c. Co. v. Edwards, 26 Wend. 541; Kortright v. Cady, 21 N. Y. 343; and *ante*, p. 548. The latter case, holds, reversing 23 Barb. 430, and overruling, Arnot v. Post, 2 Den. 344, that tender of the money due at any time before foreclosure discharges the lien, though made after the law day, and not kept good; and continued readiness to pay need not be shown.

TITLE I. JURISDICTION OF COURTS OVER THE ACTION.

Any judgment rendered by a court that had not obtained jurisdiction of the subject-matter to which it relates, and the persons to be bound thereby, is utterly void.

On this head, *vide* Phelps v. Baker, 60 Barb. 107; and *post*, Judicial Sale, ch. 38. The Supreme Court has now the jurisdiction of the former Court of Chancery, which had power from its institution to decree a sale under foreclosure. 1 R. L. 90; Onderdonk v. Mott, 34 Barb. 106; Constitution, Art. 6, §§ 3–6; 2 Rev. Stat. 191, 1st ed.; *Ib.* 234; Laws of 1847, p. 323; Laws of 1848, p. 282; Laws of 1849, p. 27; *Ib.* p. 117; *Ib.* p. 150; Laws of 1850, p. 20; *Ib.* p. 9; Laws of 1851, p. 308; Laws of 1852, p. 591; Laws of 1853, p. 526.

Superior and Common Pleas and other Courts.—Also jurisdiction in foreclosure cases is conferred on the Superior Court and Court of Common Pleas in New York city, and mayors' and recorders' courts of cities, and county courts, for lands in the city or the county. Constitution of 1846; Code, § 33, § 30, and the trial should be where the lands are located. § 123. See, also, 3 How. 325; 26 Barb. 197; 16 How. 41. As to the N. Y. Superior Court, *vide* Ring v. McCoun, 6 Seld. 268. *Vide* Hall v. Hall, 30 How. 51; Arnold v. Rees, 18 N. Y. 57; overruling, Hall v. Nelson, 23 Barb. 90, as to County Courts and their jurisdiction; and Benson v. Cromwell, 26 Barb. 218. They have also jurisdiction over lands out of the county, if included in a complaint to foreclose lands in the county. Strong v. Eighme, 41 How. 117. See, also, law of 1873, ch. 239, extending jurisdiction of the N. Y. Common Pleas and Superior Courts, Superior Court of Buffalo, and city court of Brooklyn, to be equal, in civil cases, with the Supreme Court. The grounds of jurisdiction must appear from the record, of an inferior court. Walker v. Turner, 9 Wheat. 541.

Remedy by Ejectment or Execution.—The action of ejectment will no longer lie by the mortgagee, nor can he sell the equity of redemption on an execution for the mortgage debt. 3 Rev. Stat. 312, § 57; Delaplaine v. Hitchcock, 6 Hill, 14.

Lis Pendens.—A notice of lis pendens of the action is to be filed with the County Clerk, giving particulars of the mortgage and the lands, at least forty days before judgment. See *post*, ch. 45, as to these notices, and their effect. The law of May 7, 1844, ch. 346, required the notice to be filed forty days, at least, before decree.

TITLE II. PARTIES TO THE ACTION.

Parties Plaintiff.—The party bringing the action should be the mortgagee or his personal representatives; or, if the mortgage has been assigned, the assignees or their personal representatives.

A junior mortgagee may foreclose, although the premises have been sold under foreclosure of a first mortgage, if he were not party thereto. Peabody v. Roberts, 47 Barb. 92; Walsh v. The Rutgers Fire Ins. Co. 13 Abb. 33. And he may redeem by paying the mortgage debt and interest without the costs of the previous foreclosure. Gage v. Brewster, 31 N. Y. 224. The assignee of the mortgage, who is not assignee of the bond, cannot foreclose. 17 Abb. 342. The transfer of the mortgage does not transfer the bond, *ante*, p. 546. If plaintiff die before judgment, no further proceedings can be had until the action is revived. This is not necessary if after judgment, though before sale. 12 How. 118, nor to procure a writ of assistance. Lynde v. O'Donnell, 12 Abb. 286; 21 How. 34.

Parties Defendant.—The *equity of redemption of those made parties to the action, and those in privity with them*, is alone barred by the judgment. The Revised Statutes provide, that under these proceedings, the deed to the purchaser on the sale shall be an entire bar against all the *parties to the suit*, and their heirs respectively, and all claiming under them, and shall vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed, and shall be as valid as if executed by the mortgagor and mortgagee.

1 Rev. Laws, 490; 3 Rev. Stat. p. 273, § 88, 5th ed. If the party entitled to the equity of redemption, or those having liens thereon, are not made parties, and their equity foreclosed, an action for the redemption of the mortgaged premises may be bought by them in equity. Walsh v. Rutgers Fire Ins. Co. 13 Abb. 33; Morris v. Wheeler, 45 N. Y. 708; *vide* Holden v. Sackett, 12 Abb. 473; Miner v. Beekman, 11 Abb. N. S. 147. See this case as to the action to redeem. The judgment, is not a bar to the paramount rights of parties to the action, however, which have not been subjected to litigation, in the action, either through the form or substance of the pleadings. Lewis v. Smith, 11 Barb. 152; aff'd, 9 N. Y. 502, note 1.

Who are to be made Parties Defendant.—The owner of the equity of redemption, and all persons materially interested in the mortgage or mortgaged estate, or who have any right to or lien thereon, or who may be affected by the judgment, ought to be made parties.[1] Hall v. Nelson,

[1] A recent case, Giles v. Solomon, tried at Special Term, Jan. 1868, First District (James, Justice), exemplifies the necessity of caution in making the requisite parties defendants in foreclosuse suits. Plaintiff's father died in 1840, leaving a widow and children. In 1841, a foreclosure suit was begun upon a mortgage

23 Barb. 88; 3 Barb. 534. This will ordinarily include *the heirs* of the mortgagor, 47 Barb. 144, or his *devisee* or *assignee*, and also *personal representatives*, if the mortgage is of a *term;* the *tenants* for *life*, *curtesy and dower*, *reversioners*, and *remaindermen* as also all persons having any contingent *interest* in the equity of redemption; also all persons *interested in the proceeds* of the estate, 8 Barb. 618; all *grantees* of the mortgagor. 20 Wend. 260; 5 Sandf. 447; 10 Pai. 409. As to the *wives of any grantees* of the mortgagor, 23 Barb. 125; 8 Barb. 618; 10 Abb. 154; 11 Barb. 152; 18 *Id.* 564. The wife of the mortgagor, whether of a purchase money mortgage, or whether the mortgage was executed before coverture or not; or whether she has joined in the mortgage or not, *ante*, pp. 159, 549; Mills v. Voorhies, 20 N. Y. 412. See as to when the dower must yield to the superior title of a mortgagee, in possession under foreclosure, Smith v. Gardner, 42 Barb. 356. Also any person in *possession, for possession is notice* to all purchasers and mortgagees, and if not made parties, their prior equity is not cut off, 6 Wend. 656; 2 Barb. Ch. 555; also all *judgment creditors* whose rights of redemption are otherwise not foreclosed. 45 N. Y. 708; 10 N. Y. 356;[1] *junior mortgagees*, 3 Barb. 534, and their *assignees*, 11 Paige, 28; also *tenants for years*, whose title becomes divested by the foreclosure. 52 Barb. 377. An assignee in bankruptcy, 47 N. Y. 261. See, also, Clevland v. Boerum, 24 N. Y. 613, holding a notice sufficient as to such an assignee. If the mortgagor's equity of redemption has been sold on execution, he must be made a party if his right of redemption on the sheriff's sale is still in force. Halleck v. Smith, 4 Johns. Ch. 649. The mortgagor need not be a party on foreclosure against his grantee who has assumed the mortgage. Van Nest v. Latson, 19 Barb. 604.

Persons having future Interests, and those not in Esse.—As to these *vide post*, ch. xxx.

Junior Incumbrancers need not appear and answer, in order to save their rights, if they are truly stated in the complaint. 4 Paige, 85. They may redeem if not made parties, 3 Johns. Ch. 459; 47 Barb. 91, and foreclose their own mortgage. *Ib.*; and *ante*, p. 599. They must assert their claims if not stated in the complaint, in order to protect themselves. Benjamin v. Elmira &c. R. R. 49 Barb. 441.

Prior Incumbrancers are not necessary parties, as the land may be sold subject to their liens; but they may be made parties, to have the amount due them liquidated, 2 Barb. 20; *vide* also 10 How. 367; and a junior mortgagee may make a prior mortgagee a party, without offering to redeem from a previous foreclosure to which he was not made party, Vanderkempt v. Shelton, 11 Pai. 28; and a decree may be made for sale of the equity of redemption subject to the prior mortgage. 1 Paige, 284. Persons claiming any right or equity of redemption may be made parties, Law of 1840, ch. 342.

TITLE III. JURISDICTION OVER DEFENDANTS.

It is necessary to ascertain that all the *defendants are legally before the court*, before their interests can be fore-

executed by the father; and the widow and children *in esse* were made parties. *Two days before the decree*, in 1841, the plaintiff, a *posthumous child* of the deceased mortgagor, was born. In 1866, she began her action to redeem. It was held that she was entitled to one-seventh of the premises and back rents on paying one-seventh of the mortgage.

[1] Between May, 1840, and May, 1844, it was not necessary to make judgment creditors parties. Laws of 1840, ch. 342; of 1844, ch. 346.

closed by the judgment. No principle of law is better settled than that a judgment rendered without the court having obtained jurisdiction of the persons to be bound thereby, is utterly void as to them.

There must be proper appearance or service of the process on all parties before their rights are barred by the decree. The manner in which parties are served and defaulted, or appear and litigate before judgment entered, is matter of legal practice, and cannot be here reviewed.

Defendants brought in by Publication.—Where there has been service by *publication*, all the statutory provisions and terms of the order must be strictly complied with to confer jurisdiction. *Vide* Code, §§ 134 to 137. The requirements of the statutes must be strictly complied with to confer jurisdiction. 13 How. 43; 14 *Id.* 380; 34 Barb. 95; 12 Abb. 359. Where there is a total absence of proof as to the facts necessary to confer jurisdiction, the order of publication and all proceedings founded on it are void; and the facts must appear from the papers on which the order is founded. Towsley v. McDonald, 32 Barb. 604; Waffle v. Goble, 53 *Ib.* 517. See those cases as to the requisites of the service by publication.

Infant Defendants.—These must appear through a *guardian ad litem*, duly appointed. See fully, as to such guardians, *post*, ch. xxx.

Appearance.—An appearance (even unauthorized) by an attorney for a defendant who was neither served with process, nor had notice of the suit, is binding on the defendant and will confer jurisdiction. Brown v. Nichols, 42 N. Y. 26. Appearance by a party cures any irregularity in giving him notice, or any defects in the process, and confers jurisdiction of the person.

Jurisdictional Facts.—The court cannot amend any proceeding to confer *jurisdiction*, 13 How. 43; 14 *Id.* 380, or acquire jurisdiction by proof of the necessary facts *nunc pro tunc*. 17 Abb. 67. Jurisdictional facts must be set forth, 41 Barb. 549, and must exist, 33 Barb. 71, and the judge's order is not conclusive. From the time of service of summons, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance is equivalent to personal service. Code, § 139.

Unknown Parties.—As to unknown parties having interests, *vide* Code, § 135; Wheeler v. Scully, 50 N. Y. 667.

TITLE IV. THE JUDGMENT.

Judgment of sale in foreclosure suits is obtained generally on a referee's report of facts, on due notice to all parties who have appeared.

As to a merger and superseding of the decree of sale by contract of the parties, *vide* 13 How. Pr. 16. If part only is payable, the action is to be dismissed by payment into the court, before judgment, the amount due, principal, interest and costs. 2 R. S. 192, 1st edit; 2 N. Y. 300; 4 Ab. 279. After decree in such case, there may also be a stay of judgment. *Ib.* The court may decree a sale of sufficient to discharge the amount due and costs of suit. 2 R. S. § 191. As to when and against whom there may be judgment for a residue of the debt due, *vide* Code, § 167. The purchaser cannot complain of any provisions of the judgment except that which affects his title. Garkin v. Anderson, 55 Barb. 257; 42 N. Y. 186.

Title V. The Sale.

The sale of the mortgaged premises is directed in the judgment, which must particularly describe them. Real property adjudged to be sold, must be sold in the county where it or a part of it lies, by the sheriff of the county, or a referee appointed by the court for that purpose (formerly a master in chancery), unless otherwise directed in the decree; and thereupon the sheriff or referee executes a conveyance to the purchaser.

2 R. S. 1st edit. p. 192. The sale will be made so as to protect parties having equities. Livingston v. Mildrum, 19 N. Y. 440. By law of 1869, ch. 569, in the city of New York, the sale *had* to be made by the sheriff. The law, however, was declared unconstitutional. Gaskin v. Meek, 42 N. Y. 186; affirming 55 Barb. 357. The sale is to be made as directed on the judgment.

How Lands are to be Sold.—A sale by a referee is not to be regarded as a contract requisite to be signed by him. 26 How. Pr. 325. Where a sale is made by a referee, he must be personally present. 2 Johns. Ch. 154. If the premises consist of several parcels, they must, unless otherwise ordered, be sold severally. Rule 74; 23 How. 385; 2 R. S. 192, 1st edit. Omitting to do so does not make the sale void, and the irregularity may be waived by act of the party, or by time. 7 Abb. 183; 17 Abb. 137. Sheriff has discretion. Rule 94. Sales may be made at further times to meet future instalments due, by order on the foot of the decree. Brinckerhoof v. Thalhimer, 2 John. Ch. 486; Lyman v. Sale, 2 *Id.* 487. The sale may be on election day. 35 How. 23. It seems the title cannot be objected to by a purchaser on the ground that the sale is made by the wrong officer. 7 Abb. N. S. 4. After a judgment, if a party, a mortgagor has no right of redemption. 10 How. Pr. 310. A tenant in possession, who was made party to the action, must *attorn* to the purchaser, or be removed by writ of assistance, although claiming under an expired lease previous to the mortgage. 9 How. 220. As to the order in which the lands should be sold to meet the different equities of parties, *vide* Breese v. Busby, 12 How. 485, and *ante*, p. 550.

The Deed.—Before a deed is executed, the mortgage must be filed or recorded, if acknowledged. Rule 75. The deed passes the title, and confirmation of the sale relates back to the date of the deed. 6 Barb. 60; 4 Hill, 171. A deed for premises not embraced in the *sale*, will not pass title, though the premises were embraced in the decree. Laverty v. Moore, 33 N. Y. 658. The purchaser takes the same estate, and no other, that would have vested in the mortgagee if the equity of redemption were foreclosed. 2 R. S. p. 192, 1st edit. The deed is as valid as if executed by the mortgagor and mortgagee; and shall be a bar against them, and the parties to the suit, and their heirs, and those claiming under them. *Ib.* The confirmation of the report of sale is not necessary to pass the title to the purchaser. The title passes by the referee's deed. 4 Hill, 171; 6 Barb. 60. The purchaser or his grantee takes the title the mortgagor had before the mortgage. Butler v. Viele, 44 Barb. 166. *Bona fide* purchases will be protected under a judicial sale, even though the sale be set aside. James v. Dodd, 2 Paige, 99; Tripp v. Cook, 26 Wend. 143. See also *post*, ch. 38, Sales on Execution.

When not Excused from Completing.—The purchaser will not be excused from completing on account of irregularities in the proceedings that may be corrected (5 Abb. 451; 4 *Id.* 193; 11 Abb. 440); nor even where an appeal has been taken from the judgment; nor if an action is instituted to cancel the mortgage. 12 Abb. 473. He must complete if the mortgagor had a good title by adverse possession. Grady v. Ward, 20 Barb. 543. But will not be compelled to take a worthless or encumbered title. McGown v. Wilkins, 1 Paige, 120. The purchaser, on being relieved from completing, is entitled to a return of his deposit and interest, the expenses of examining title and costs of motion. 31 Barb. 394. The purchaser is entitled to a perfect title in law and equity (22 Wend. 498; 3 Edw. 428); otherwise he may refuse to complete purchase (5 Abb. Pr. 451); unless the title can be made good immediately. 22 Wend. 498; 20 Barb. 543. An obsolete mortgage of record is no objection. 4 Pai. 441.

Parties Estopped.—Persons made parties to the suit are estopped from disputing the purchaser's title (47 Barb. 179); and a purchaser is estopped from denying the validity of a mortgage, subject to which he purchased on an execution. Horton v. Davis, 26 N. Y. 495.

When the Title Vests.—The bid, its acceptance and payment of a deposit makes no change in the title, even in equity. It is not until payment of the balance and delivery of the deed that the purchaser acquires a right to rents, and the title to the lands. Strong v. Dollner, 2 Sandf. 444; Clark v. Corley, 5 *Id.* 447; Brown v. Frost, 10 Pai. 247; Cheney v. Woodruff, 45 N. Y. 98; Blanco v. Foote, 32 Barb. 535; Whitwell v. Bartlett, 52 Barb. 319. Rents intermediate the sale and delivery do not belong to the purchaser. *Id.*

Possession under the Deed.—The court may enforce the sale by compelling possession to be given to the purchaser, through a writ of assistance. 4 Johns. Ch. 609; 3 Rev. Stat. p. 272, § 83.

Title VI. Resale, &c.

The court will not order a resale for a mere inadequacy of price, but will where there has been *fraud, accident* or *mistake*, misrepresentation or surprise, or where the price is very inadequate.

22 Barb. 167; 24 How. 440; 25 How. 403; King v. Platt, 37 N. Y. 155. Until confirmation of sale, any person may apply to vacate it. 10 Paige, 243. Excusable accident may be a ground, or mistake. 2 Abb. Pr. 296. Vacating the sale and opening the judgment, *tolls* the title of the purchaser and his grantee. 15 Abb. 468. The purchaser may appeal (17 Abb. 229), but not to the Court of Appeals. 28 N. Y. 122. See also Lents v. Craig, 13 How. 72, as to the purchaser's rights. Without some legal reason the sale will not be set aside. McCotter v. Gay, 30 N. Y. 80; Hotchkiss v. The Clifton Air-cure, 4 Keyes, 170. A resale will be ordered if the lands are not sold in parcels as directed, unless under the Rule 74, to the contrary. Wolcott v. Schenck, 23 How. 385.

Purchaser refusing to Complete.—If the purchaser refuse to complete, application is made to the court to compel him, or for a resale of the property at his expense. Cazet v. Hubbell, 36 N. Y. 677; Miller v. Colger, 36 Barb. 250.

Deficiency.—A judgment may also be rendered for any deficiency, and execution issue thereon. 1 R. S. 1st edit. p. 191.

Surplus Moneys are to be brought into court for those entitled thereto, subject to the order of the court. 2 R. S. 192, 1st edit. As to those

belonging to the estate of a deceased person, *vide ante*, p. 454; Law of 1857, ch. 658. Persons not parties to the suit may make application for. Law of 1840, ch. 342. As to rights of tenants for. Clarkson v. Skidmore, 2 Lans. 238; Burr v. Stanton, 52 Barb. 377.

TITLE VII. STRICT FORECLOSURE.

The object of a bill for *strict foreclosure*, is to obtain a decree for the payment of the mortgage debt, &c., within a short period after judgment, to be fixed by the court, or that in default thereof, the *mortgagor and all persons claiming under him, may be barred and foreclosed* of all rights, interest, and equity of redemption, in the mortgaged premises, and their title be extinguished and vested in the mortgagee, without a sale. This action is often brought to foreclose parties having a right of redemption, who may have been omitted in a prior foreclosure; or where a former court had no jurisdiction; or where the mortgagee is in possession, and he wishes to bar the redemption of the mortgagor.

Parties.—The parties to a bill for strict foreclosure, are in general the same as a bill for foreclosure and sale. The complainant should bring before the court all persons who have a right to redeem the premises, and all persons claiming any interest.

The Judgment.—The judgments in these cases will have to be particularly examined, as there may be inserted in them special provisions with reference to the redemption by infants or other defendants. The decree generally is, that the amount be paid in six months from confirmation of the report, or the parties be foreclosed. This time may be enlarged. Infant heirs are often allowed to a certain day in court to show cause against the decree. It is said that there can be no valid strict foreclosure against an infant heir of the mortgagor. Mills v. Dennis, 3 Johns. Ch. 67. The judgment must find the amount due, and allow a time for payment and redemption; otherwise it will be void, unless authorized by special law. After the expiration of the time the lands become the property of the mortgagee. Clark v. Reyburn, 8 Wall. U. S. 318; Bolles v. Duff, 43 N. Y. 469; Mills v. Dennis, 3 Johns. Ch. 67.

Final Judgment.—If the mortgage money is not paid as directed by the court, the plaintiff takes a *final* judgment that the defendants be absolutely debarred and foreclosed of all right, title, and equity of redemption, to the mortgaged lands. For form of proceedings and judgment on the strict foreclosure of a mortgage, *vide* Kendall v. Treadwell, reported in 5 Abb. 168; 14 How. 165. See also Bell v. The Mayor, 10 Pai. 49; Benedict v. Gillman, 4 Pai. 48; Ruckman v. Astor, 9 Pai. 517; Bolles v. Trimble, 43 N. Y. 469.

Extinguishment of the Debt.—The debt secured is not extinguished except as to the value of the land foreclosed. De Grant v. Graham, 1 N. Y. L. Ob. 75; Spencer v. Harford, 4 Wend. 384; Morgan v. Plumb, 9 Wend. 287; Lansing v. Goelet, 9 Cow. 346; Globe Ins. Co. v. Lansing, 5 Cow. 380.

Title VIII. Sale under a Power.

The mortgagee also may sell under a power inserted in the mortgage. In this State a sale under a power is made the subject of a statutory provision. The sale under a power, if regularly made, according to the direction of the statute, is a final and conclusive bar to the equity of redemption, even as to infant heirs. When title is made under the statutory proceedings, they will have to be strictly examined, for if not in every respect conformable to the statutes, they are *void;* and are not like proceedings in a court, where the court has certain amendatory powers to supply omissions and remedy defects.

Vide Dwight v. Phillips, 48 Barb. 116; 9 Barb. 278; 11 *Id.* 191; 16 *Id.* 9; 20 *Id.* 18; 9 Abb. 66. The present statutory proceedings to foreclose under a power are to be found in the Rev. Stat. of 1830, as amended by the laws hereinafter noted, being chiefly the acts of 1842, ch. 277; 1844, ch. 346; 1857, ch. 308. These proceedings are continued in force by § 471 of the Code.

Earlier Provisions.—The principal provisions of the act were passed February 26, 1788. 2 Greenl. 99; see also 1 Rev. Laws of 1813, p. 373. By the law of 1788, sales under powers in a mortgage were held good, and barred the redemption, provided the person giving the power were of the age of twenty-five years, and the power be acknowledged and recorded. These provisions were re-enacted by law of April 6, 1801. Sales were to be by public auction, on six months' published notice. 1 Webster, 450. See also provisions of act of March 19, 1813, as to these proceedings. 1 Rev. Laws, p. 372; 7 Johns. Ch. 50; 5 John. Ch. 35. The above provisions were superseded by the provisions of the Revised Statutes. See also act of 1822, 262.

Provisions of the Revised Statutes.—The Revised Statutes of 1830 provide as follows: § 1. "Any mortgage of real estate made by a person being at the time more than twenty-five years of age, or hereafter executed by any person over the age of twenty-one years, containing a power of sale on default, may be foreclosed by advertisement in the cases and in the manner hereinafter specified."

Superseded by Code C. P. §§ 2387 et seq.

2 R. S. Part iii, ch. 8, title 15. Parties may contract as they please, as to the power and its exercise. Elliott v. Wood, 45 N. Y. 71; Doolittle v. Lewis, 7 Johns. Ch. 45. The power passes by any assignment of the mortgage. 1 Paige, 48; *vide ante*, p. 542. A sale under the power, after due tender of the mortgage debt by one entitled to redeem, is void, and so held where the purchaser had notice. 5 Johns. Ch. 35. Payment of a mortgage extinguishes the power of sale. Cameron v. Erwin, 5 Hill, 272. And if a statute foreclosure afterwards take place, even a *bona fide*

purchaser acquires no title. *Ib.* But if the sale were illegal, the mortgage and power remain in force. Stackpole v. Robbins, 47 Barb. 212. A *bona fide* purchaser would be protected if the mortgage had not been satisfied of record. Warner v. Blakeman, 36 Barb. 501; affi'd, 4 Keyes, 487. The damages or amount must be liquidated, or there can be no foreclosure under these proceedings. Jacks v. Turner, 7 Wend. 458; Ferguson v. Kimball, 3 Barb. 619; Ferguson v. Ferguson, 2 Com. 364; and *ante*, p. 597.

As to the Law in Force, vide ante, p. 345.

Notice to be Given.—§ 2 provides that to give the notice thereinafter specified: 1. Some default shall have occurred, by which the power to sell shall have become operative. 2. That there shall be no then existing suit to recover the mortgaged debt, or that an execution therein has been returned unsatisfied in whole or part. 3. That the power of sale has been duly registered, or the mortgage containing the same has been duly recorded. Formerly the power need not be recorded. The omission to record the power did not affect the validity of the sale before the Revised Statutes. 1 Caines Ca. 1; 2 Cow. 229; 4 Cow. 266. The rule under the Revised Statutes seems peremptory. It must be recorded in all the counties where the lands are. Wells v. Wells, 47 Barb. 416.

Notice, how Served.—Notice of the foreclosure must be given by publication for twelve weeks, once a week in a paper in the county or counties where the lands are, and by affixing a notice for twelve weeks on the outer door of the nearest county court house, and by delivering a copy thereof to the county clerk twelve weeks before the sale, who is to index and put the same in a book (as amended, 1842, ch. 277, § 3; 1844, ch. 346; and 1857, ch. 308). If the lands are in several counties, the notices must be affixed on the court house in each county (47 Barb. 416), and advertised in each county. As to publication when the printers refuse to publish, *vide* 2 R. S. p. 648, 1st edit.; and as to notice to mortgagees when publication is made in the State paper, *Ib.*; Laws of 1818, ch. 235. Previous to the act of 1842, a notice of 24 weeks was necessary. As to the change affecting existing mortgages, *vide* James v. Stull, 9 Barb. 482. The subsequent removal of the notice will not vitiate. 12 How. 491. Notice published in each of the 12 weeks is sufficient. Howard v. Hatch, 29 Barb. 297; partially overruled in Bryan v. Butts, 28 How. 582; sustaining 27 Barb. 503. It must be at least 84 days, exclusive of day of publication. Bunce v. Reed, 16 Barb. 347; Howard v. Hatch, 29 Barb. 297. A copy of the notice must be served 14 days before the sale, upon the mortgagor or his personal representatives, and upon the subsequent grantees and mortgagees, whose conveyances and mortgages shall be upon record at the time of the first publication of the notice, and upon all judgment creditors subsequent to such mortgage. The notice is to be served personally, or at their dwelling in charge of some person of suitable age, or by depositing a copy in the post office at least twenty-eight days prior to the time therein specified for the sale, directed to said persons, properly folded, at their places of residence. Laws of 1844, ch. 346; Stanton v. Kline, 1 Ker. 196. If not served as required, the sale is void. St. John v. Bumpstead, 17 Barb. 100; Dwight v. Philips, 48 Barb. 116; Cole v. Moffit, 20 Barb. 18. The 28 days are counted from the time of deposit. Hornby v. Cramer, 12 How. P. 490. A wife of a mortgagor surviving the husband is entitled to notice; but not his heirs. King v. Duntz, 11 Barb. 191. Personal representatives—the above words mean executors or administrators, and not heirs or devisees. Anderson v. Austin, 34 Barb. 319. A junior mortgagee (or his assignee of a mortgage recorded) is entitled to

notice. As to his rights, *vide* Hornby v. Cramer, 12 How. 490; Winslow v. McCall, 32 Barb. 241; Wetmore v. Roberts, 10 How. 33. If the mortgagor is deceased, service is dispensed with, if he left no personal representatives. Cole v. Moffit, 20 Barb. 18; and 34 Barb. 319, *supra*. Junior mortgagees, if not served, may redeem. Wetmore v. Roberts, 10 How. P. R. 51. Even actual notice to a lienor has been held not to dispense with the statutory notice. Root v. Wheeler, 12 Abb. P. 294. In the above case it is held that the street and number of residence, the manner of folding and the kind of stamps for postage, must be specified. See also, Chalmers v. Wright, 5 Robt. 714.

A direction upon an unsealed envelope does not satisfy the statute, although the notice is within. Rathbone v. Clarke, 9 Abb. 66. The advertisement must not contain false statements, or the sale is void (5 Johns. Ch. 35), except where there is mistake. 11 Paige, 24; 6 Barb. 347; 1 Hill, 108; 11 Pai. 626; 62 Barb. 223. If the notice is not properly served by mail, the foreclosure is void (25 N. Y. 320); so, if the residence of the mortgagor is not specified. 48 Barb. 116. No particular post office is required (4 How. 246), but it should be in the State. 1 Kern. 196. The notice may be in all cases served through the post office. Stanton v. Kline 11 N. Y. 196; reversing 16 Barb. 9. If the notice is addressed to a party, at a wrong place, the foreclosure would be void as to him (Robinson v. Ryan, 25 N. Y. 320), or if the affidavits disclose no place of residence, when served by mail. Dwight v. Phillips, 48 Barb. 116.

Notice, what to Contain.—§ 4. The notice is to contain the dates and names of parties to the mortgage and assignees, and when and where recorded, amount then due, and description of the premises as in the mortgage. Any postponement of notice must be made by inserting notice as soon as possible in the newspapers in which the original advertisement was published until time of sale. 7 How. P. R. 372; Miller v. Hull, 4 Den. 107. The description of the land must be full and correct. 9 Abb. 66. An overclaim will not vitiate. Moury v. Sanborn, 62 Barb. 223; Klock v. Cronkhite, 1 Hill, 108. Nor erroneous statements which do not mislead, especially if corrected. Hubbell v. Sibley, 5 Lans. 51; Jencks v. Alexander, 11 Pai. 619. The whole amount due must be claimed. *Ib.* The notice must state that the mortgage is to be foreclosed under a power, and an error in the book of record, or in the amount may be disregarded, if substantial indication is made. Klock v. Cronkhite, 1 Hill, 108; Bunce v. Reed, 16 Barb. 347; Judd v. O'Brien, 21 N. Y. 186; Jencks v. Alexander, 11 Pai. 626. Notice of postponement need not be in writing. Westgate v. Hamblin, 7 How. 372. After sixteen years a mortgagee cannot question the regularity of the notice. Demarest v. Wynkoop, 3 Johns. Ch. 129. The clerk's office and date of record is sufficient as to statement of record; but the notice must be of a foreclosure and sale. Judd v. O'Brien, 21 N. Y. 186.

Sale, how Made.—§ 6. The sale is to be at public auction in the daytime, in separate plots, in the county where the premises, or some part, are situated, except sales on mortgages to the people are to be made at the capitol. No more is to be sold than necessary. A sale on any other than the fixed or adjourned day is void. 4 Den. 104. The sale must be at auction. Lawrence v. The Far. L. & T. Co. 3 Ker. 200, unless there is agreement to the contrary. Elliott v. Wood, 45 N. Y 71; 53 Barb. 285. The sale must be for the whole amount secured. Holden v. Gilbert, 7 Pai. 208; Cox v. Wheeler, *Id.* 248; Tice v. Anin, 2 Johns. Ch. 125; Leonard v. Morris, 9 Pai. 90. When there are future instalments, *vide* Jencks v. Alexander, 11 Pai. 619. The sale of a farm need not be in parcels. Lam-

erson v. Marvin, 8 Barb. 9. The foreclosure may be complete without a deed. 4 Den. 44; 4 Cow. 266; 1 Pai. 48. As to sale on Sunday, *vide* Sayles v. Smith, 12 Wend. 57; and as to postponement from such a day, Westgate v. Handling, 7 How. 372.

Who may Purchase.—The mortgagee, his assigns, or legal representatives, may fairly and in good faith purchase the premises or any part. § 7, 2 R. L. of 1813, p. 375; 20 Barb. 559; 4 Pai. 58; 1 Pai. 48; 4 Cow. 277. If no bidders are present but the auctioneer, who bids in for the mortgagee, the sale is held void. Campbell v. Swan, 48 Barb. 109.

Effect of the Sale.—Under the law of 1830, the sale did not affect judgment creditors. 4 Pai. 61; 5 *Id.* 526; 7 *Id.* 167. As amended, as above stated, every sale pursuant to a power, conducted as aforesaid, to a purchaser *in good faith*, shall be equivalent to a foreclosure and sale under the decree of a court of equity, so far only as to be an entire bar of all claim or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage, and also of any person having lien by any judgment or decree subsequent to such mortgage, and of every person having any lien or claim by or under such subsequent judgment or decree, who shall have been served with notice of such sale as required by law. As amended, law of 1842, ch. 277, and 1844, ch. 346, § 4; Warren v. Blakeman, 36 Barb. 501. Before the amendment of 1844, the sale did not affect any mortgagee or judgment creditor whose lien occurred prior to the *sale*, and they might redeem. Benedict v. Gillman, 4 Paige, 58. If the sale is irregular, the purchaser takes nothing by his deed. 7 Johns. 217. If the mortgage was usurious, the sale is void if purchaser had notice. 10 Barb. 558. The owner of the equity of redemption must have notice, or the sale is void as to him, 17 Barb. 100; also a junior mortgagee or his assignees. 10 How. Pr. 51. The sale is voidable if the lands are not sold in distinct tracts, or lots, if so situated. 47 Barb. 416.

Record of Proceedings.—§§ 9 and 10. Affidavits may be made, by the auctioner, of the sales; and also by the printer, his foreman, or clerk, of the publication; and affidavits of other persons, of the affixing of the notices and other service, and in the county clerk's books, are to be made and filed with the clerk of the county. As amended, laws of 1831, ch. 266; 1844, ch. 346; and 1857, ch. 308. Parol or other evidence of service (in another action) may be given, but it will not dispense with the filing of the affidavits. Layman v. Whiting, 20 Barb. 559; Mowry v. Sanborn, 62 Barb. 223; Van Slyke v. Sheldon, 9 Barb. 278. The affidavit of posting the notice may be by one who posted the notice or saw it posted. 12 How. P. 490. The affidavits are only presumptive evidence of the facts, except as to the mortgagee and his privies. Bunce v. Reed, 16 Barb. 347; Maury v. Sanborn, 62 Barb. 223; Sherman v. Willet, 42 N. Y. 146. Defects in them may be supplied *aliunde;* and errors in date, &c., will not vitiate, if they can be corrected from entries made. Chalmers v. White, 5 Robn. 713; Mowry v. Sanborn, 62 Barb. 223.

Effect of Record.—§ 11. They are to be filed and recorded by the clerk in the book of mortgages, and such original affidavits, the record thereof, and certified copies of such record shall be presumptive evidence of the facts therein contained. The clerk is directed to make a minute opposite the record of the mortgage when such affidavits are recorded. The affidavits must also state the service of the notice on the mortgagor, if made since the amendment of 1844. 20 Barb. 559. Where no notice appeared by the affidavits to have been served on the mortgagor, proceedings held void. 48 Barb. 116.

Stamps.—As to the necessity of revenue stamps on such proceedings,

vide Frink v. Thompson, 4 Lans. 489; and *ante*, ch. 27. The sale forecloses the equity of redemption, and there is no time requred for filing the affidavits; and the delay in making them does not extend the time for redemption. Tuthill v. Tracy, 31 N. Y. 157. The affidavits are evidence of the title though unrecorded. Frink v. Thompson, 4 Lans. 489; Howard v. Hatch, 29 Barb. 297. The sale is not invalid as to judgment creditors for omission to serve other parties. Hubbell v. Sibley, 5 Lans. 51.

The Record Operates as a Conveyance.—§ 14. The affidavits of the publication, and of affixing notice of sale, and of the circumstances of such sale, shall be evidences of the sale and of the foreclosure of the equity of redemption, as herein specified, without any conveyance being executed, in the same manner and with the like effect as a conveyance executed by a mortgagee, upon such sale, to a third person, hath hitherto been. As amended, 1838, ch. 266, § 8; 4 Denio, 41; 13 Barb. 137; 16 Barb. 347; 10 Pai. 562. There is no transfer of title until all the necessary affidavits have been made and recorded. They operate as the statutory transfer of title. Layman v. Whiting, 20 Barb. 559; Bryan v. Butts, 27 Barb. 503; affirmed, 28 How. 582, overruling Howard v. Hatch, 29 Barb. 297. The subsequent filing of an affidavit will not establish the title back by relation. Layman v. Whiting, 20 Barb. 559. Where there has been a sale, the equity of redemption is foreclosed, though the affidavits be not filed for twenty years thereafter. Chapman v. The Delaware, &c. Co. 3 Lans. 261; Tuthill v. Tracy, 31 N. Y. 157.

Not to Apply to Mortgages to the People.—§§ 15 and 16 provide that these proceedings shall to a certain extent not be applicable to mortgages to the people.

Lands Out of the State.—The above provisions do not apply to them. Elliot v. Wood, 45 N. Y. 71; Doolittle v. Lewis, 7 Johns. Ch. 45.

Usury.—If the purchaser has notice that the mortgage was usurious, he acquires no title nor his grantee. Hyland v. Stafford, 10 Barb. 558.

Surplus Moneys.—As to surplus moneys on such sale, *vide* law of 1868, ch. 804; amended, law of 1870, ch. 706.

Redemption.—By law of May 12, 1837, ch. 410, redemption was allowed within a year after any mortgage sale, by a mortgagor, his representatives, or assigns, on repayment of the amount bid and ten per cent. thereon. This act was repealed by law of April 18, 1838, ch. 266; and the purchaser is allowed to take possession unless the mortgagor, his assigns, &c., who have a right to redeem, give certain specified securities to redeem in a year. This act also gives certain rights of redemption to creditors.

TITLE IX. MISCELLANEOUS.

Railroad and Plank Road Companies.—As to foreclosure of mortgages given by railroad or plank road companies, to secure the payment of any bond of such company, *vide* 2 Rev. Stat. p. 700, 5th edition; also *ante*, p. 562.

Mortgages to the People.—As to foreclosure of mortgages to the People of this State, *vide* 1 Rev. Stat. 565 to 569, 5th ed.

CHAPTER XXIX.

MORTGAGES TO COMMISSIONERS OF LOANS AND SALES THEREUNDER.

COMMISSIONERS OF LOANS UNDER ACT OF 1837.

TITLE I. MORTGAGES, AND THE DISCHARGE THEREOF.

These officers were created under act of January 10, 1837, ch. 2, and act of April 4, 1837, ch. 150. This latter act provides for the loaning on mortgage of the surplus moneys of the United States, deposited with the State for safe keeping (under the act of Congress of June 23, 1836), through officers then created, called "*Commissioners for loaning moneys of the United States,*" appointed for each county. The substance of the mortgages taken are to be inserted in books to be kept by the commissioners in each county, and shall be matter of record.

Discharge of Mortgages.—§ 28. On payment of the mortgage, the commissioners are to give a release, and shall make an entry thereof on the margin of the mortgage and in the minute book. By law of 1868, ch. 698, mortgages paid may also be discharged by these commissioners, by direction of the comptroller.

TITLE II. OFFICES OF COMMISSIONERS, LIEN OF MORTGAGE, &C.

Their offices are to be kept at the court houses of their respective counties, or where the courts of Common Pleas are held (Law of 1837, § 41), and in the city of New York, at the office of the Register. (Laws of 1851, ch. 286.) They are to permit all persons to search any books on paying twelve and a half cents.

Lien of the Mortgages.—The execution of the respective mortgages, and their entry on being placed in their

books of mortgages, shall have the like *lien, priority, operation and effect*, as if such mortgages had been duly recorded in the book of mortgages in the office of the clerk of the proper county.

Laws of 1837, § 43.

Where to be Deposited.—The mortgages are to be numbered and indexed. The book of mortgages is to be deposited with the clerks of the respective counties. *Ib.* § 55. By law of 1851, ch. 286, all mortgages on lands in the county of New York, are to be deposited with the register, and also the indexes relating thereto.

Proceedings to be Minuted.—Ib. § 46. The commissioners are to insert the minutes of their proceedings in a minute book in detail, *viz.:* whose mortgages are foreclosed, and the names and numbers, the orders for and copies of the advertisements for sale, and places at which they are set up, &c., the names of purchasers on sales, and also the cause of all suits, and the information they have received in relation thereto. The omission to make all proper entries, does not vitiate the sale as against a *bona fide* purchaser. See Wood v. Terry, 4 Lans. 80, where these provisions are considered directory merely; also White v. Lester, 34 How. P. 137; 1 Keyes, 316; Powell v. Tuttle, 3 Com. 396.

Sale of Mortgages, &c.—Such commissioners cannot sell (or assign) mortgages taken by them. Woodgate v. Fleet, 44 N. Y. 1; Pell v. Ulmar, 18 N. Y. 139. Nor can one be the borrower, so as that a valid mortgage can be executed to the other. N. Y. L. & T. Co. v. Staats, 21 Barb. 570.

Title III. Foreclosure and Sale.

The law (§ 31) makes provision for the sale by the commissioners of the premises mortgaged. The object of the sale is to foreclose all equity of redemption.

8 Cow. 47; 7 Hill, 431; 5 N. Y. 144.

Default.—§ 30 of law of 1837.—On default of the mortgagor to pay the yearly interest on the first Tuesday of October, or within twenty-three days thereafter, and also the principal when due, the commissioners of the county and their successors, &c., shall be *seized of an absolute and indefeasible estate in fee* in the said lands, and the mortgagor, his heirs or assigns, shall be utterly foreclosed and barred of all equity of redemption of the mortgaged premises. It is supposed under this section that if the borrower fails to pay the interest on the first Tuesday of October, or within twenty-three days thereafter, the mortgage becomes *ipso facto* foreclosed, and the commissioners are seized in fee, subject to the right of redemption provided. See as to this provision, Fellows v. The Commissioners, 36 Barb. 655; Olmstead v. Elder, 1 Seld. 144. This latter case was overruled in Pell v. Ulmar, 18 N. Y. 139; reversing 21 Barb. 500.

Redemption.—But the mortgagor, his heirs, &c., may retain possession until the first Tuesday of February thereafter, and may redeem the same as subsequently provided. Under this section, although, on default, the commissioners are stated to have an absolute estate, the right of redemption is held not to be barred until after a sale, as provided. 7 Hill, 433; 8 Cow. 47; 2 Sand. 325; 1 Seld. 144; Sherwood v. Reade, 7 Hill, 433; Jackson v. Rhoades, 8 Cow. 47; York v. Allen, 30 N. Y. 104. But it is only a right, and gives no interest in the land. Pell v. Ulmar, 18 N. Y. 139; White v. Lester, 34 How. P. 136; 1 Keyes, 316.

Act of 1844.—By act of May 7, 1844, ch. 326, the act of April 4, 1837, was modified so as to allow forfeited mortgages to be delivered to the comptroller, certified copies whereof may be recorded and read in evidence. This act directs the commissioners to give certificates of their proceedings, which may be recorded and read in evidence, or a transcript thereof.

Advertisement and Notice.—§ 31.—The commissioners are to advertise the lands for sale in three public places of the county, to be sold at auction in the county court house, and advertise in one county paper, once a week, for six weeks successively, prior to the day of sale, which is to be on the first Tuesday of February. If no paper in the county, then in the nearest paper. Wood v. Terry, 4 Lans. 80. By Laws of 1863, ch. 73, the advertisement must be served on the *mortgagor or his representatives*, executors, &c., if any, fourteen days before the sale, and also upon all his *grantees, lessees* or *mortgagees of record*, and on all *incumbrancers* of record subsequent to the mortgage. The notice to be served personally, or by leaving the same at the dwelling house with a person of full age, or through the post office; if the latter, on twenty-eight day's notice. *Vide* 3 Pai. 390.

Sale by one Commissioner.— The notice of the sale must be given by *both* commissioners, or it is void (30 N. Y. 104), and a sale by one is held void, even if both unite in the deed. 3 Com. 396; overruling 6 Johns. Ch. 323; also, 1 Seld. 144; 18 N. Y. 139. But by Laws of 1863, ch. 73, sales *heretofore* made by one commissioner are, if deed is executed by both, made valid; and if there is a vacancy, one commissioner may convey. By Law of 1867, ch. 704, a sale by one is made valid if the proceedings are otherwise correct, the purchase money has been paid, and the deed is signed by both. This applies to past and future sales.

The Papers Given.—The commissioners are to give the purchaser a certified copy of the mortgage, together with the affidavits, and the deed. Law of 1837, *supra*, § 19; 1863, ch. 73. The statute must be strictly pursued as to the sale. 7 Hill, 431; 3 Com. 396; 4 Hill, 99; 1 Hill, 141; 6 Wheat. 119. It may be postponed. § 33.

Effect of Sale.—The law provides that the purchaser shall hold the land free from all equity of redemption, and all other liens or incumbrances arising *after* the execution of such mortgage. § 32 of Laws of 1837, as amended by Law of 1856, ch. 3; 1863, ch. 73.

Void Sales.—§ 33, act of 1837.—Commissioners not to become purchasers, or the sale is void; also, all sales made contrary to the provisions of the act *Vide* White v. Lester, 34 How. 136, as to irregularities on such sales, and how far the statutory provisions are directory merely; and 8 Pai. 633; 7 Hill, 431. If any of the lands have been sold by the mortgagor, they are to be sold by the commissioners in the inverse order of alienation, beginning with those expressly charged. Law of 1856, ch. 3. As to a sale when the mortgagor repurchased, and there was an intermediate judgment, *vide* Commrs. v. Chase, 6 Barb. 37.

Presumption.—Presumption is in favor of the purchaser that all proceedings were correct. Wood v. Terry, 4 Lans. 80. Under the former law, the deed was conclusive at law. Any remedy by the party entitled to redemption was in equity. Brown v. Wilbur, 8 Wend. 657.

TITLE IV. THE FORMER ACTS OF 1786, 1792, AND 1808.

The above act of April 4, 1837, is in lieu of the acts of 1786, 1792, 1797, 1808, 1819 and of the Revised Statutes

of 1830, and all the duties of the former "Loan Commissioners" are by acts of 1850 (*infra*) transferred to the above mentioned commissioners of the United States deposit fund.

Loan officers for each county were created under the above acts, to loan moneys of the State to citizens thereof, on mortgage to be entered in a book, and a minute thereof to be made, which were thereupon declared to be matter of record. Their offices were to be kept in the court houses of each respective county; and the entry of the respective mortgages in the books of said commissioners were to have the like priority, operation and effect, as if such mortgage were registered in the office of the clerk of the county where the lands were situated. Provision was made for the sale of land on default, and conveyances to purchasers, and the barring of the equity of redemption thereby. Laws of 1797 and 1819. The loan officers were by subsequent acts directed to furnish minutes of all mortgages held by them to the county clerks of their counties, who were to file the same, and they would thereupon be matters of record as a mortgage. For the earlier laws on the subject, *vide*, also, Laws of 1815, p. 61; 1818, p. 31; 1819, p. 37; 1820, p. 246; 1821, p. 17; 1822, p. 265; 1823, p. 205; 1824, p. 341; 1825, p. 442; 1829, ch. 91; 1832, ch. 118. By Law of April 21, 1825, one commissioner might execute a deed on sales under foreclosure where there was a vacancy. By act of April 13, 1832, ch. 118, the loan officers in the several counties, under the laws of 1786 and 1792, were directed to transfer all their books and minutes and papers to the "Commissioners of Loans" for their respective counties. Books of mortgages were to be deposited in the clerks' offices of their respective counties.

Transfer of Mortgages under Acts of 1792 *and* 1808.—By Law of April 10, 1850, ch. 337, the loan commissioners in the several counties of this State are directed to transfer to "the Commissioners for Loans of the United States" in the county, all mortgages then in their hands, and books, papers, &c., under the Laws of 1792 and 1808, and the United States loan officers are to have the same authority over them as if taken under the act of 1837; and after settlement of their accounts, the offices of loan commissioners, under the acts of 1792 and 1808, are to cease. By act of February 4, 1856, p. 10, the provisions of the act of 1837 are made to apply to all mortgages taken under the loans of 1792 and 1808.

CHAPTER XXX.

TITLE THROUGH PARTITION PROCEEDINGS.

The title to land frequently passes under judgments in actions for the partition or severance of interests of those holding lands in common. At common law there was no remedy by partition. The proceedings in this State are now special and statutory, and have to be strictly pursued.

For the history of the law of England, and of the State of New York, respecting the partition of lands, *vide* Mead v. Mitchell, 5 Abb. Pr. R. 92; affirmed 17 N. Y. 210. A suit in partition is a proceeding *in rem*, and the jurisdiction of the court is confined to the subject matter described in the petition. If other land is adjudged upon, the whole judgment is void. Corwithe v. Griffing, 21 Barb. 9. A mining interest may also be partitioned. Canfield v. Ford, 28 Barb. 336.

TITLE I. COURTS HAVING JURISDICTION.

Courts of equity originally had an inherent jurisdiction to decree partition, independent of statute; but their action and jurisdiction since the Revised Statutes are confined to the statutory provisions.

Wood v. Clute, 1 Sand. Ch. 199; Poltey v. Kain, 4 Sand. Ch. 508. But it is held that where the provisions of the Revised Statutes are not broad enough to cover cases where partition is sought, the Supreme Court has power to divide estates that are certain. Canfield v. Ford, 28 Barb. 336; see Smith v. Smith, 10 Pai. 470; Van Arsdale v. Drake, 2 Barb. 599; Danvers v. Dorrity, 14 Abb. 206.

The Court of Chancery had formerly jurisdiction of such actions coordinate with the actions by petition, as provided by Revised Statutes. The proceedings in said court were by bill or petition. 3 Rev. Stat. p. 617; 3 Pai. 242. As to the transfer of the powers of the former Court of Chancery to the *Supreme Court*, *vide* title "Foreclosure of Mortgage," *ante*, p. 598. The *Superior* Court of New York City and Court of *Common Pleas* have also jurisdiction of such actions, if the lands are in the county (Code, §§ 33, 123; Varian v. Stevens, 2 Duer, 635; 9 How. 512; 3 Daly, 185;) also *City Court of Brooklyn* (Laws of 1863, ch. 66, as to partition of real

estate of infants, and *infra*); also *County* Courts. Code, § 30, sub. 4. It had been questioned whether county courts have jurisdiction under the Constitution, but it was finally decided they had, in Doubleday v. Heath, 16 N. Y. 80; also 18 N. Y. 57. When brought in the latter courts, jurisdiction extends by the Code only to real property situated within the county. See also law 1847, ch. 280, 470. The *Tribunal of Conciliation* of the Sixth judicial district had jurisdiction (Laws of 1862, April 23), but that court was abolished by Law of 1865, ch. 336. By Law of 1873, ch. 239, the jurisdiction of the courts of N. York, Com. Pleas and Superior of New York and Buffalo, and the City Court of Brooklyn, were made concurrent with that of the Supreme Court in civil actions and proceedings.

Action under the Code of Procedure.—By the Code, § 448, the provisions of the Revised Statutes relating to the partition of land are made to apply to actions for such partition brought under the act, so far as the same can be so applied to the subject matter of the action, without regard to its form. St. John v. Pierce, 22 Barb. 367. Since the Code, the proceedings, it has been held, must be by summons and complaint, and not by petition. 17 N. Y. 218; 6 Abb. 350; 23 How. 358; 25 Barb. 336; 37 Barb. 22, overruling other cases. By Law of 1857, ch. 679, the provisions of the amendments of the Code made in § 173 of Laws of 1852, ch. 392, are also made applicable as to *amendments* herein. This applied to process and pleading, adding or striking out parties, correcting mistakes, &c.

TITLE II. PROCEEDINGS UNDER THE REVISED STATUTES.

A summary of the proceedings for partition under the Revised Statutes is here given.

They will be found at length in title 3, ch. 5, part 3, of the Revised Statutes, vol. 3, 5th edition, p. 602. These provisions are mainly founded upon the law of April 7, 1801, 1 Web. 542, and the law of 1813, 1 Rev. Laws, 507. On January 8, 1762, a colonial act was passed regulating partition of lands. 1 Van. S. 402; amended, pp. 416, 417. For proceedings and titles under said act, *vide* Munro v. Merchant, 26 Barb. 383; reversed, 28 N. Y. 9. On March 16, 1785, was passed the first act for the partition of lands under the State government (1 J. & V. 202); and the system was altered and amended Feb. 6, 1788; Feb. 10, 1791; Apr. 3, 1792; Feb. 27, 1793; March 25, 1794; Apr. 1, 1797, and Apr. 7, 1801, providing for partition by petition to the Supreme Court. The act was amended by the introduction of other provisions, on Apr. 9, 1804; Apr. 2, 1806; March 27, 1807; Apr. 6, 1807; March 8, 1811; Apr. 12, 1813 (*vide* 1 Rev. Laws of 1813, p. 506), embracing most of the provisions of the Revised Statutes of 1830, below given, and now in force. This act of April 12, 1813, was repealed in the repealing clause of the Revised Statutes, passed Dec. 10, 1828; *vide* 3 Rev. Stat. 2d edition, p. 153. Acts were also passed amending the Laws of 1813, on Apr. 15, 1814; Apr. 9, 1814; March 23, 1821. This act of March 23, 1811, was also repealed by law of Dec. 10, 1828, establishing the Revised Statutes (3 Rev. Stat. 2d edition, p. 149), also repealing an act passed Apr. 18, 1826. The proceedings in partition actions were also regulated by Laws of 1830; p. 396; 1831, p. 243; 1833, p. 311; 1840, pp. 128–321; 1842, p. 363; 1846, p. 204; 1847, p. 556; 1849, p. 576.

Notice of Lis Pendens.—It will be necessary to see that a notice of *lis pendens* has been filed according to § 132 of Code. *Vide* "*Lis Pendens*," *infra*, ch. 45. *Vide* Waring v. Waring, 7 Abb. 472, as to *lis pendens* in partition suits and of the effect of irregularities in filing.

The Application for Partition, When and by Whom Made.—When several persons shall hold and be in the possession of any lands, tenements, or hereditaments, as joint tenants, or as tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years, any one or more of such persons, being of full age, may apply by petition to the Supreme Court, or to the (County) Court of the county, or to the Mayor's City Court where the premises are situated, for a division and partition of such premises, and for a sale thereof, if a partition thereof cannot be obtained without great prejudice.

2 Rev. Stat. § 1, p. 317, 1st edit. The application must be now by summons and complaint; *ante*, p. 615.

Possession Necessary.—The plaintiff must have possession, actual or constructive. Florence v. Hopkins, 46 N. Y. 182. A contingent interest is not sufficient. 5 Denio, 385; 2 Paige, 387; Brownell v. Brownell, 19 Wend. 367. Adverse possession is a bar to the partition proceedings. 46 N. Y. 182; 2 B. Ch. 398; 3 *Id.* 608; 9 Cow. 530. Compare 5 Barb. 51; 9 *Id.* 516; where parties have equitable claims and the Court has jurisdiction over the matter as such.

Reversioner.—It is held in England that a reversioner cannot institute the suit. So held in Striker v. Mott, 2 Pai. 387; Fleet v. Dorland, 11 How. 489.

Remaindermen, it has been held cannot institute the action. Brownell v. Brownell, 19 Wend. 367. But a judgment in such a case would not invalidate a sale, and since the R. Stat. a person with a vested remainder can be plaintiff. Blakeley v. Calder, 15 N. Y. 617; McGlone v. Goodwin, 3 Daly, 185.

Married Woman.—A married woman cannot bring it without her husband. Spring v. Sandford, 7 Paige, 550. Nor a mere dowress. 1 Sand. Ch. 199. She may bring partition against her husband. Moore v. Moore, 47 N. Y. 467; Code, § 114.

In other Cases a Court of equity will not entertain a partition suit where the legal title is disputed or doubtful, nor where there is an action pending. 9 Cow. 530; 2 Barb. Ch. 398; 3 *Id.* 608; 7 Barb. 221; 14 Abb. 206. Nor by a widow claiming merely under a dower right. 15 Johns. 319. Even after assignment. 1 Sand. Ch. 199. Nor between tenant in fee and his landlord. 4 Pai. 639.

Heirs out of Possession.—By laws of 1853, however (ch. 238, § 1), heirs claiming lands by descent from an ancestor dying in possession, whether such heirs be in possession or not, may prosecute for the partition thereof, notwithstanding any apparent devise by such ancestor, and may establish the validity of such devise. One tenant in common, though out of possession, may bring the action. Beebee v. Griffing, 14 N. Y. 238.

Infant Plaintiff.—Formerly an infant could not be plaintiff. Postley v. Kain, 4 Sand. Ch. 508. By Laws of 1852, ch. 277, an infant may be plaintiff in partition through a next friend. The action can be brought only by order of the court. 14 Abb. 299; 21 How. 479; 26 How. 250; 13 *Id.* 104; 15 *Ib.* 383. The non-appointment of a *guardian ad litem* or next

friend, for an infant plaintiff, is an irregularity that may be waived or cured. Rutter v. Puckhover, 9 Bos. 638.

Other Parties Who May Bring the Action.—Assignees for creditors, 2 Barb. 599. Tenant by curtesy initiate. 4 Edw. 668. A devisee. 33 Barb. 176.

Parties Defendant.—As to jurisdiction over parties defendant, it may be observed, that when the defendant has never been served according to law nor apppeared, and there is consequently a defect of jurisdiction, it is fatal, and can be taken advantage of by any person affected by or interested in the proceedings.

Vide ante. p. 599, and Stone v. Miller, 62 Barb. 430.

Infant Defendants.—By the Code, § 134, if the infant is under 14, a summons must be served not only on the infant personally, but also on his father, mother or guardian, or if none in the State, on the person having the care or control of the minor, or with whom he shall reside or be employed. §§ 2 and 3 and 4 of the Revised Statutes relate to the appointment of *guardians* "*ad litem*" for minors, who, on being appointed *by the court*, shall give bonds in such penalty and with such *surety* as the court shall direct, to the *People of this State*, conditioned for the faithful discharge of their trust, and to render an account when required. On their so doing, their acts in relation to the partition "shall be binding" on such minors. As to publication against non-resident minors, under act of 1831, ch. 227, according to the practice of the old Court of Chancery, *vide*, Clemens v. Clemens, 37 N. Y. 59; affirming 60 Barb. 366.

Guardian, How Appointed.—By the Code, § 115 (amended in 1865), when an infant is a party to a suit, he must appear by *guardian*. A guardian may be appointed even before service of summons on the infant. 2 Duer, 635; *contra*, 19 Abb. 161. By the Code, § 116, as amended in 1865 and 1862 and 1863, the guardian is appointed where an infant is defendant, on application of the infant, if fourteen, and he apply in twenty days after service of summons; if under that age, or he do not apply within twenty days, then on application of any party to the action, or a relative or friend of the infant, after notice to general or testamentary guardian, if any in the State; if none, then to the infant himself, if over fourteen, and he reside in the State; if under fourteen and within the State, to the person with whom such infant resides. In *partition or foreclosure* suits, where the infant resides out of the State, or is temporarily absent, on application of plaintiff, a guardian will be appointed by order of the court at special term, unless the infant, or one in his behalf, within a certain time after service of the order, to be specified in the order, shall procure the appointment of a guardian. The court shall direct how the order is to be served. In case the infant resides in a State with which there is no regular mail, the court may appoint a guardian. The omission to have a guardian prevents the court from having jurisdiction. 41 How. 41; 60 Barb. 117; 42 Barb. 636. The plaintiff cannot apply until twenty days after service of summons on infant. 1 Barb. Ch. 73. The appointment of the guardian in partition suits must be according to the Revised Statutes. Althause v. Radde, 3 Bos. 410. A minor cannot waive the omision of the appointment of a guardian as to his rights. Fairweather v. Satterly, 7 Rob. 546. As to guardians under the law of 1813, *vide* Fowler v. Griffin, 3 Sand. 385. The guardian may be served as soon as his bond is filed.

3 Bos. 410. The appointment of a guardian *ad litem* where the infant has not been served with summons is void. Glover v. Hawes, 19 Abb. 161. But not so if on the infant's application, and he is over fourteen. Varian v. Stevens, 2 Duer, 635. Under act of 1831, as regards non-resident infant defendants, it was not necessary to appoint a guardian unless they appeared. Clemens v. Clemens, 60 Barb. 366; affirmed 37 N. Y. 59.

The Guardian's Pond.—The bond may be amended (14 How. 94), even after judgment. 7 Abb. 473; Laws of 1857, p. 503; 25 Barb. 336; 17 N. Y. 218. See Laws of 1833, p. 311, as to appointment of clerk of court, register or assistant register, without security (7 Paige, 596), for an infant defendant absentee. Laws of 1833, ch. 227. The omission to file the bond is a mere irregularity that is amendable, and does not affect the validity of the sale. 6 Abb. 350; 25 Barb. 336; Croghan v. Livingston, 17 N. Y. 218. If not filed, the sale will be set aside, and purchaser released. 21 How. 479. By Laws of 1852, ch. 277, the court may order the bond to be filed "*nunc pro tunc*," if before judgment, in any case, or after judgment and actual partition. 6 Abb. 350; 17 N. Y. 218; 25 Barb. 336. The bond should be executed by the guardian himself, as well as by his sureties. Jennings v. Jennings, 2 Abb. P. 6; Clark v. Clark, 14 Abb. 299.

A Judge cannot Appoint.—In partition suits, the guardian can be appointed by the court *only*, and the appointment by a county judge is a nullity. 1 Johns. 509; 10 *Id.* 486; 13 How. 105; 2 Duer, 635; *contra*, Towsey v. Harrison, 25 How. 266. It might be amended. 5 Abb. 53; 14 How. 94. In the First district, the appointment may be at chambers. 5 Abb. 53. A guardian cannot act if appointed in another State. 31 Barb. 305; 11 Abb. 440; 31 How. 379; 34 N. Y. 536.

The Act of 1813.—Under the act of 1813 the appointment of a guardian for an infant was not a necessary preliminary to the acquisition of jurisdiction by the court. Fowler v. Griffin, 3 Sand. 385; Croghan v. Livingston, 17 N. Y. 218.

Infant Married Woman.—As to appointment of guardian of infant defendant, if a married woman. 5 Abb. 54.

Answer of Guardian.—A *guardian ad litem's* appearance or answer may be filed *nunc pro tunc*. 3 Bosw. 410. The guardian need not necessarily answer. Bogart v. Bogart, 45 Barb. 121.

Presumption of Regularity.—In the absence of evidence to the contrary, the regularity of the appointment of the guardian is to be presumed. 17 Wend. 483; 21 *Ib.* 184.

Settlement by Guardian.—A guardian cannot of his own action, without direction of the court, make a settlement. Edsall v. Vandemark, 39 Barb. 589.

Infant Lunatics or Idiots.—The guardian or committee out of the State can apply for the *guardian ad litem*. Rogers v. McLean, 34 N. Y. 536; reversing, 31 Barb. 304; affirming, Rogers v. McLean, 11 Abb. 440.

Infant's Laches.—If infants do not object to irregularities for a length of time after coming of age, innocent parties will be protected, and the non-appointment of a guardian, &c. cannot be objected to by a purchaser. McMurray v. McMurray, 41 How. P. 41; Same case, 60 Barb. 117; Clemens v. Clemens, 60 Barb. 366; affirmed, 37 N. Y. 59; McMurray v. McMurray, 41 How. 41.

What Petition or Complaint to State, and Who to be Parties.—§§ 5, 6, 7. The petition, (now the complaint) is to be verified by affidavit, and set forth the rights, titles and interests of all persons in the lands, so far as known;

and every person having any interest, whether in possession or otherwise, and every person entitled to dower, if it has not been admeasured, may be made a party. The petition is to set forth if any parties are unknown, or have uncertain or contingent interests.

Parties Defendant.—No decree can be made unless all the tenants in common are before the court. 2 Barb. Ch. R. 397, 407. If one die, the action must be revived, or the judgment is void. 26 N. Y. 338; 27 How. 289; 16 N. Y. 193; 13 How. 405; 7 Abb. 472.

Dower.—It is not necessary, although it is advisable, to make parties entitled to *dower* in the whole premises parties. 1 Barb. 500; *Ib.* 560; 8 How. 456; 1 Sand. Ch. 119; 8 Johns. 558; 15 Johns. 319. But those entitled to dower in an undivided share should be. *Ib.* See, also, Ripple v. Gibborn, 9 How. 456; Brownson v. Gifford, *Ib.* 389. The widow of one purchasing during suit, has dower. Church v. Church, 3 Sand. Ch. 434. If a male defendant marry, *pendente lite*, his wife should be made a party. 7 Pai. 387. If not a party, the woman's dower attaches to the share set off to her husband, when divided, if no sale is made. Wilkinson v. Parish, 3 Paige, 653; Matthews v. Matthews, 1 Edw. 565. See further, as to provision for dower, under the judgment, *post.*

Incumbrancers.—By § 8, as amended 1830, ch. 320, §§ 40, 41, it is made unnecessary to make creditors having a lien by judgment, decree, mortgage or otherwise, parties to the proceedings in the first instance; but if on an undivided interest, the lien shall attach to that interest only, after partition; but such incumbrancers having specific liens on undivided interests may be made parties if desired, §§ 9, 10; and to make a clear title they should be joined. Bogardus v. Bogardus, 7 How. P. 305.

Incumbrancers need not be made parties. 7 Johns. Ch. 140; 9 Cow. 344; 3 Abb. 246; 1 Paige, 469; nor *reversioners* always (2 Paige, 387; 28 Barb. 336); nor *lien holders.* 7 How. 305; 2 Barb. 599; 7 Barb. 221. If the lands are divided, the lien will be confined to the share of the party against whom the incumbrance is held. 1 Paige, 469. Nor the owner of a *trust estate*, unless the trust is void (8 Paige, 513); but the *trustee* should be a party (*Ib.*); and a substituted trustee. 5 Pai. 46.

Contingent Interests.—*Future contingent* interests of persons not *in esse*, and though not claiming under parties to the suit, are barred by the proceedings. They are bound by the action, as virtually represented by those in whom the present estate is vested. Mead v. Mitchell, 17 N. Y. 210; 5 Abb. 92; Law of 1840, ch. 177; 37 N. Y. 59; Cheesman v. Tichborne, 1 Ed. 629. Since the acts of 1848 and 1849 relative to married women, a husband, it is supposed, is not a necessary party where she takes an interest in land subsequent to those statutes. 22 Barb. 372; 18 *Id.* 159–164; 17 Barb. 662; 28 Barb. 343; but see 18 Barb. 556, and 29 *Id.* 633. It is more judicious, however, to make him a party.

Persons having Future Interests.—It is not necessary to make every person having a future and contingent interest in the premises a party. It is sufficient if the person who has the *first vested estate of inheritance*, and all other persons having or claiming prior rights or interests in the premises, and intermediate remaindermen, are brought before the court. Nodine v. Greenfield, 7 Paige, 544; Mead v. Mitchell, 17 N. Y. 211; Bowman v. Tallman, 27 How. 212.

Service of the Summons and Other Proceedings.—The summons is to be personally served to put the parties in default. In case any are unknown,

absent from, or cannot be found in the State, they are to be proceeded against by publication, as provided in the statute, § 12, and Code, § 135. The Revised Statutes provide for a publication once a week for three months in a county and also in the State paper; if none printed in the county, then in one in the city of New York; or it may be served on a known absent party out of the State, personally, forty days previous to its presentation, without publication. See also, as to unknown and absent owners, law of 1842, ch. 277, and law of 1831, ch. 200; Bloom v. Burdick, 11 Wend. 647; overruled, 1 Hill, 131; Cole v. Hall, 2 Hill, 625.

Unknown Owners must be served with notice of the application by publication as provided. 23 Barb. 303; 11 How. 277; 31 Barb. 307; 2 R. S. 319, § 12; *Id.* 329, § 84. This notice may be given even after the report on title. Hyatt v. Pugsley, 23 Barb. 285; Same case, 33 Barb. 373. It must appear by affidavit that they were unknown, and that the notice was given, otherwise the judgment is void as to them. Denning v. Corning, 11 Wend. 647; compare Cole v. Hall, 2 Hill, 625.

Proof of Title and Abstract.—§ 22 of the statute is as follows: "If the default of any of the defendants be entered, the petitioners are to exhibit proof of their title before the court or a referee, and an *abstract* of the conveyances by which the same is held." The proof given and the abstract furnished shall be filed with the clerk.

Death of Parties, Plaintiff or Defendant.—Provision is made by the Revised Statutes for the substitution of parties in interest, on the decease of parties to the action. Part 3, ch. 7, title 1; see, also, Code, § 121; and the following cases, as to the death of parties before the sale, and its effect: Gordon v. Sterling, 13 How. 405; Sharp v. Pratt, 15 Wend 610; Wilde v. Jenkins, 4 Pai. 481; Reynolds v. Reynolds, 5 Pai. 161; Gardner v. Luke, 12 Wend. 269; Requa v. Holmes, 16 N. Y. 193; 26 *Ib.* 338; Waring v. Waring, 7 Abb. 472; Gordon v. Sterling, 13 How. 405; see, also, 9 Abb. 323; 18 How. 458.

Receivers of Estates of deceased Persons.—As to partition by, *vid. ante*, p. 440.

Judgment of Partition.—The court ascertains the rights of the parties (generally by a reference), and gives judgment of partition according to such rights, or for a sale if the lands cannot be fairly divided, as *infra*, p. 621.

Contingent Rights, &c.—Provision is made by law of 1847, ch. 430, §§ 1, 2, 3, 4, and 5; relative to actual partition or a sale, and when and how made; as to shares or proceeds being temporarily assigned or set off in common; of amendments by suggestion, and where new parties arise, of allotting to tenants in dower, by the curtesy or for life, their shares, without reference to the duration of the estate; and of allotting the shares to parties entitled in remainder. If there are rights belong to unknown owners that cannot be ascertained, there may be a reservation of lands from the judgment sufficient for such interests. § 24. Judgment takes effect from the order confirming the report. Van Orwan v. Phelps, 9 Barb. 500; Lynch v. Rome Gas Co. 42 Barb. 591. Judgment must be for the lands described in the complaint, and for none others. Corwith v. Griffiin, 21 Barb. 9. It is a matter of discretion to direct a sale or partition. Scott v. Guernsey, 48 N. Y. 106; see Fleet v. Dorland, 11 How. 489.

Commissioners Appointed.—The Revised Statutes fur-

ther provide for the appointment of the commissioners to make partition, and of their oath, and that they shall proceed to make actual partition, and allot the several portions and shares to the respective parties according to their interests as adjudged. Others may be appointed to fill vacancies.

Report.—They, or any two of them, are to make a full *report* of their proceedings, describing the land and shares allotted to each party, which report is to be acknowledged and filed with the clerk. § 33. The report should be signed by *all*, or show why it is not, and that they all met. 1 Barb. Ch. 73. All must meet (37 Barb. 350; 2 Hill, 625), but the acts of a majority are valid. § 31. Where only two were present, the proceedings were held void under the act of March, 1785. *Ib.* The statute further provides that on good cause shown, the court may set aside the report, and appoint new commissioners to proceed as above. § 34.

Final Judgment.—§ 35. Upon any report of the commissioners being confirmed by the court, *judgment* shall thereupon be given that such partition be *firm and effectual* forever, and such judgment shall be binding and conclusive:

1. On all parties and their legal representatives, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder or inheritance; or who may become entitled to any contingent beneficial interest; or who shall have any interest in any undivided share, as tenants for years, for life, by the curtesy, or in dower. 2. On all persons interested in the premises, who may be unknown, to whom notice shall have been given of the application for partition, by such publication as is hereinbefore directed. 3. On all other persons claiming from such parties, or persons, or either of them It will bar the *future contingent interest of* persons *not in esse*. *Vide supra*, p. 619, and *ante*, p. 243.

Effect of Judgments on Tenants in Dower, &c.—Such judgment and partition shall not affect any tenants in dower, by the curtesy or for life, in the whole premises, nor any other persons except those above enumerated. *Ib.* § 36. See provisions as to dower, &c., p. 619, 623.

Ouster by Paramount Title.—If one of the parties is subsequently evicted from his part by paramount title, it is supposed that equity might order a repartition of the rest. This principle is established by statute in Massachusetts.

Interests in Common.—By law of 1847, ch. 430, where there conflicting claims, portions of the land may be set off in common for further adjustment. If parties desire, tracts may also be set off in common. See Haywood v. Judson, 4 Barb. 228; McWhorter v. Gibson, 2 Wend. 443; Northrop v. Anderson, 8 How. 351.

Errors in Judgment.—Irregularities in the statement of the interest in the parties in the judgment will not vitiate the proceedings. Noble v. Cromwell, 26 Barb. 475; affirmed, 27 How. 289.

The Sale.—If it appears that the premises, or any part thereof, are so situated that a *partition* cannot be made, the court may order the lands to be sold at public auc-

tion to the highest bidder. The terms of credit to be fixed by the court.

The terms of sale are to be made known at the time of sale, and if the premises are in parcels they are to be sold separately. The sales are to be noticed and made in the same manner as for land under execution. §§ 56, 57; 22 Barb. 167; see, as to correction where the time was short, Alvord v. Beach, 5 Abb. 451; as to Hamilton Co. *vide* Laws of 1860, ch. 297; 1866, ch. 296; 1867, ch. 162; 1870, ch. 662.

Irregularities.—Irregularities in a judgment for sale, which do not affect *the jurisdiction* of the court, or the parties, or the subject-matter, do not affect the title taken under the sale. If any necessary parties were not brought before the court, the judgment is void as to them. Alvord v. Beach, 5 Abb. 451. If the plaintiff omits to file any of the papers necessary to the regularity of the judgment, the court may allow them to be filed *nunc pro tunc.* 7 Abb. 473; 6 Abb. 350; 17 N. Y. 218; 26 Barb. 475; 45 Barb. 121; 34 N. Y. 536; 21 How. 479. Even the summons may be amended as to *parties* after judgment and sale. 11 Abb. 473; 20 How. 222. Irregularities in the proceedings may be amended *nunc pro tunc.* 45 Barb. 121; 27 How. 289; 31 How. 279. The judgment roll need not be enrolled, signed or docketed, to make title. 42 Barb. 591. The statutory provision as to selling in parcels, is *directory* merely. 1 Johns. Ch. 503; 7 Abb. 183; 17 N. Y. 276. The omission to give notice of sale shall not affect the title of a *bona fide* purchaser. 22 Barb. 167. By § 58, if a commissioner or a guardian of an infant purchase, except for the infant's benefit, the sale is void. 22 Barb. 171.

Specific and General Liens.—Before a sale is ordered, if those having specific liens on an undivided interest, are not made parties, the court may order them to be made parties, and ascertain the incumbrances through the clerk or a referee. Laws of 1830, ch. 340; and of 1847, ch. 280. The referee or a clerk is to publish a notice, once a week, for six weeks, in the State paper, and also in a newspaper printed in every county in which any of the lands in question are situated, requiring all persons having any *general lien or incumbrance* on any undivided interest or share therein, by judgment or decree, to produce proof of all of such liens and incumbrances. It is not *necessary* to advertise for persons having general liens. Advertising is only a method of cutting off certain general liens, if any are in existence. 5 Abb. 451; 10 How. 188; Noble v. Cromwell, 27 How. 289; affirming, 26 Barb. 475. Nor is it necessary for the referee to annex to his report any searches for liens. *Ib.* His statement of the liens and incumbrances is sufficient. As to allowing creditors to establish their liens after the time for doing so has expired, *vide* Horton v. Buskirk, 1 Barb. 421.

Payment of Incumbrances.—Subsequent sections of the Revised Statutes provide for the payment of the incumbrances on the interest of any party to the suit out of his proportion of the proceeds for sale, and of the satisfaction or cancellation of such incumbrances.

Estates in Dower or by Curtesy.—When any person entitled to such an estate, in the whole or any part of the premises, has been made a party to the proceedings, the court shall determine whether it is for the interest of the parties that such estate be excepted from the sale, or sold. If a sale thereof be ordered, a sale shall pass the title thereto, whether the estate be on an undivided share or on the whole premises. The court shall direct the payment of such sum in gross out of the proceeds to the person entitled to the estate as shall be deemed a reasonable satisfaction, and which the person so entitled shall consent to accept in lieu thereof, by an instrument under seal, duly acknowledged or proved, as are deeds. If no con-

sent be given, the court, whether the persons are known or unknown, shall determine what shall be a reasonable sum, and shall order it to be brought into court, according to certain proportions of value. The same course is to be adopted as to unknown parties having such estates.

Inchoate Dower or other Future Interests.—By Laws of 1840, ch. 177, § 1, where there is an *inchoate* dower right, or any vested or contingent future right or estate, the court shall ascertain and settle the value thereof, and direct the same to be invested, secured, or paid over. § 2 provides that "any married woman may release such right, interest, or estate, to her husband, and duly acknowledge the same before the master or a commissioner making the sale separate and apart from her husband. The proceeds are to be paid to him. By Laws of 1840, ch. 379, she may also acknowledge it before other persons who are entitled to take acknowledgments. By Law of 1840, ch. 177, such release is made a bar to any claim; as is also any payment or investment as above provided. If a wife is a party, her *inchoate* right of dower is divested by the sale. Jackson v. Edwards, 7 Paige, 386; affirmed, 22 Wend. 498. The widow of a purchaser who has paid a part purchase money, has dower. Church v. Church, 3 Sand. Ch. 434. By Laws of 1847, ch. 430, parties admitted to have estates in dower, curtesy, or for life, may have shares allotted to them, without regard to the duration of such estate, and may allot the remainders thereon to those entitled.

Resale.—As to when a resale will be ordered, *vide* Jackson v. Edwards, 7 Pai. 387; 22 Wend. 498; Lefevre v. Laraway, 22 Barb. 167.

Confirmation of the Sale and Conveyances.—After completing the sale, the commissioners shall report the particulars of the same to the court on their oath.

If such sales be approved and confirmed by the court, an order shall be entered, directing the commissioners, or any two of them, to execute conveyances pursuant to such sales.

§§ 59, 60.

Effect of the Conveyance.—Such conveyances shall be recorded in the county where the premises are situated; and shall be a bar, both in law and equity, against all parties to the action, and those proceeded against by publication as unknown, and against all persons claiming under them. *Ib.* § 61.

Effect of Conveyance on those having Liens.—§ 61 (first enacted, Laws of 1830, ch. 45) provides that such conveyances shall also be a bar against all persons having *general* liens or incumbrances by judgment or decree on any undivided share or interest in the premises sold, in all cases where the notice to such creditors hereinbefore prescribed shall have been given; and also against all persons having *specific* liens on any undivided share or interest therein, who *shall have been made parties to the proceedings.*

Partition under Proceedings in Chancery.—When the proceedings were by bill or petition in chancery, there were further provisions for sales by *masters*, in the same manner as by commissioners, and deeds to be given by them (Laws of 1826, p. 146), for taking judgment by default in said court of chancery, and for decreeing compensation for equality of partition. 1 R. L. 514, §§ 16 and 17. The decree of said court is made as binding on all parties as in the proceedings by petition. § 79, *Ib.* The powers of the court of chancery are now vested in the supreme court. *Vide supra*, p. 598.

Infants, Unknown Parties, &c.—Shares of infants are to be paid to general guardians or invested as directed. Unknown owners' shares are to be invested for their benefit; also, those of tenants in dower, curtesy, or for life. §§ 64 to 66. There are further directions as to investments, costs, and the practice in the proceedings, and as to writs of error and appeals.

General Efficacy of a Judicial Sale.—*Vide post*, ch. 38.

Defects in the Proceedings.—Courts have power to add parties to the the summons, to add verifications, &c. Alvord v. Beach, 5 Abb. 451; and *supra*, Van Wyck v. Hardy, 39 How. 392; and Herbert v. Smith, 6 Lans. 493. See, also, *ante*, p. 618.

Title III. Division or Partition of Infant's Interests without Action.

Whenever it shall appear satisfactorily, by due proof, or on report of a referee, to the Supreme Court, that any infant holds real estate in joint tenancy, or in common, or in any other manner, which would authorize his being made party to a suit in partition, and that the interests of such infant, or of any other person concerned therein, require that partition of such estate should be made, such court may direct and authorize the general guardian of such infant to agree to a division thereof, or to a sale thereof, or of such part of the said estate as in the opinion of the court shall be incapable of partition, as shall be most for the interest of the infant, to be sold.

Laws of 1814, 129; 1 R. S. 1st ed. part III, ch. v, tit. 3, § 86. (As amended by ch. 320, of 1830, § 46, and modified by substituting "referee to the Supreme Court," in place of "master to the Court of Chancery.") On the sale by such guardian being approved and confirmed by the court, it shall direct him to make conveyances to purchasers, or releases of the shares that fall to the other joint tenants or tenants in common; which deeds shall be valid and effectual. The husband of a married infant may be appointed her guardian. §§ 87, 88, 89, *Ib.*

Title IV. Partition of Lands of Idiots and Lunatics.

Partition by committees of idiots, lunatics, or persons incapable of managing their affairs, may be made under direction of the court, in a similar manner as in the case of infants, *supra.*

The effect of the releases to be executed by the committee shall be as valid and effectual to convey the share of such lunatic, idiot, or other person of unsound mind, as if the same had been executed by them respectively, when of sound mind and understanding, and for a valuable consideration. 1 R. L. 148, § 4; 2 R. S. §§ 88 to 91.

Title V. Partition, Miscellaneous.

Partition against and by the People.—§ 92, *Ib.*, pro-

vides that proceedings for partition may be had against the people of the State in the Supreme Court, in the same manner as against individuals; and in ch. ix, part 2, title 5, the Commissioners of the Land Office are to make partition of lands held by the State in common with others.

Laws of 1814, p. 249, §§ 2 and 3.

Partition by Arbitration.—Partition may also be made under the statutes by "*arbitration.*"

Vide 3 Rev. Stat. p. 855, 5th ed.

Pre-emption Rights.—By law of Nov. 22, 1847, ch. 391, the Supreme Court, where there are minors or non-residents, is authorized to sell the rights of pre-emption to real estate and chattels real in the city of New York, where there are several owners, and to distribute the net proceeds among them. As amended, law of 1848, ch. 391, details of the proceedings are given.

Parol Partition.—A *parol* partition of lands by tenants in common may also be made, and if followed up by possession, is valid and sufficient to sever the possession.

Jackson v. Hardee, 4 John. 202; Same v. Vosburgh, 9 Johns. 270; Same v. Livingston, 7 Wend. 136; Corbin v. Jackson, 14 *Id.* 619; Bool v. Mix, 17 *Id.* 119; Ryers v. Wheeler, 25 *Id.* 434; Morton v. Morton, 20 Barb. 123. This, however, cannot prejudice the rights of third parties, but is binding on the heirs. Wood v. Fleet, 36 N. Y. 499. A parol partition may be made by those having a contract for lands. Taylor v. Taylor, 43 N. Y. 578. In the case of Towlin v. Hilyard, reported in 43 Illinois, it is held, that although the legal title to the individual allotment between two tenants in common may not be considered to have passed, unless after a possession sufficiently long to justify the presumption of a deed, yet each co-tenant would stand seized of the legal title of one-half of his allotment, and the equitable title to the other half, and could compel from his co-tenant a conveyance according to the terms of the partition.

Limitation.—By § 94, R. S. *supra*, the statute of limitations is not to be affected by the above provisions of the Revised Statutes.

Recording the Judgment.—An exemplification of a judgment record or decree in partition may be recorded in the clerk's office of any county where the lands are, and indexed in the deeds, and an exemplification or the record be evidence (Laws of 1846, ch. 182); also with register of N. Y. county (1851, ch. 277).

CHAPTER XXXI.

INSOLVENT ASSIGNMENTS.

TITLE I. ASSIGNMENTS ON APPLICATION OF AN INSOLVENT OR CREDITORS.

Assignments on Application of the Insolvent.—Voluntary assignments may be made pursuant to the application of an insolvent, on notice to his creditors. The insolvent is discharged from his debts, upon executing an *assignment* of all his estate for the benefit of his creditors, on the provisions of law being complied with.

Rev. Stat. part 2, chap. 5, title 1, art. 3.

As to what matters are necessary to give the officer jurisdiction, *vide* 28 Barb. 416; 2 Abb. Pr. 175; 12 N. Y. 575.

The first *general* act for the relief of insolvents was passed July 5, 1755; amended May 19, 1761. This system continued in force by different subsequent acts till Jan. 1, 1770, when it expired by its own limitation. No general system was adopted after Jan. 1, 1770, until the act of April 17, 1784, and that having been amended at different times, the act of March 21, 1788 (2 Greenl. 204), was passed, commonly called the "three-fourths act," which was revised April 3, 1801. 1 Web. 428. All former insolvent acts were repealed by law of April 3, 1811. The act of April 3, 1811, was itself repealed, and the three-fourths act of 1801 revised by an act of Feb. 14, 1812. The three-fourths act continued till April 12, 1813, when the system requiring two-thirds only of the creditors to petition, &c., was adopted. Under these various laws, assignees were appointed and a conveyance made to them by the insolvent; and they were empowered to sell and execute deeds of his real estate. The laws as amended are found in Revised Laws of 1813, vol. 1, p. 460. The Revised Statutes contain the provisions now in force, as amended by Laws of 1849, ch. 176; Laws of 1850, ch. 210. The title of an insolvent is not affected by his proceedings in insolvency until actual assignment under the statute, so that it may be divested by process of law, or by act of the debtor meanwhile. Bailey v. Burton, 8 Wend. 339.

Assignment of the Estate.—On compliance with the provisions of the law, the court or judge directs a grant or assignment of the insolvent's estate, real and personal, both in law and equity, in possession, reversion or remainder, to be made by such insolvent to assignees. No contingent in-

terest passes unless the same shall become vested within three years after the making of the assignment. The assignment is to be recorded in the county clerk's office. 2 R. S. 1st ed. p. 20.

Compulsory Assignment.—Art. 4. The law also provides for the procurement of a compulsory assignment of a similar nature as the above by creditor of a debtor imprisoned for sixty days for a debt of $25 and upwards.

The *assignment* has the same effect as the above mentioned, and all property acquired by the debtor after the first publication to creditors vests in the assignees. Part 2, ch. 5, title 1, art. 4, Rev. Stat.

Execution of the Assignment by the Officer on Refusal of the Debtor.—If the imprisoned debtor refuse to execute the assignment, the officer before whom the proceedings are had may execute it for him, which shall be equally valid on the real and personal property of the debtor which he had on the first day of the publication of notice to creditors (therein required), as if executed by the debtor. On such assignment being executed by the officer, the property acquired by the debtor during his imprisonment, and after the first publication of notice to creditors, shall be deemed to vest in the assignees.

Assignments to Exonerate Persons from Imprisonment.—Art. 5. An insolvent debtor may make an assignment similar to the above, for the purpose of exonerating his person from imprisonment on compliance with certain provisions. The judge appoints the assignee, and the assignment has the same effect as that above mentioned.

Part 2, ch. 5, title 1, art. 5, Rev. Stat. § 12. No debts or judgments, however, or the lien thereof, are affected by the discharge.

Assignments to procure Discharge from Imprisonment.—Art. 6. Voluntary assignments by a debtor may also be made to procure his discharge from imprisonment on execution in civil causes.

The assignment vests in the assignee all the estate, right and interest of the applicant in all the property, real and personal, directed to be assigned. Part 2, ch. 5, title 1, art. 6, Rev. Stat.

Discharges to be Recorded.—By § 19, p. 38, *all discharges* granted under the first three articles (*vide* 3d, 4th, and 5th articles above recited), must be recorded by the clerk of the county where granted. The petition, affidavits, &c., on which the discharge was granted, must be filed with the county clerk within three months after the discharge. As amended, Law of March 9, 1866, ch. 116. If discharge not filed as above, other rights may intervene. Barnes v. Gill, 13 Abb. N. S. 169.

Assignments to be Recorded.—All of the *assignments* under the above four several provisions (arts. 3, 4, 5, and 6), shall also be recorded by the clerk of the county in which they were executed respectively, upon being acknowledged and proved in the same manner as deeds of real estate. Rev. Stat. vol. 3, p. 112, § 19. Also certificates of revocation of assignments must be recorded. *Ib.* §§ 20, 25.

Assignments, When to take Effect.—The assignees or the survivor under the above articles shall be deemed vested with all the estate, real and personal, of the debtor (excepting legal exemptions) in proceedings under the 3d, 5th and 6th articles, from the time of the execution of the assignment. Under the 4th article, when the assignment was voluntary, from the time of its execution; when executed by an officer as therein directed, from the time of the first publication of the notice required. Title to property does not pass until the assignment. Bailey v. Burton, 8 Wend. 339.

Trust Powers.—All beneficial powers and the rights to compel the exercise of trust powers pass under the above assignments. Rev. Stat. p. 735, § 104. The assignment passes all the estate of the debtor, whether in the inventory or not. Roseboom v. Mosher, 2 Den. 61.

Powers.—As to the powers, authority, right of survivorship, acts of majority, &c., of said assignees (and trustees *infra*), *vide* 2 Rev. Stat. p. 40, 1st edit. Property theretofore fraudulently transferred passes to the assignee. Ward v. Van Bokkelen, 2 Pai. 289.

Decease of Assignees appointed before Jan. 1, 1830.—By Law of 1830, ch. 258, others might be appointed.

Assignments under Law of April 26, 1831, ch. 300, assignments were also to be made under this act (non-imprisonment act), subject to the general provisions of art. 8, title 1, ch. 5, 2d part, Rev. Stat.

Removal of Assignees.—As to appointment of substitutes when assignees leave the State, *vide* Law of 1846, ch. 158.

What the Deed or Assignment is to state to pass Real Estate.—It should recite the proceedings. Rockwell v. Brown, 11 Abh. N. S. 400. The words, "all my estate," would pass lands, although not in the inventory. Roseboom v. Mosher, 2 Den. 61.

Redemption by Trustees or Assignees.—*Vide* Phyfe, v. Riley, 15 Wend. 248.

Foreign Insolvent Proceedings.—As to the effect of a foreign proceeding or one in another State, on property in this State, *vide* Story's Conflict of Laws; Oakey v. Bennet, 11 How. U. S. 33; Johnson v. Hunt, 23 Wend. 87.

The Code.—By the Code, § 471, all the above provisions are maintained in force.

Trustees of Absent, Concealed, and Absconding, and Imprisoned Debtors.—These trustees have the same powers as the above assignees. Transfers and sales by the debtor after notice of attachment are void. The trustees are to cause their appointment to be recorded with the county clerk. Their appointment vests in them the estate of the debtor from the first publication of notice in the case of absent, &c., debtors, and in case of imprisoned debtors from their appointment.

1 Rev. Laws, 157; Laws of 1822, p. 239; Arts. 1 and 2 of ch. 5, title 1, part 2 Rev. Stat. The special provisions of this act are considered directory merely, and a deed from trustees will not be invalid by omissions. Wood v. Chapin, 3 Ker. 509. The trustees have a title to the debtor's land and not a mere power to convey. Wood v. Chapin, 13 N. Y. 509.

TITLE II. GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

It has been seen above (p. 265) that among the classes of trusts permitted to be created by the Revised Statutes, is one authorizing the selling of lands for the benefit of creditors. A special act relative to assignments for the benefit of creditors, was passed April 13, 1860. Laws of 1860, ch. 348, p. 594. The act provides that every conveyance or assignment made by debtors of their estate, in trust to assignees for their creditors, shall be in writing and shall be duly acknowledged, and the certificate of such acknowledgment shall be duly *indorsed* upon such conveyance or assignment, before the delivery thereof to the assignees.

If only proved by subscribing witness, and not acknowledged, it is void. 14 Abb. 466; 16 *Ib.* 23; 21 *Ib.* p. 23. *All* the assignees must acknowledge in person, and not by attorney. 14 Abb. 466; 3 Abb. N. S. p. 46; 30 N. Y. 344; 50 Barb. 440. Where a partner is absent, there must be an authorization or ratification. 42 Barb. 88; 36 How. 479. If one absconds, his assent is not necessary. 43 Barb. 509. A purchaser from assignees under a fraudulent assignment, will be protected if he had no knowledge of the fraud. 42 Barb. 284. A surviving partner may make the assignment. Loeschigk v. Addison, 4 Abb. N. S. 210. The assignment is now held void if not acknowledged as provided by statute. Britton v. Lorenz, 45 N. Y. 51; Hardman v. Bowen, 39 N. Y. 196. In Baldwin v. Tynes an acknowledgment by one partner had been held sufficient. 19 Abb. Pr. 32.

Inventory, Schedules and Bond.—The act provides for a sworn inventory of the assets and of the creditors, to be made and delivered to the county judge of the county in which the debtor resides, within twenty days after the execution of the assignment, and a bond to be filed within thirty days by the assignee. These provisions were at first held directory, merely. 14 Barb. 298; 23 *Ib.* 313; 26 *Ib.* 585; 34 Barb. 620; 45 Barb. 317. The Court of Appeals, in Juliand v. Rathbone, 1868, 39 N. Y. 369, so far reversed the same case, in 39 Barb. 97, as to hold that these requirements must be strictly complied with in order to vest title. So also Fairchild v. Gwynne, 16 Abb. 23; reversing 14 *Id.* 121. An omission of a debt will not vitiate. 4 Robt. 161. Nor to acknowledge the schedule separately. 10 Bos. 408.

Assignments to be Recorded.—The conveyance or assignment must be recorded in the clerk's office of the county in which the debtor or debtors resided at the date thereof; and the inventory is to be there filed. If made by non-residents the assignment may be recorded in the county where the property is. Scott v. Guthrie, 25 How. 212. Such an assignee is not a purchaser for value. Griffin v. Marquardt, 17 N. Y. 28.

Assignments before the Statute.—Before these statutory provisions were enacted, *general assignments* in favor of creditors were frequently made. When real estate was transferred under them, the rules regulating their

validity were the general provisions regulating the transfer of land by deed, and the creation of trusts.

When Void.—Care is to be taken in all cases to see that their provisions do not render them fraudulent as against creditors, otherwise they are void. If fraudulent in fact they are also void. *Vide ante*, Fraudulent Conveyances, pp. 532, 533, and Scott v. Guthrie, 10 Bos. 408; O'Neil v. Salmon, 25 How. 246; Kavanagh v. Beckwith, 44 Barb. 192; Terry v. Butler, 43 Barb. 395; Dunham v. Waterman, 17 N. Y. 9; Jessup v. Hulse, 21 N. Y. 168; Russel v. Lasher, 4 Barb. 232; Curtis v. Leavitt, 19 N. Y. 9, among many other cases, as to fraud appearing on their face or by the facts. Conditions as to the management and disposition of assigned property make the assignment void; but not mere superfluous directions, which in themselves would be legal. Dunham v. Waterman, 17 N. Y. 7; overruling Cunningham v. Freeborn, 11 Wend. 240. See, also, Jessup v. Hulse, 21 N. Y. 161.

When Notice to Purchasers.—It has been held by the Superior Court of N. Y. city (Simon v. Kaliske, 6 Ab. N. S. p. 224) that these assignments to be notice to *bona fide* purchasers, should also be recorded in the register's (or county clerk's, where there is no register) office, among conveyances.

By Infants.—If one of several partners is an infant, the assignment is void. Fox v. Heath, 16 Abb. P. 163; 21 How. P. 184.

Effect of Bankrupt Laws on.—*Vide post*, ch. 32.

Impeachment of Assignments, Transfers, &c., for fraud.—*Vide ante*, p. 316.

Assignments by Corporations.—*Vide ante*, pp. 554, 560. Manufacturing corporations cannot make them. Harris v. Thompson, 15 Barb. 62; Sibell v. Remsen, 33 N. Y. 95; nor Banking Co.'s. Robinson v. Bank of Attica, 21 N. Y. 406.

Mortgage by Assignor after Assignment.—This may operate as an equitable mortgage of his residuary interest. Briggs v. Palmer, 20 Barb. 393.

Accounting by such Assignees.—*Vide* Laws April 13, 1860; May 22, 1872.

CHAPTER XXXII.

ASSIGNMENTS AND TRANSFERS UNDER UNITED STATES BANKRUPT ACT, MARCH 2, 1867.

By the said act (§§ 14, 15), as soon as the assignee in bankruptcy is appointed, the judge or register, by an instrument, shall assign and convey to the assignee all the estate, real and personal, of the bankrupt; and such assignment shall relate back to the commencement of such proceedings in bankruptcy, and thereupon, *by operation of law*, the title to all such property and estate (except what is exempt by the law of the State and *trust* property) vests in the assignee; and any *attachment* thereon, issued within four months next preceding the commencement of said proceedings, shall be dissolved.

The assignment relates back to the commencement of the proceedings, notwithstanding any amendments to the petition, &c. *In re* Patterson, 1 Ben. 500; 6 Int. Rev. R. 27.

Record of the Assignment.—The assignee shall, within six months, cause the assignment to be recorded in every *registry of deeds* or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded.

What Passes under the Assignment.—*Leases* with covenants do not pass, unless the assignee adopt them. 6 Bing. 321; 1 B. & A. 93. It does not divest prior legal or equitable liens. 5 Gilm. 346; 2 Story, 360, 630; nor the wife's right of dower. 1 Glynn & J. 232; *in re* Wilbur, E. D. of N. Y. 1867; *in re* Schepf, *Ib.*, Benedict, J. All property that comes to the bankrupt before adjudication passes. 2 Story, 360, 327; 7 Tenn. R. 296. Equities of redemption pass under the decree. 5 Humph. 389. Also contingent estates. 3 P. Williams, 132. After filing petition, no interest can be acquired under proceedings in a State court. 8 Blatch. 153; and the sheriff is liable for proceeds to the assignee. Miller v. O'Brien, 9 Blatch. 270.

Exemptions.—Assignees do not acquire title to the exempt property of a bankrupt under homestead laws, &c. *Re* Hurst, 5 Bank. Reg. 493; and other cases, 2 *Ib.* 85, 180; 3 *Ib.* 38; *Ib.* 60; 4 *Ib.* 59; 2 *Ib.* 62; *Ib.* 158; 3 *Ib.* 21.

Possession.—The bankrupt's possession becomes that of the assignee, from date of appointment. *Re* Rosenberg, 3 Ben. 366.

Title.—The assignee takes the property as held by the bankrupt, and no greater interest than creditors take under adverse statutory proceedings. Appold's Estate, 7 Am. L. Reg. N. S. 624; *Re* Fuller, 4 Bank. Reg. 29.

Sales by the Assignee.—By § 15, the assignee shall sell all the unincumbered estate, real and personal, on such terms as he thinks best for creditors. The court may make orders concerning the time, place and manner of sale.

If the assignee purchase, the sale will be set aside. 8 Vesey, 351; 1 Glynn & J. 112; 4 Madd. 459. The purchaser is entitled to a marketable title. The deed should recite the decree in bankruptcy and order appointing the assignee, and the conveyance must be made in the manner directed by the court. § 18 provides for the appointment of a new assignee when necessary, and the former assignee shall convey to the one appointed all the estate held by him. No title to property sold shall be affected by reason of the ineligibility of an assignee.

Preference by Insolvents Void.—By § 35, if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition for or against him, with *a view to give a preference*, &c., procure any part of his property to be attached, sequestered, or seized on execution, or make any assignment, transfer or conveyance, &c., thereof, directly or indirectly, absolutely or conditionally, the *grantee, transferee, &c., having reasonable cause* to believe such person to be *insolvent*, and that such attachment, conveyance, transfer, &c., is made in fraud of the provisions of this act, the same *shall be void;* and the assignee may recover the property, or the value of it, from the person so receiving it or to be so benefited. And if any person being *insolvent, or in contemplation thereof* or of bankruptcy, within six months before the filing of the petition for or against him, make any sale, transfer, conveyance, &c., or other disposition of his property, to any *person who then has reasonable cause to believe him to be insolvent*, or to be acting in contemplation of insolvency, and that such sale, conveyance, transfer, &c., is made *with a view to prevent his property coming in the hands of his assignee* in bankruptcy, or to otherwise evade the act, &c., the same shall be *void;* and the assignee may recover the same or the value thereof. Also all contracts, securities, or covenants, made with intent to prevent the opposition of a creditor, are void. Whether the transfer is to be deemed fraudulent or not, must depend upon the circumstances of each particular case. Under the former bankrupt law, it was held that the transfer, &c., is only void as against an *assignee properly appointed.* See 3 Barb. Ch. R. 344; 8 Met. 400.

A Bona Fide Sale would be held valid unless the purchaser has reasonable grounds to believe that it is made for the purpose of defrauding creditors under the act. 9 B. & C. 45; 3 B. & C. 415; 3 Bing. N. C. 400. By § 37, these provisions and those relating to assignments, refer to joint stock companies and corporations also. It has been recently decided in the case of Sedgwick v. Place, by Judge Nelson, United States Circuit Court, Southern District of New York, that the assignee in bankruptcy cannot take the property assigned to the general assignee for creditors transferred before the petition, where there was no fraud. Nor can he take the property in the hands of a receiver under a judgment creditor's bill to set aside a general assignment. Sedgwick v. Mink, *per* Nelson, Judge, June, 1868. But see Hardy v. Binninger, 7 Blatch. 262, modifying the above views. Assignees are authorized under the direction of the court to discharge liens. § 14, General Order 17. The beginning of a creditor's suit does not so operate as a lien as to prevent the assignee in bankruptcy taking. N. Y. Com. Pleas, 1868, Steward v. Isidor. The decisions on the above section in the bankrupt courts of the State are numerous, and reference is made for them to the various treatises on the bankrupt law.

Attachments under State laws become dissolved by the assignment. Pennington v. Lowenstein, 1 Bank. R. 157.

Nature of the Assignment.—An assignee in bankruptcy does not acquire the beneficial interest, but merely the title and control of assets. Hence the assignment is not within a condition in a contract restricting

alienation of the beneficial interest. Starkweather v. Cleveland Ins. Co. 2 Abb. N. S. 67; 4 Bank. Reg. 110.

Assignees in Bankruptcy as to Foreclosure.—Need not be made parties to a foreclosure, where the mortgagor is declared bankrupt during the foreclosure. Cleveland v. Boerum, 23 Barb. 201; 23 N. Y. 20. See also *ante* p. 600. As to power to prevent a foreclosure in United States Courts, *vide In re* Iron Mountain Co. 9 Blatch. 320.

Proceedings by Assignee to set aside Fraudulent Deeds.—*Vide* Cookingham v. Ferguson, 8 Blatch. 488.

CHAPTER XXXIII.

TITLE BY ESCHEAT AND FORFEITURE.

TITLE I. TITLE BY ESCHEAT.

Title by *escheat* was, under the common law, a result of feudal tenure; the land reverting to the *lord*, on failure of heirs of the feudatory. In this State, the State itself, by its right of sovereignty, is the original and ultimate proprietor of land within its jurisdiction, to whom it reverts on default of lawful owners.

Art. 1, sec. 11, Constitution of 1846; 1 R. S. 718. In cases of intestacy where there is no heir, or where there is a failure of competent heirs by reason of alienism, the lands vest immediately in the State, as no title or estate whatever can pass to an alien by operation of law. When the ancestor dies, if the persons who would otherwise inherit are aliens, it passes by them, and not through them, and vests at once in the State. A "*purchase*" by an alien, however, does not necessarily create a forfeiture, but the government may interfere and deprive him of his title. In the mean time the estate is deemed vested in him until office found, or until his death; in which case, as he can have no heirs, and the title cannot descend, it immediately reverts to the people without office found. A trust created by an alien in order to evade the law, would also escheat. See fully as to the above principles, and as to the rights of aliens, and the various changes of the common law by the statute law of this State, *ante*, pp. 86 to 100. Lands that have escheated may be conveyed by the State before entry. McCaughal v. Ryan, 27 Barb. 376, even if they be held adversely. *Ib.* The provisions of the Revised Statutes were based upon those of the Rev. Laws of 1813, which were repealed by the general repealing Act of 1828, as also the law of Ap. 14, 1820.

What Estate is Taken.—The State takes the estate in the condition it was in which the party held it, subject to all liens, remainders, &c. Foster's Crown law, 96; Borland v. Dean, 4 Mason, 74.

British Subjects.—As to the rights of British subjects under the treaties of 1783 and 1794, *vide ante*, pp. 6, 7.

Trusts in Escheated Lands.—The Revised Statutes declare that all escheated lands when held by the State or its grantee, are to be subject to the same *trusts*, *incumbrances*, *charges*, *rents* and *services*, to which they would have been subject if they had descended; and the attorney-general is to convey them to any person equitably entitled thereto. 1 R. S. 1st ed. 718.

Proceedings of Escheat.—By the Revised Statutes, the attorney-general shall cause an action of ejectment to be brought for the recovery of escheated lands, and may proceed by publication against unknown owners—and must publish a notice for three months of his intention to to escheat. Vol. 1, p. 283, § 1, laws of 1818, 293; 1820, 248; 1830, ch. 320; see 8 Barb. 195, but see the Code.

Unknown Owners may contest within five years after *sale* and *conveyance*, and until any *disability removed*, if infants, insane, imprisoned, or married women.

Bounty Lands.—As to lots on "*military bounty lands*" escheating on death of *patentee*, to be sold by commissioners of land office. *Vide* §§ 6, 7, 8.

Contracts for Sale.—The Commissioners of the land office are to fulfil all contracts existing relative to escheated lands, with tenants and others, under certain conditions. Law of 1831, ch. 116.

Actions by the People.—By the Code, ch. 2, §§ 75–77, the People of the State will not sue any person with respect to real property unless their right has accrued within forty years, before any other proceeding commenced or unless they or those under whom they claim shall have received any rents thereof within forty years. This limitation also was made by Laws of 1788, 2 Greenl. 93; and of 1801, 1 Web. 619; People v. Clark, 5 Selden, 349; People v. Livingston, 8 Barb. 253; People v. Arnold, 4 Com. 508; Wendell v. The People, 8 Wend. 183; People v. Dennison, 17 *Id.* 313; People v. Van Rensselaer, 5 Seld. 319, approved 22 N. Y. 44; Champlain Co. v. Valentine, 19 Barb. 484.

Taking Possession.—The State cannot take possession until the alienism and escheat have been judicially established. Larreau v. Davignon, 5 Abb. N. S. 367.

Suspension of Proceedings by the People against lands escheated, or interests Therein.—As to proceedings for this, *vide* law of 1845, ch. 115, repealing law of Ap. 29, 1833, ch. 300; which latter act had repealed act of Ap. 26, 1832. The law of 1845, also repealed act of Ap. 26, 1832, and virtually repealed act of Mch. 18, 1834, ch. 37. The act of 1845, was extended by act of Ap. 15, 1857, ch. 576. See more fully as to said acts, *ante*, pp. 94 to 98. As to the interpretation of the above acts of 1833 and 1834, *vide* Englishbe v. Helmuth, 3 Com. 294.

TITLE II. TITLE THROUGH FORFEITURE BY THE STATE.

This is a title created by act of the owner whereby he forfeits to the State all land owned at the time of the offence, or at any time afterward. In New York, forfeiture to the State for crime is confined to convictions for treason.

2 R. S. p. 701, § 22, 1st ed. 1 R. L. 495.

Under the common law, it tainted the blood of the party forfeiting, so that others could not inherit through him. This provision is abolished by the Constitution of the United States.

After the successful termination of the Revolutionary war with Great Britain, the Legislature passed an act 22d October, 1779, 1 Greenleaf, p. 25; 13 Nov. 1781; also 12th May, 1784, *Ib.*, 127, declaring certain persons *nominatim*, and others thereafter designated, attainted of *treason and felony* against the United States, banishing them from the State and forfeiting all their property, and all conveyances by them since 9th July, 1776, were held fraudulent. "Commissioners of forfeiture were appointed for the sale of said estates; no sales to be made before 1st of October, 1780, and deeds to be given which shall operate as *warranties* by the people; the land to be sold in their respective counties, and not over 500 acres to be included in one sale; the commissioners are not to purchase themselves." Books of these conveyances were made by the commissioners of forfeiture for the great districts of the State. Such a book is to be found in the office of the registers and clerks of many counties in the State. These acts have been held retrospective, so as to affect prior titles. Col. & C. Cases, 88. Acts were also passed as to the above forfeited estates, Nov. 27, 1784, March, 31, 1785, May, 1, 1786. By law of 2d of March, 1788, 2 Greenleaf, 200, the office of commissioners of forfeiture was abolished after September, 1st 1788, and their duties shall be executed by the surveyor-general. By law of March 28, 1797, after five years from the date of the act or accruing of an interest in a forfeited estate, all right to an action to recover the estate was barred; with exceptions in favor of feme coverts, insane persons, and infants. As to limitation of actions by the people for forfeited estates, *vide ante*, p. 635, and also The People v. Clarke, 5 Seld. 349.

Estates in Remainder.—These estates are not lost by forfeiture of the particular estate. Foster's Crown Law, 95; 4 Mason, 174.

Forfeiture before 1783.—Treaty with Great Britain. See as to forfeiture before 1783, as to British subjects, *ante*, p. 6, and McGregor v. Comstock, 16 Barb. 427; aff'd, 17 N. Y. 162.

Recovery by the People.—By Revised Statutes, real estates forfeited to the People of this State upon any conviction or outlawry for *treason*, may be recovered in the same manner as escheated lands. *Ante*, p. 635, 1 R. S. 1st ed. p. 284; 1 R. L. 382. And the proceedings may be had in any court of record, 2 R. S. 586, § 53. By the Code, § 447, the action is to be in the Supreme Court.

Forfeiture of Lands held under letters Patent, when there has been Fraud, Mistake, &c.—See *ante*, p. 16.

CHAPTER XXXIV.

TITLE BY POSSESSION.

Possession gives title through continued occupation, that so far infers ownership or right as to exclude the recovery by others claiming title, unless under certain exceptions established by law.

TITLE I. LIMITATION OF REAL ACTIONS.

The statutes of this State have prescribed certain limits as to time, to the recovery of land, even by the true owner, against parties who have the possession; which possession in time, ripens into an indefeasable legal title. These provisions, as now in force, are found in the Code of Proceedure.

The statute of limitations, with reference to real property, was revised in 1801, and again under the Rev. Statutes, and subsequently by the Code. The Code, § 73, repeals the chapter of the Revised Statutes, entitled "Of actions, and the times of commencing them."

Grants from the People.—§§ 76 and 77 make provisions for actions based upon grants from the people, and for suits after the patents are declared void.

By the Code, § 78, no action for the recovery of real property, or the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action.

By § 79, *Ib.* a seizin within twenty years of the act on which the action or defence is based by the party, or his privies in estate, is also necessary in any action or defence founded on title to real estate. This § 78 applies only to actions which, prior to the Code, were actions at law, for recovery of real property, or its possession. Miner v. Beekman, 50 N. Y. 337; Hubbel v. Sibley, *Ib.* 468; and *vide ante*, Foreclosure, p. 597. By § 80, action must be commenced within a year after entry, to make it

valid, and within twenty years from the time the right accrued. As to when actions are deemed commenced, *vide* Code, § 99; and as to absence of a person from the State, § 100; as to actions by representatives after death of party entitled, § 102. The former statutes of 1798 and 1801 may operate as a bar to an action by the people to recover lands held under patents in 1685 and 1704. The People v. Van Rensselaer, 9 N. Y. 291. In an action of ejectment brought as a substitute of a writ of right, to enforce a claim accruing before the Revised Statutes, an adverse possession of 25 years is necessary to bar the action; *e. g.*, as in a case where a right to realty existed, and the party died leaving heirs. Their right does not accrue until the death of the ancestor. See also, as to claims by writ of right, Fosgate v. The Herkimer, &c. Co. 9 Barb. 287; affirmed, 12 N. Y. 580; see also *Ib.* 12 Barb. 352; see also, as to adverse possession before the Revised Statutes, Cahill v. Palmer, 45 N. Y. 478. As to reversal of judgment and time for new action, § 104; as to the time not being staid by injunction or statutory prohibition, Code, § 105.

Persons under Disabilities.—Persons who are infants, insane, imprisoned for criminal charges for less than life (or married women) have, within ten years after the disability may cease, or after the death of the person dying under disability, but not after that period. § 88. Ten years after death of person under disability his heirs may bring the action, and have only that time, even if some are under disability. Carpenter v. Schemerhorn, 2 B. Ch. 323. "Married women," struck out, Laws of 1870, ch. 741. As to the exact computation of the ten years, *vide* Phelan v. Douglas, 11 How. 193. The disability must exist when the right accrues; if two or more exist when the right accrues, limitation does not begin until all are removed. §§ 106, 107. See fully, as to disabilities and the early cases reviewed, Jackson v. Johnson, 5 Cow. 74. Where the action has begun to run, a subsequently accruing disability will not suspend it; and cumulative disabilities are not allowed. Bradstreet v. Clark, 12 Wend. 602. Successive disabilities cannot operate to enlarge the time. 2 Barb. Ch. 214; 3 Hill, 85; 15 Johns. 269; 3 Johns. Ch. 129; 13 Johns. 513.

When Limitation Begins.—The statute of limitations does not begin to run from the time of occupancy, but from the commencement of the adverse possession. 3 Johns. Ch. 124; 16 Johns. 293; 18 *Id.* 355.

Reversioner.—As against a reversioner, there can be no adverse possession. It can only exist against one entitled to possession. Clark v. Hughes, 13 Barb. 147.

As against Remaindermen.—The statute does not begin to run till the determination of the precedent estate. Fogal v. Perro, 10 Bos. 100. See also, as to reversioners and remaindermen, 5 Cow. 74; 4 Johns. 390; 4 Wend. 58; 2 B. Ch. 314.

Coverture.—By the former rule, a married woman has only 10 years, after the coverture ceases, and 20 years in all. Wilson v. Betts, 4 Den. 201.

Aliens may plead the statute *as a defence*, although they may not acquire *title* by an adverse possession, against the State. Overing v. Russel, 32 Barb. 263. As to alien enemies, the period of hostility is to be deducted from the time the statute runs. Code, § 103. *Vide* Bormean v. Dinsmore, 23 How. 397; Sanderson v. Morgan, 25 *Id.* 444; affirmed, 39 N. Y. 231; U. S. v. Victor, 16 Abb. 153.

Title II. Adverse Possession.

Adverse Possession Superior to Legal Right.—By the Code, § 81, a person establishing a *legal right* to premises,

in every action for the recovery of real property, shall be *presumed to have been possessed* thereof within the time required by law; and the occupation of such premises by *any* other person shall be deemed to have been under and in subordination to the *legal* title, unless it appears that such premises *have been held and possessed adversely* to such legal title for twenty years before the commencement of an action for the recovery thereof.

Corporations may hold adversely (Robie v. Sedgwick, 35 Barb. 319); but (*semble*), possession by a railroad corporation of an easement of a tract does not make an adverse possession. Watson v. N. Y. C. R. 6 Abb. N. S. 91.

When Land Deemed to be held Adversely under a Conveyance, Judgment, &c.—By § 82, lands are deemed to be held *adversely*, when it appears that the occupant, or those under whom he claims, entered into the possession under a *claim of title*, exclusive of any other right, founding such claim upon a *written instrument* as being a conveyance of the premises in question, or upon a decree or judgment of a competent court; and that there has been a *continued occupation and possession* of the premises included in such instrument, judgment or decree, or of some part of such premises, under such claim for twenty years. Possession of one lot of a tract is not to be deemed possession of any other lot of a tract divided into lots.

The deed must include in its boundaries the exact land claimed. Jackson v. Camp, 1 Cow. 605; Jackson v. Woodruff, *Id.* 286; Same v. Richards, 6 *Id.* 617; Sharp v. Brandon, 15 Wend. 597; Hallas v. Bell, 53 Barb. 247. To constitute adverse possession, it must be not under a general claim, but under claim of some specific title. Crary v. Goodman, 22 N. Y. 170; Hallas v. Bell, 53 Barb. 247. The title need be *prima facie* good only (1 Cow. 276; 5 Wend. 532); and must not be a void or fraudulent one, *e. g.*, as by a deed fraudulently obtained. Jackson v. Case, 7 Wend. 152; Livingston v. Peru Co. 9 Wend. 511. The lands claimed must be fully identified or described in the instrument. Lane v. Gould, 10 Barb. 254; Jackson v. Woodruff, 1 Cow. 276; Jackson v. Camp, *Ib.* 605.

§ 83.—*To constitute adverse possession* by any person claiming a title founded upon a written instrument or a judment or decree, land shall be deemed to have been *possessed and occupied* in the following cases: 1. Where it has been usually *cultivated* or *improved*. 2. Where it has been protected by a substantial *inclosure*. 3. Where, although not inclosed, it has been used for the supply of *fuel*, or of *fencing timber*, for the purposes of *husbandry*, or the *ordinary use* of the occupants. 4. Where a known farm or single lot has been *partly improved*, the portion of such farm or

lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated. A certificate under a tax sale does not transfer a title under which adverse possession may be set up. Fish v. Fish, 39 Barb. 513. See fully as to such constructive possession, under § 83, and a sub-constructive possession, Finlay v. Cook, 54 Barb. 9; Jackson v. Vermilyea, 6 Cow. 677. The doctrine of constructive adverse possession under a deed, &c. held not applicable to large tracts of land not bought for cultivation, but only to single farms or tracts, Jackson v. Woodruff, 1 Cow. 276. Mere occupancy of a lot in virtue and under claim of a grant which does not embrace it, is not adverse possession sufficient to defeat a transfer of title. Laverty v. Moore, 33 N. Y. 658. The payment of taxes and State rents under a nominal grant, and the hiring of men to protect timber held sufficient. The People v. Van Rensselaer, 9 N. Y. (5 Seld.) 291; approved 22 N. Y. 44.

Land held under a Contract.—A possession by a purchaser under a contract cannot be adverse against the grantor, until he pay the purchase money. Fosgate v. Herkimer M. Co. 12 Barb. 352. But it may be adverse as to strangers. Vroman v. Shepperd, 14 Barb. 441. After full performance by a vendee, a conveyance may be presumed, after twenty years. *Ib.* See also Clapp v. Bromagham, 9 Cow. 530; partially overruling Jackson v. Johnson, 5 Cow. 74.

Possession must be Hostile, &c.—Adverse possession to constitute a bar to the assertion of a legal title must be actual and *hostile*, and not a mere trespass. Fosgate v. Herkimer, &c. Co. 12 Barb. 352; McGregor v. Comstock, 16 Barb. 427; 17 N. Y. 162; Humbert v. Trinity Ch. 24 Wend. 587; Kent v. Harcourt, 33 Barb. 91. It must not recognize the rightful title (Jackson v. Croy, 12 John. 427; Jackson v. Britton, 4 Wend. 507); but may take a release. Northrop v. Wright, 7 Hill, 476; Stevens v. Rhinelander, 5 Robt. 285. It cannot be adverse if held under a lease. Corning v. Troy, &c. Factory, 40 N. Y. 191; same case, 34 Barb. 485.

Visible, Distinct, &c.—The possession also must be visible, continuous, notorious and distinct, or definite, and inconsistent with the claim of others. Burhaus v. Van Zandt, 7 Barb. 91; Humbert v. Trinity Ch. 24 Wend. 587; Cahill v. Palmer, 45 N. Y. 479; Beeker v. Van Valkenburgh, 29 Barb. 319. A person holding adversely is a freeholder *de facto*. Roseboom v. Van Vechten, 5 Den. 414.

Presumption against Adverse Holding.—A seizin is presumed continuous, and another entering without claim, is presumed as of that seizin and subservient to it, unless the contrary is proved. Jackson v. Thomas, 16 Johns. 293; Fosgate v. The Herkimer, &c. Co. 9 Barb. 287; affirmed, 12 N. Y. 580; see also same title, 12 Barb. 352; Bogardus v. Trinity Ch. 4 Sand. Ch. 633.

When Party Estopped.—A party is not estopped from setting up adverse possession by purchase of a right from the legal owners. Jackson v. Vanderlyn, 18 Johns. 355; see, also Burhaus v. Van Zandt, 7 Barb. 92; Fish v. Fish, 39 Barb. 513; Kent v. Harcourt, 33 Barb. 491, as to estoppel generally in cases of adverse possession.

Watercourses.—Watercourses are also the subject of adverse possession. Townsend v. McDonald, 12 N. Y. 381. But non-user, during twenty years, will not impair title. *Ib.;* Olmstead v. Loomis, 9 N. Y. 423; same case, 6 Barb. 152; and see *post, Prescription;* and Corning v. Troy Co. 40 N. Y. 191.

Conveyance of Land held Adversely.—As to such conveyances, *vide supra*, p. 171.

Indians.—The possession of lands in this State by Indians is not such an adverse possession as will avoid conveyances by patentees of the State. Jackson v. Hudson, 3 Johns. 375.

Grants from the State.—The statute as to conveyances under adverse possession does not apply to grants from the State. 34 Barb. 349; 36 *Ib.* 533.

Adverse Possession through Occupation and a Claim of Title merely.—§§ 84, 85, *Ib.* When it shall appear that there has been *an actual continued occupation of premises, under a claim of title exclusive of any other right,* but *not* founded on a written instrument, judgment or decree, only the premises so *actually occupied* shall be deemed held adversely.

What Constitutes the Possession.—And to constitute such adverse possession, land shall be deemed to have been possessed and occupied as follows: 1. When it has been protected by a substantial enclosure. 2. Where it has been usually cultivated or improved. § 87. The right of a person to the *possession* of any real estate, cannot be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property. In considering acts of an adverse character, reference should be had to the character of the land and the uses to which it is ordinarily applied; for the purpose of ascertaining with what mind it was so possessed on the one side, and such possession was permitted on the other. Corning v. Troy Factory, 44 N. Y. 577.

Whole Title.—The claim must be for the entire title, and not subservient to another, or acknowledge title in another. Howard v. Howard, 17 Barb. 663; Jackson v. Johnson, 5 Cow. 74; Stevens v. Rhinelander, 5 Robt. 285, and *ante*, p. 639.

Enclosure.—The enclosure, under the 85th section, means not a fence far away embracing the lands, but an enclosure of the lot alone, upon lines claimed. The enclosure may be by a natural barrier, as of rocks, &c. Doolittle v. Tice, 41 Barb. 181; Becker v. Valkenburgh, 29 Barb. 319. See also 2 Johns. 230; 5 Cow. 216; 7 Wend. 62.

Cultivated and Improved.—The land must not only be cultivated but improved. Reaping alone is not sufficient, nor keeping up an old fence, mowing grass or cutting brush; there must be sowing, ploughing, &c., or the erection of buildings Jackson v. Woodruff, 1 Cow. 276; Jackson v. Camp, 1 *Id.* 605; Doolittle v. Tice, 41 Barb. 481; Munro v. Merchant, 28 N. Y. 4; Finlay v. Cook, 54 Barb. 9.

Actual Occupancy.—Occasional resort to, or temporary occupation of, open lands, is not sufficient without a paper title distinctly describing the lands. Lane v. Goold, 10 Barb. 254. There must be *actual* occupancy measured by a distinct, visible and marked, and not a presumptive or constructive, possession. Corning v. The Troy, &c. Factory, 44 N. Y. 577, affirming, 34 Barb. 529. Actual occupancy of the bank of a stream will not carry constructively to the centre. There must be actual occupancy of the land under water. Corning v. Troy Nail Co .34 Barb. 529; affirmed, 44 N. Y. 577.

The Claim.—To found title under a *claim* of title, and actual occupation, it is immaterial whether the deed be valid in form; and there need be no deed or written evidence of title; and the party may even know

his title to be bad. Bogardus v. Trinity Church, 4 Sand. Ch. 633; Jackson v. Wheat, 18 Johns. 40; Burhans v. Van Zandt, 7 Barb. 91; Jackson v. Camp, 1 Cow. 605; Kent v. Harcourt, 33 Barb. 491. But it must be a *claim of title*, even if oral, and exclusive of the claim of all others. Humbert v. Trinity Church, 24 Wend. 587, and *ante*, p. 639.

Possession of a Tenant.—The possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy, or where there is no written lease from the time of last payment of rent. Code, § 86. The limitation does not run from the time of the tenant's possession but from his adverse claim. Jackson v. Thomas, 16 Johns. 293.

Naked Possession without Claim.—Any possession to be adverse must be accompanied with a claim of right or title: a mere naked possession or intrusion without claim of right will enure to the benefit of the owner. Humbert v. Trinity Church, 24 Wend. 587; Jackson v. Frost, 5 Cow 346; Howard v. Howard, 17 Barb. 663. As to tenancy under a lease in fee, *vide*, Tyler v. Heidorn, 46 Barb. 439.

Tenants in Common.—The possession of *one tenant in common* will be held the possession of all (no matter how long continued), and not adverse to them, unless he claim for the entire title, or has ousted them. And if a tenant in common of part convey the whole, the *grantee* holds adverse possession to the others. Clapp v. Bromagham, 9 Cow. 530; Town v. Needham, 3 Pai. 545; 9 Johns. 174; Siglar v. Van Riper, 10 Wend. 414; Humbert v. Trinity Church, 24 Wend. 587; Florence v. Hopkins, 46 N. Y. 182. See the above case of Clapp v. Bromagham, as to various acts which may constitute an adverse tenancy against co-tenants in common.

As to Wharf Property.—Under a claim that a party had appropriated to himself the whole wharfage of wharf property for thirty years, when he was entitled only to wharfage of half the pier, a corporation having annually demised the other half to lessees from time to time, it was held that there should be proof, knowledge by, or notice to the corporation of an adverse claim and enjoyment to establish title by prescription against it. Thompson v. The Mayor, 1 Kernan (11 N. Y.) 155.

As to Water Lots.—Where a municipal corporation has a title to land between high and low water, an adverse title cannot be established against it by reason of lateral fences running below the tide-way on either side, nor by the building of a bulkhead and filling in of a portion of it, or cutting sedge thereon; nor by reason of the claimant having paid taxes and assessments thereon, the property having been assessed to him on the city maps. McFarlane v. Kerr, 10 Bos. 249. See also Stevens v. Rhinelander, 5 Robt. 285. See also, *post*, ch. 43, as to Ferry Slips.

TITLE III. POSSESSION AS NOTICE.

The possession of real estate is notice of the claim or right of the occupant to all subsequent mortgagees, purchasers and others. It is *prima facie* evidence also, of the highest estate in the property, namely: a *seizin in fee*. See fully, as to possession as notice, *ante*, p. 593, and cases cited.

Title IV. Squatters or Intruders.

By Statutes of 1857, chap. 396, any person who shall "*intrude*" or "*squat* upon" any lands within the bounds of any incorporated city or village, or put any hut, house, shanty, hovel or other structure thereon, without license or authority from the owner, or in the streets thereof, shall be guilty of a misdemeanor, and the owner may give him ten days notice to quit his land on a day specified, by leaving the same on the premises.

If the squatter or his successor do not remove he is guilty of a misdemeanor, and the owner may remove any hut, hovel, or shanty, or other structure thereon, and cause the squatter to be removed. The process for so doing is not specified.

CHAPTER XXXV.

TITLE BY DEDICATION.

TITLE I. DEDICATION HOW MADE.

The right to hereditaments incorporeal and corporeal may pass to the public by such acts or permission of the owner, as may be tantamount in law to a transfer by *dedication*, and operate as an *estoppel* against him. Although the statute of frauds requires lands to be transferred by writing, exception is made where the transfer is by operation of law. The owner need not part with the title which he has; but the effect of the dedication is that, while it is in force, it estops, or prevents, in law, a party from exercising the right of exclusive possession and enjoyment of property which is generally incident to ownership. The doctrine of dedication extends to all realty, and particularly ways, streets, highways and places both of a public and private nature, and to easements generally. A dedication may, of course, be made through a direct grant, as well as by acts which have the effect and force of a grant, and the grant may be made subject to conditions, which may determine the estate.

Vide ante, Conditional Estates, p. 122.

Distinction between a Dedication and a Reservation of Land.—There is a distinction between a dedication and a reservation of land. The former is generally irrevocable. The latter imposes no obligation on the owner; his control over the property continues as fully as before, especially if there has been no adoption of the act by

the persons claiming. There must be a renunciation of a right, and an acquisition of it by others, before the title and estate in land can be varied by estoppel. The actual application to public use, therefore, of land, as, for example, the site of a market, court-house, etc., especially when the reservation is by a municipal corporation, does not deprive the owners of the right of resuming the entire control and disposition of the property when it is no longer wanted for the purpose to which it was originally applied.

Vide Woodyear v. Hadden, 5 Taunt. 127; Pitcher v. N. Y. & Erie Road, 5 Sand. 587; Gowan v. Phila. Exchange, 5 Whart. 141; Irwin v. Dixion, 9 How. U. S. 10.

General Principles of Dedication.—There is no particular form or act necessary in the dedication of land to the public; all that is required is the action or assent of the owners of the land, and the fact of its being used for the public purposes intended by the appropriation. The right to the land dedicated need not be vested in any corporate or other body. It may exist in the public generally, and have no other limitation than the wants of the community at large. A dedication of a street or a part of a street to the public will be presumed and established from acts of the owner, although no proceedings have been taken to divest his title. None but the owner of the fee can make a dedication that is absolute and final. The *presumption* of dedication will be created in law by a twenty years' uninterrupted use by the public. A lesser time will not raise the presumption or be sufficient evidence of dedication unless accompanied by some act of dedication. The act of the owner from which the dedication is inferred must be clear and unequivocal, and *intended to be irrevocable*, and accompanied or immediately followed by public use, in order to prevent a revocation. Acts are more strongly construed as effecting a dedication if purchases have been made on the faith the act was meant to induce.

The Trustees, &c. v. Merryweather, 11 East, 375; Regina v. Petrie, 30 Eng. L. & Eq. 207; Denning v. Roome, 6 Wend. 651; The President, etc.,

of Cincinnati v. Lessee of White, 6 Peters, 437; Ward v. Davis, 3 Sand. S. C. 502; Carpenter v. Gwynn, 35 Barb. 395; McManus v. Butler, 51 Barb. 436; Wiggins v. Talmadge, 11 Barb. 457; Curtis v. Koeler, 14 Barb. 511. See *Ib.* 328; Bissell v. The N. Y. Central R. R. Co. 23 N. Y. 61; Barclay v. Howell, 6 Peters, 498; The Mayor of New Orleans v. The United States, 10 Peters, 662; Hunter v. Trustees, &c., 6 Hill, 407. The title may pass without any specific grantee, *in esse*, at the time. Town of Paulet v. Clarke, 9 Cranch, 292; McConnell v. Town of Lexington, 12 Wheat, 584; Mayor v. U. S. 10 Peters, 662; Cincinnati v. White, 6 Pet. 431; Watertown v. Cowen, 4 Pai. 510; Pearsall v. Post, 20 Wend. 111; affirmed, 22 Wend. 425; Hobbs v. Lowell, 9 Pick. 405. The dedication must be to a public use, but not necessarily to the advantage of the public at large, Ward v. Davis, 3 Sand. 502; Tallmadge v. E. River Bank, 26 N. Y. 105; Irwin v. Dixion, 9 How. U. S. 10. Only clear and unequivocal acts may make a dedication immediate. Carpenter v. Gwynn, 35 Barb. 395; Holdane v. Trustees, &c., 21 N. Y. 475. There must be acts, as well as words of intention. Pitts v. Hall, 2 Blatch. 229. No certain period of time is necessary, if the acts of the parties make the intention manifest; user, alone, however, is not in itself sufficient, except perhaps in the case of streets and ways. Pearsall v. Post, *supra;* Hunter v. Trustees, &c, 6 Hill, 407; Munson v. Hungerford, 6 Barb. 265; Curtis v. Keesler, 14 Barb. 511. *User*, however, may be taken in connection with other evidence to prove actual dedication. Non-user will not make a dedication. City of Boston v. Lecraw, 17 How. U. S. 426; *vide* also, *Ib.* 188.

By the State.—A dedication may be made by a State, through its legislature, the same as by an individual. C. of Oswego v. Oswego, 2 Seld. 257.

Special Dedication.—There may be a partial or special dedication, as for foot passengers, or for horses, and not for carts, or for special vehicles. The dedication may be defined both as to time and as to the mode of use.

Pethbridge v. Winter, 1 Camp. 263; Marquis of Stafford v. Coyney, 7 B. & C. 259; Gowen v. Phil. Ex. Co. 5 Watts & Serg. 141; Poole v. Huskinson, 11 Mees. & W. 827.

Revocation.—*Vide infra*, title, ii.

Rivers, Streams and Wharves.—As to these *vide post*, ch. 36, Prescription; and ch. 43, Land under Water.

Religious and Charitable Uses.—Land may be dedicated to the public for pious and charitable purposes as well as for ways, commons, etc. *Vide ante*, p. 293. And as to dedication for burial grounds, *ante*, p. 563, and Hunter v. Trustees, &c., 6 Hill, 407.

Title II. Dedication of Streets and Ways.

The doctrine of dedication is frequently applied in cases where lots are sold with reference to contiguous streets and places, designated on a map to which reference is made, and by which streets, &c., the lots are bounded or access is given. In such cases, all pur-

chasers, buying with reference to the map, are held to have such a right, by dedication of the land, as will conclude the owner of the street bed, &c., from asserting his former title; and a covenant will be implied that the purchasers are to have an easement over such streets or places. This easement becomes appurtenant to, and a servitude on all the land conveyed or so located; and, for that purpose, no acceptance of the street, &c., as a highway by the public is necessary.

Bissell v. N. Y. C. R. R. 23 N. Y. 61, reversing 26 Barb. 630; Holdane v. Trustees, &c. 21 N. Y. 174; Cox v. James, 45 N. Y. 557; Smiles v. Hastings, 24 Barb. 44; Irwin v. Dixion, 9 How. U. S. 10; and the cases hereafter cited in this title. This, however, would only apply to streets which were necessary to give access to the highway, and would not apply to distant projected streets. Badeau v. Mead, 14 Barb. 328; Cox v. James, 59 Barb. 144 (aff'd 45 N. Y. 557). Nor to a mere survey, without sale of the contiguous lots. Irwin v. Dixion, 9 How. U. S. 10. The above rule applies, also, to an alley-way. Cox v. James, *supra*. Each lot-owner and grantee is bound by the map, and their lots become subject to the streets laid out as a servitude, which becomes appurtenant to all the land. Smiles v. Hastings, 24 Barb. 44; and see *post*, ch. xxxvi, Prescription. Dedication for purposes of streets binds the parties, though made by commissioners in partition; and lots conveyed by the map and streets take title to the centre. The People v. City of Brooklyn, 48 Barb. 211. The publishing of a map by the owner of ground proposed to be made the site of a town, does not conclude him to any extent. It is only when lots are sold with reference to such plan that other rights intervene. Logansport v. Dunn, 8 Ind. 378.

In order to make the street a public highway, however, there must be either an acceptance of the dedicated strip, or public user of the street as a highway; and the mere surveying and mapping of the street, and opening and selling lots on it, does not make it a public highway, These acts show an incipient dedication, but until the lots are sold, or some of them, the owner can recall the proposed dedication, and extinguish the claims of purchasers by release or otherwise. There must be either an express acceptance by a positive act, such as opening the street, &c., or a distinct and unequivocal user for at least a short time to effectuate the dedication. Until the acceptance, the street remains the property of the original proprietor, subject to the easement of right of way in purchasers of lots adjoining the street.

Holdane v. Trustees, &c. 21 N. Y. 474, reversing 23 Barb. 103; McMan-

nis v. Butler, 49 Barb. 176; s. c. 51 Barb. 436; Fonda v. Borst, 2 Keyes, 8; Clements v. The Village of West Troy, 16 Barb. 251; City of Oswego v. The Oswego Canal Co. 2 Seld. 257; Willoughby v. Jenks, 20 Wend. 96; Wohlee v. The Buffalo, &c. R. R. 46 N. Y. 686; Carpenter v. Gwynn, 35 Barb. 395; McMannis v. Butler, 49 Barb. 177. Removing obstructions or improving a street by the public authorities will make an acceptance. McMannis v. Butler, 51 Barb. 437. By user for twenty years or over an acceptance is implied. Wiggins v. Tallmadge, 11 Barb. 457; Gould v. Glass, 19 *Id.* 175. An immediate acceptance and use of the thing dedicated is not necessary, where the positive acts of the proprietor of lands amount to an immediate dedication. Clement v. Village of West Troy, 10 How. 199; contrary, s. c. 16 Barb. 251. It is held, also, that positive acts of dedication, accompanied by an *open public user*, will make the dedication complete and irrevocable, without other acts of acceptance. McMannis v. Butler, 51 Barb. 436; Denning v. Roome, 6 Wend. 651. Until acceptance, the dedication may be revoked so far as the public is concerned, and the land is subject to the control and enjoyment of the proprietors. Lee v. Village of Sandy Hill, 40 N. Y. 442; *In re* Brooklyn Heights, 48 Barb. 288; The City of Oswego v. Oswego Canal Co. 2 Seld. 257; Clements v. Village of West Troy, 16 Barb. 251; Bissell v. N. Y. C. R. Co. 26 Barb. 630; reversed 23 N. Y. 61; and see, *infra*, "Revocation." Where an owner dedicates land for a street, and then grants the land in fee, and the public takes no step as to the same for twenty-five years, all their right will be deemed to have ceased. Baldwin v. City of Buffalo, 29 Barb. 396.

Streets Laid Down on a Public Map.—So far as relates to streets laid down on a public city, &c. map, it does not seem that the public bodies are to do anything, either by way of immediate ratification or acceptance, to complete the dedication to the public of a right of way where land is conveyed bounded upon streets designated on such a map. Any act of the proprietor amounting to a dedication of the easement, which the city, &c., has shown its desire to obtain, by planning the map with the street on, is sufficient, and no affirmative action is necessary to give effect to the dedication, further than the use by the public, when they choose to use it, who, together with the purchasers, acquire a perpetual right of way over such street. On a subsequent opening of the street and taking the street bed by municipal proceedings, when the public officials see fit to take them, the easement is enlarged into a fee held by the municipal body as trustee for the public.

Vide the above cases and the cases cited, *infra.*

Effect of Boundaries by Streets and Dedication under a Public Law and Map.—The general tenor of the decisions

as to lots so sold is, that if lots are sold by descriptions bounding them by public streets and avenues laid down on a public map, or if the owners of lots have by deed adopted or recognized such map, the land in the street or avenue laid over the land of such owners is considered dedicated to the public use. If the grant runs up to the center line, the grantee takes subject and with reference to the map lines, but takes the legal title to the street bed, subject to a perpetual public easement, with a right only to nominal damages on the street opening; and with a further right to have the streets permanently kept open. The damage, however nominal, should be paid to vest the title in the public under the proceedings subsequently to be taken to open the street. If the grantor had not conveyed so as to transfer land to the center to the grantee, then he, and not the grantee, would be entitled to the damages as owner of the fee taken. Prior to the actual proceedings opening the street, therefore, any dedication as above, transfers immediately the *easement or right of way* to the surrounding lot owners and the public—the mere naked fee remaining in the owner of the soil, or his grantees, which subsequently becomes transferred to public, on compensation being made under the acts opening the street and taking the street bed, if that is done. The following cases sustain the above views and establish other points of interest bearing upon them:

Where one bounds by a space called a street laid down on a public map, he dedicates his land in the site of the street to the public use, of the width as specified, so that he would be entitled only to nominal damages therefor on the street being opened. Matter of 39th street, 1 Hill, 191; Wyman v. Mayor, 11 Wend. 486; Matter of Lewis street, 2 Wend. 472; Matter of Furman street, 17 Wend. 649. He is still held to have the actual fee, however, until divested by the proceedings; an easement being implied in the lot owners in the vicinity as well as in those immediately bounded on the street, until the street becomes a public one. Smith v. Hastings, 24 Barb. 44; Matter of 17th street, 1 Wend. 262; Wyman v. Mayor, 11 Wend. 486; Matter of 32d street, 19 Wend. 128. The value of that fee, however, on the street being opened, is held merely nominal, whether vested in the former owner or a purchaser, as it is subject to a perpetual right of way in the public, and the interest is a mere *reverter*, dependent upon the contingency of that public use ceasing. See the cases above, and Livingston v. The Mayor, 8 Wend. 85; Matter of 32d street,

19 Wend. 128; Matter of 29th street, 1 Hill, 189; 16 Abb. 66; Wetmore v. Story, 22 Barb. 414; Cox v. James, 45 N. Y. 557. As to whether bounding on a designated street, but one not opened, would convey to the centre, it was held in Bissell v. N. Y. Cen. R. R. that it would, 23 N. Y. 61. To the contrary were Matter of 17th street, 1 Wend. 262; Livingston v. The Mayor, 8 Wend. 85; Willoughby v. Jenks, 20 Wend. 95; Bartow v. Draper, 5 Duer, 730. And see *ante*, p. 499, as to boundaries by a street or highway.

Where no Dedication has been Made under a Public Map.—Where there has been no dedication of any land laid down as a street or place on a public map, or adoption of the map by an abutting land owner, doubtless both the right of way and the fee remain undisturbed in him or his grantee, and he would be entitled to full compensation for the land when taken for the public use.

Revocation.—As a general rule, where a dedication has been accepted and acted on by the public, it cannot be revoked by the owner so long as the land remains in public use as a street. If a tract, however, is laid out into lots and streets, but the plan is not accepted by a municipal corporation, but other streets are adopted by them sufficient for adjoining lot owners, the owner is not obliged to keep his original streets open, but may close them if the act does not disturb any private rights or interests that may have arisen, based on the proposed dedication.

Underwood v. Stuyvesant, 19 Johnson, 181; In the Matter of the Mayor and Mercer street, 4 Cowen, 542.

Therefore, where the acceptance has never been made, or no rights raised, nor private interests concerned, nor a common user established, or acted on by the public for a sufficient time, the dedication may be revoked and the streets closed.

See above, remarks as to lots sold by a public map, snd Badeau v. Mead, 14 Barb. 328; Baldwin v. City of Buffalo, 29 Barb. 396; Holdane v. Trustees of Cold Spring, 21 N. Y. 474; Lee v. Village of Sandy Hill, 40 N. Y. 442; Williams v. N. Y. C. R. 16 N. Y. 97; The City of Oswego v. Oswego Canal Co. 2 Seld. 257; Clements v. Village of West Troy, 16 Barb. 251; Bissel v. N. Y. C. R. R. 23 N. Y. 61; reversing 26 Barb. 630. The question of revocation is one of fact. McMannis v. Butler, 51 Barb. 436. The owner may not revoke, so long as the street continues in use. Adams v. Saratoga, &c. 11 Barb. 414. But he may revoke by satisfying private claims to the easement, if the dedication has not been accepted by the public. Bissell v. N. Y. C. R. R. 26 Barb. 630; reversed on other grounds, 23 N. Y. 61; Holdane v. Trustees, &c. 21 N. Y. 474.

Fee of Streets where Dedication has been Made.—Where a municipal corporation has acquired title by a mere dedication of the original owner, they have no right to the streets except for improving and regulating. The owner who dedicates his land to the public use for a street or highway, does not give to the public an unlimited use, and the nature of the public easement cannot be materially enlarged or changed. In cases, therefore, where the fee of the land was vested in the State, and by charter or legislation has been transferred to a city, or where a city has acquired title to the fee by proceedings to open, or by cession or other legal means, the city may devote the streets to such purposes as would be unjustifiable and illegal in cases where the streets merely existed by dedication, the original or contiguous owners or their successors in title still holding the fee. In cases of dedicated streets, a municipal corporation could erect no structure thereon, their title being limited to the controlling and enjoyment of the easement according to the intentions of the dedication. And neither the Legislature nor a municipal body, could create an obstruction nor authorize any appropriation of the street bed of a dedicated street, except for the purposes of a street, without obtaining the consent of, or making due legal compensation to, the owners thereof. The public acquire by a dedication only such interest in land appropriated by dedication to the uses and purposes of a highway, as will entitle them to use it for that object; and subject to the right of easement, the persons making the dedication and their representatives having the fee of the land may cause those obstructing or appropriating the streets otherwise than for the uses and purposes of streets, to respond in damages.

Williams v. N. Y. Cen. R. R. Co. 16 N. Y. 97; reversing same case, 18 Barb. 222; Knox v. The Mayor, 55 Barb. 406; Kelsey v. King, 32 Barb. 411; 33 How. P. 40, Court of Appeals, 1866; Wendall v. Mayor, 39 Barb. 329. Therefore it seems that where land has been dedicated and not opened, it can only be used for a street easement; but when it has been opened and *paid for*, the corporation may construct sewers, and otherwise use the road bed for municipal purposes. Kelsey v. King, 32 Barb. 410; affid. Court of Appeals, 1866, June 7, 33 How. 39.

Use of Dedicated Streets for Railroads.—In accordance with the above principles, the authorizing of a street railroad, with cars drawn by horses, to be constructed over a dedicated street, was at first held illegal and invalid, without provision for compensation to the owners of the street bed. The following later cases, however, seem to take a contrary view, holding that the construction and operation of a street railroad is only another way of using the easement. Drake v. Hudson R. R. 7 Barb. 508; Wetmore v. Story, 22 Barb. 414. A party not owning the road bed could not claim compensation for use of the road by a steam railway, if the usefulness of the road was not impaired. Corey v. Buff. &c. R. R. 23 Barb. 482. See fully as to railroads over public streets and highways, *ante*, ch. 2, pp. 43 to 48.

Highways.—*Vide* ch. 36, Title 3, *post.*

TITLE III. PUBLIC PLACES.

The principles above laid down as to streets apply equally to public places. The following cases may also be desirable for reference, as to public "squares" or places, and the rights of adjoining owners or the public therein.

The Trustees v. Cowen, 4 Pai. 510; City of Cincinnati v. White, 6 Pet. 431; The Mayor of N. Orleans v. The U. S. 10 Pet. 662; Mayor v. Stuyvesant, 17 N. Y. 34. A law authorizing land, which had been dedicated by its owner for the purpose of a public square, to be used for a different purpose, impairs the obligation of a contract, and is void. Warren v. Lyons City, 22 Iowa, 351. It has been seen heretofore that where lots are bounded by a space giving access to them which is called a "*park*," grantees of lots bordering thereon would take to the centre, *ante*, p. 500. Perrin v. N. Y. C. R. R. 36 N. Y. 121; *reversing* 40 Barb. 165. In 41 N. Y. 619, this case is said to be *affirmed*, but no comment or report is made. The principle of the decision appears to be, that if the space allotted is a "park," in the proper and full sense of the term, abutting grantees would *not* take to the center by construction. The appropriation of public ground for a certain time for a public use does not make a dedication of it. Pitcher v. N. Y. & E. R. R. 5 Sand. 587. As to the dedication and appropriation of a strip of ground in front of a row of dwellings, *vide* Maxwell v. E. Riv. Bank, 3 Bos. 124. As to dedication of a "Village Green," *vide* Cady v. Cruger, 19 N. Y. 256.

CHAPTER XXXVI.

TITLE BY PRESCRIPTION, EASEMENTS, LICENSES, SERVITUDES, AND OTHER INCORPOREAL HEREDITAMENTS.

TITLE I. PRESCRIPTION.

A title may, by the common law, be made to incorporeal hereditaments through *prescription*, that is, such a continued peaceful *occupancy* or *user* as causes a legal inference of title or right. The period adopted in this State is *twenty* years (formerly twenty-five years). Immemorial usage was requisite by the English law. The prescription may be a personal right, or one annexed to a particular estate. Title by prescription is restricted to such rights as might have been created by grant. If by law, no grant of a right could be rightfully made, no presumption of grant arises from user, and the right cannot vest in prescription. *Prescription* is a right annexed to the person, while *dedication* is a public right. The public cannot acquire a right by prescription. The doctrine is inapplicable to the public, for it supposes a grant, and in the case of the public there can be no grantee. The occupancy or user must be *open, continuous, peaceable* and *under claim of a right*, and not by *permission or indulgence*, to make it effectual as a prescriptive interest. It must be a lawful continuation for the required time of the possession from one to another, and

any interruption of the enjoyment by an adverse claim and possession destroys the prescription. The investigation of these rights involves curious and intricate law that cannot be here but generally reviewed. In connection with this subject, the preceding chapter on Title by Dedication is to be considered.

Munson v. Hungerford, 6 Barb. 265; Stiles v. Hooker, 7 Cow. 266; Corning v. Gould, 16 Wend. 531; Hoyt v. Carter, 16 Barb. 213; Colvin v. Burnett, 17 Wend. 568; Miller v. Garlock, 8 Barb. 153; Rose v. Bunn, 21 N. Y. 275. As prescription supposes a grant, it is not applicable to a case where there can be no grantee. Munson v. Hungerford, 6 Barb. 265. The occupation or user, too, to be valid, must have been with the acquiescence and knowledge of the owner. Parker v. Foote, 29 Wend. 313; Flora v. Carbean, 38 N. Y. 111; Miller v. Garlock, 8 Barb. 153. No prescription can operate against a public right. Pierson v. Edgar, Cranch, C. C. 454. A license even for thirty years, unless irrevocable, confers no prescription. Boyce v. Brown, 7 Barb. 80. Prescription only applies to incorporeal hereditaments. Ferris v. Brown, 3 Barb. 105. Uninterrupted possession is *prima facie* evidence that it is adverse. The prescription, also, must be certain and reasonable; and an easement established by prescription or inferred from user, is limited to the actual user. Gayetta v. Bethune, 14 Mass. 49; Hart v. Vose, 19 Wend. 365; Brooks v. Curtis, 4 Lans. 283; affi'd, 50 N. Y. 639; Miller v. Garlock, 8 Barb. 153. See as to the public not acquiring a right by prescription, Curtis v. Keesler, 14 Barb. 511. There can be no prescriptive right to use what it would be illegal to have obtained a grant of —*e. g.*, as waters of the Erie canal. Burbank v. Fay, 5 Lans. 397.

The doctrine of prescription is most usually applied to certain rights, which are not, strictly speaking, land or real estate, although they are, from their very nature, or usual appropriation, rights attached to or flowing out of land or corporeal inheritances, such as easements generally, rights of way, rights of common and piscary, riparian rights and privileges, and ancient air and lights. Among these rights, "*Franchises*" have been adverted to, in a previous chapter. The right to "*pews*" has been considered under the subjects, "Descent" and "Title by Deed;" the right of *piscary* will be briefly reviewed in a subsequent chapter, as, also, prescriptive rights over *waters*, and in *water-courses*. Easements are annexed to the estate of the dominant tenement, and pass with such estate, and are a charge upon the estate of the owner of the servient tenement, and follow such estate.

Vide above cases and Hills v. Miller, 3 Pai. 254.

Easement, how Extinguished or Lost.—An easement created by deed cannot be lost by mere disuser. In general, it may be lost by an abandonment for twenty years continuously, or an actual adverse user by the owner of the land servient for that period.

Jewett v. Jewett, 16 Barb. 150; Smiles v. Hastings, 24 Barb. 49; affi'd, 22 N. Y. 217; Corning v. Gould, 16 Wend. 531; Miller v. Garlock, 8 Barb. 153. A non-user for twenty years, accompanied by some act inconsistent with the right, will raise the presumption of a release or surrender. Reg. v. Chorley, 12 Jurist. R. p. 822; Ward v. Ward, 14 Eng. L. & E. 413; Hoffman v. Savage, 3 Mass. 130; Miller v. Garlock, 8 Barb. 153; Moore v. Rawson, 3 Barn. & C. 332. Abandonment, also, may be inferred by acts *in pais*, at any time. Crain v. Fox, 16 Barb. 184; Taylor v. Hampdon, 4 McCord, 96; Farrar v. Cooper, 34 Maine, 394; Zimmerman v. Wingert, 31 Penn. 401. An easement is not destroyed by a division or sale of part of the estate to which it is appurtenant. Hills v. Miller, 3 Pai. 254. And see *post*, Title II, as to loss of right of way.

Title II. Rights of Way.

The most usual class of easements to which the doctrine of prescription is applied, are rights of way. The easement of a right of way, or of private passage over the ground of another, may arise either by *grant of the owner* of the soil, by reservation from a former grant, or by *prescription*, which supposes a grant, or from necessity. Such rights, when arising by prescription, are *stricti juris*. A right of way for one purpose, does not necessarily include a right of way for another purpose; and it cannot, by implication, be enlarged or extended to adjoining lands; nor can the way be enlarged, varied or changed at the option of the one having the right. These rights can be created only by the owner of the land; and one tenant in common cannot establish them upon the common property, without the consent of his co-tenant. They may be attached to a house, lot, gate, or city lot, as well as to a rural tract of land.

As to instance of an easement created by reservation, *vide* Rose v. Bunn, 21 N. Y. 275.

Assignment.—If the right be a mere personal one, it cannot be assigned or transmitted by descent; but if the right is appendant or annexed to an estate, it may pass by assignment when the land is sold. Child v. Chappell, 5 Seld. 246; Smiles v. Hastings, 24 Barb. 44; affi'd, 22 N. Y. 217; Huttemeir v. Albro, 18 N. Y. 48. It may be created by reference to a map.

Huttemeir v. Albro, 18 N. Y. 48; and *vide infra*, Highways, and *ante*, "Dedication," and Cox v. James, 59 Barb. 144; affi'd, 45 N. Y. 557.

Limitation.—The exercise of these and other easements and servitudes may be general or limited to certain times. The right of using a well, or a right of passage, may be confined to certain hours as well as to a certain place.

When and How the Prescription Arises and How Lost.—The right of way may be established through a prescription, or through its existence for immemorial usage. Parol evidence of twenty years' uninterrupted continuous use, adverse or in hostility to the owner of the land, will authorize the inference of a grant. Hamilton v. White, 4 Barb. 61; Lansing v. Wiswall, 5 Den. 213; Williams v. Safford, 7 Barb. 313; Corning v. Gould, 16 Wend. 531; Miller v. Garlock, 8 Barb. 153. All agreements with reference to easements, as conferring interests in lands, should be in writing. Wolfe v. Frost, 4 Sandf. Ch. 72; Pitkin v. Long Island R. R. Co. 2 Barb. Ch. 221; Day v. N. Y. C. R. R. 31 Barb. 548. The owner of land cannot close a new passage where there is prescriptive right of way without restoring the old one. Hamilton v. White, 1 Seld. 9. The locality of a right of way may be established by usage and length of time, and changed in the same manner. Wynkoop v. Burger, 12 Johns. 222. An easement may exist over a highway. Irvin v. Fowler, 5 Rob. 483. A right of way by prescription can never be inferred in a person to any part of his own land; but when he sells a part, the right of way may continue over the part sold in favor of the remainder, if it be necessary for ingress, but not for convenience. Wheeler v. Gilsey, 35 How. 139; Huttemeir v. Albro, 2 Bos. 546; affi'd, 18 N. Y. 50. A right of way appurtenant to land attaches to every part of it, although it may go into the possession of several persons. Underwood v. Carney, 1 Cush. 285; Lansing v. Wiswall, 5 Den. 213; Child v. Chappell, 5 Seld. 246; Lampman v. Wilks, 21 N. Y. 505; Huttemeir v. Albro, 2 Bos. 546; affi'd, 18 N. Y. 50. A right of way created by deed cannot be extinguished by non-user; but a parol agreement therefor, if partially performed, may be effectual as an estoppel. Pope v. O'Hara, 48 N. Y. 447. Neither can a right of way acquired by dedication be lost by non-user, although it may be evidence of extinguishment. Wiggins v. McCleary, 49 N. Y. 346.

Tenants in Common.—One tenant in common cannot acquire or grant an easement over the common property. Lampman v. Wilks, 21 N. Y. 505; Crippin v. Morss, 49 N. Y. 63. A covenant of warranty is broken by the existence of an easement. Rea v. Minkler, 5 Lans. 196.

Obstructions.—The owner of a right of way has a right to remove all obstructions placed on it, and to repair it. Williams v. Safford, 7 Barb. 309; Boyce v. Brown, 7 *Id.* 80; Taylor v. Whitehead, 2 Doug. 748. But an obstruction put up by the owner of the easement permanently extinguishes it. 3 Kent, 448. Bars or gates may be put up for protection, in a proper case, by the owner of the servient estate. The necessity is to be decided by a jury. Bakeman v. Talbot, 31 N. Y. 366; Huson v. Young, 4 Lans. 64. See, also, Rose v. Bunn, 21 N. Y. 275; and see *post*, "Highways."

Temporary Right of Way.—A temporary right of way would also exist over adjoining land, if the highway be out of repair, or be otherwise impassable, as by a flood. This right would not arise by the impeding of a mere private way, unless the private way were one of necessity.

Williams v. Safford, 7 Barb. 309; Boyce v. Boyce, 7 *Id.* 80; Taylor v. Whitehead, 2 Doug. 748; 3 Kent, 424.

Way by Necessity.—A grantee of land without access to the highway may have a right of way, by necessity, over the grantor's or a tenant in common's remaining land to the highway. The latter persons may designate the way in the first instance. The way is considered a necessary incident to the grant, without which the grant would be useless, and passes with the land. If a road is designated on a map, it is to be considered as the easement.

Smiles v. Seely, 9 Wend. 507; N. Y. Life Ins. Co. v. Milnor, 1 Barb. Ch. 353; Holmes v. Seely, 19 Wend. 507; Smiles v. Hastings, 24 Barb. 44; *Ib.* 22 N. Y. 217; Wheeler v. Gilsey, 35 How. P. 139; Huttemeier v. Albro, 2 Bos. 546; aff'd 18 N. Y. 50. A right of way by necessity, however, is considered terminated with the necessity. N. Y. Life Ins. Co. v. Milnor, 1 Barb. Ch. 354; Viall v. Carpenter, 14 Gray, 126; Holmes v. Goring, 2 Bing. 76. A right of way which has long existed as a convenience is not a way of necessity. Huttemeier v. Albro, 2 Bosw. 546; aff'd 18 N. Y. 48; Proctor v. Hodgson, 29 Eng. L. & Eq. 453; 3 Kent, 323. Rights of necessity may exist temporarily, as if a structure, pipes, etc., have been erected on another's lands by license, there is a presumed right of entry for repairs or other purpose incident to the full enjoyment of the license. Pompel v. Ricroft, 1 Saund. 321; Doty v. Gorham, 5 Pick. 487; Chambers v. Furry, 1 Yeates; 167; Cooper v. Smith, 9 Serg. & Rawle, 26. Such rights are not lost or extinguished by mere non-user, but only by a holding strictly adverse for the period of twenty years. Smiles v. Hastings, *supra.*

Private Roads under the Constitution.—The Constitution of 1846 provides that private roads may be opened in a manner to be prescribed by law; damages to be assessed by a jury, and paid by the person to be benefited. The law of 1801, re-enacted in 1813, 2 R. L. 276, provided for laying out private roads, damages to be assessed and paid as above. The present laws on the subject were passed in 1848, ch. 77, 1853, ch. 174, for the details of which the act will have to be consulted, also 1 R. S. 1st ed. p. 517. As to the fencing such roads, *vide* Herrick v. Stover, 5 Wend. 580; Lambert v. Hoke, 14 Johns. 383; Brout v. Becker, 17 Wend. 320, 322, and Laws of 1853, ch. 174. If a private road is laid over a person's lands without consent, or by due process of law, he may obstruct it. Dempsey v. Kipp, 62 Barb. 311. See also provisions as to private roads, *post*, title iii, Highways, and law.

Extinguishment.—Rights of way, as well as all other subordinate rights and easements, are extinguished by the unity of possession, both the servient land and the easement being owned by the same person. But a right of way existing from necessity would not be extinguished by the unity of possession; such as a right of way to a

church or market, or a right to a gutter carried through an adjoining tenement; or to a water-course running over adjoining lands to a highway; such a right would be revived by a severance.

Proctor v. Hodgson, 29 Eng. L. & Eq. 453; 1 Saund. 323, note, 6; Hazard v. Robinson, 3 Mason, 276; 3 Kent, 423; Buckby v. Coles, 5 Taunt. 311; Cruise's Digest, title 24, Ways; Huttemeier v. Albro, 2 Bos. 546; aff'd, 18 N. Y. 50.

Rights of Way and Prescription in Streams and over Water.—Vide post, ch. 43.

Title III. Highways.

It is a general principle of law that the Legislature has the right to establish and improve public highways as it pleases.

People v. Flagg, 46 N. Y. 401.

Highways are referred to herein, as distinguished from "streets" opened under acts by which the land for the streets is in terms transferred to the city. Highways were established, both in the cities and in the State generally, under a system of laws different from that which laid out and regulated streets; and the title to and rights in the same are regulated by different principles.

General Principles of Law applicable to Highways.—By the rules of the common law, when a highway is laid out over the land of a private person, the public acquires no more than a right of way or easement, and the powers and privileges incident to such right. The title of the original proprietor is not divested, but still continues. He may use the land, above or below, in any manner not inconsistent with the public right, and may maintain trespass or ejectment in relation to it; and while it is used as a highway, he is entitled to any productions which may grow upon the surface, and to all minerals. If the road should be vacated by the public, he resumes the exclusive possession and ownership of the ground.

Dovaston v. Payne, 24 Blacks. 527; *in re* John St. 19 Wend. 659; 12 Wend. 371; Sidney v. Earl, 12 Wend. 98; People v. Law, 34 Barb. 494; Dygart v. Schenck, 23 Wend. 446; Congreve v. Smith, 18 N. Y. 79; Jackson v. Yates, 15 Johns. 447; The Trustees of Presbyterian Ch. v. The

Auburn, &c. R. R. Co. 3 Hill, 567; Pearsall v. Post, 20 Wend. 131; Barclay v. Howell's Lessee, 6 Peters, 498; The People v. The Board, &c. of West'r Co. 4 Barb. 64; Etz v. Daily, 20 Barb. 32; Kelsey v. King, 33 How. 39; McCarthy v. City of Syracuse, 46 N. Y. 194. As to railways over highways, *vide ante*, ch. ii. As to compensation for highways taken under the law of eminent domain, *vide ante*, ch. ii.

Transfer of Title in Highways.—Land in a highway may pass not only by special description in a conveyance, but constructively. It has been seen above (ch. xx), that if a person, over whose land a highway is laid out, convey the land on either side of it, but describing the land by such special boundaries as not to include the road or any part of it, the property in the road would not pass to the grantee by the deed, nor would it pass as an incident or appurtenance. If, however, lots are conveyed by descriptions, bounding them "by" or "along" roads or streets, in which the grantor has an interest or estate, the respective grantees will take the fee of the land in front of their respective lots to the centre of the streets. This applies equally to city lots as to rural property. The rule is otherwise when the land is so bounded by feet, &c., as to exclude the street, or is bounded by a specific line or side of the street. Or probably if a municipal corporation were to grant land bounded by a public street. So also if a strip of land were the only means of access to lots, and they were bounded on that, they would be considered as bounded to the centre, unless words were used showing an intention to restrict the grant.

Perrin v. The N. Y. C. R. R. Co. 36 N. Y. 120, affirming 20 Barb. 65; Hening v. Fisher, 1 Sand. S. C. 344; Sherman v. McKeon, 38 N. Y. 266; Jackson v. Yates, 15 Johns. 447; Jones v. Cowman, 2 Sand. S. C. 234; Hammond v. McLachlan, 1 Sand. S. C. 323; 23 N. Y. 68; Adams v. Saratoga and Wash. R. R. 11 Barb. 414; The People v. Law, 34 Barb. 494; Wetmore v. Story, 22 Barb. 486; Anderson v. James, 4 Rob'n, 35; Wetmore v. Law, 34 Barb. 515; Dunham v. Williams, 36 Barb. 136, and 37 N. Y. 251; see also, *ante*, p. 499, and the cases cited.

The Presumption as to Ownership.—The legal presumption both as to grantor and grantee, as respects a highway or road, is that one who owns both sides of a highway is presumed entitled to the fee of the road, subject to the public easement. Upon the discontinuance of a road, therefore, the fee is not in the public, but

presumptively in the owners of the adjoining land, until proof is made showing other ownership.

Matter of John, &c. street, 19 Wend. 659; Van Amringe v. Barnett, 8 Bos. 358; Mott v. Mayor, 2 Hilton, 358; Herring v. Fisher, 1 Sand. 344–350; Wetmore v. Story, 22 Barb. 487; Bissell v. N. Y. C. R. R. 23 N. Y. 61; The People v. Law, 34 Barb. 494; Dunham v. Williams, 37 N. Y. 251; Williams v. N. Y. C. R. R. 16 N. Y. 97.

Turnpike Companies.—A turnpike company, also, has merely authority to obtain land for the purpose of its road, *i. e.* the easement; and on closing the road, the land would revert to the original owner, in whom or his privies the title might be. Dunham v. Williams, 36 Barb. 136; reversed on other grounds, 37 N. Y. 251; but see, *infra*, the statutes relative thereto.

Abandonment of a Highway.—An abandonment of a highway can only be done by the public by some act of obstruction or other unequivocal act, or by non-user for twenty years. Amsbey v. Hinds, 46 Barb. 622; but see, *infra*, the statutes relative thereto. The owner of the highway bed may build drains connecting with sewers. Barton v. City of Syracuse, 37 Barb. 292; affirmed 36 N. Y. 54. See this case as to the obligations of a municipality in constructing and repairing sewers. As to user of a highway making a dedication, *vide ante*, "*Dedication;*" also, Barclay v. Howell, 6 Pet. 498. No user by the public of land adjoining a navigable stream will raise presumption of a grant. Post v. Pearsall, 22 Wend. 425.

Roads Opened under the Dutch Government.—The civil laws prevailing under the Dutch government established a different rule as to the taking and ownership of land used for highway. The title to the bed of highways laid out, under that dominion, is in the public, and not in the original or adjoining owners or their privies. See Dunham v. Williams, 37 N. Y. 251, reversing 36 Barb. 136; Wetmore v. Story, 22 Barb. 433; Rewthorp v. Bourgh, 4 Martin (La.) 97–137.

Acts establishing Public Highways.—At an early period of the Colonial rule ordinances were made and acts passed laying out and regulating highways in the Province, and in the cities. In 1691, May 6 (1 S. & L. 3, 1 V. S. 3), an act was passed regulating and laying them out in the towns in the province, through overseers, on agreement and direction by freeholders, to be registered in the town books, and subject to approval of the next court of sessions of the peace. On the 11th May, 1697, an act was also passed authorizing laying out, regulating, and amending the highways. On June 19, 1703, an act was passed for laying out public highways in the colony.

Renewal of the Act of 1703.—The above act of 1703 was renewed in 1707 and 1708, 1713, 1720, and 1773. Local acts were also passed from time to time.

Law of March 19, 1813.—The law of March 19, 1813 (2 R. L. 270, § 47), in repealing other acts relative to highways, states that those relating to the city and county of New York shall not be repealed by the act, and provides generally as to laying out highways.

By the Revised Statutes, commissioners of highways of towns are to regulate and alter highways, and to cause those laid out, and those used for twenty years as such to be described and recorded in the town clerk's office, and to lay out new and to discontinue old roads, if deemed unnecessary, on the oath of twelve freeholders. Surveys are to be made of discontinued or new roads, and recorded. Provision is made against laying out private or public roads (without the consent of owners) through orchards or gardens (of four years' growth), or through buildings or fixtures or erec-

tions for trade or manufacture, or yards or enclosures necessary for use or enjoyment; and no highway is to be laid out through improved or cultivated ground, unless certified as necessary by twelve town freeholders. The law further provides that the highway is to be laid out on application and assessment of damages. 1 R. S. 1st ed. 509 to 521, based on Laws of 1813, p. 283; Laws of 1826, 228. See, also, as to the above, 20 N. Y. 252; 1 Cow. 23; 10 How. P. 209; 6 Barb. 607; 19 *Ib.* 179; 5 N. Y. 572; 6 Barb. 607; 3 Hill, 460; 6 Pai. 86; 4 *Ib.* 519; 4 Cow. 190; 2 Hill, 443. The Revised Statutes were amended by Law of May 3, 1834, ch. 267; Ap. 11, 1836, ch. 122; 1845, ch. 180; 1847, ch. 455; 1853, ch. 174; 1855, ch. 235; 1857, ch. 491; 1857, ch. 615; 1858, ch. 103; 1862, ch. 243; 1870, ch. 125, in various details of the proceedings, and as to powers of commissioners of highways, and repairs thereof, and encroachments thereon. Apart from the statute, a mere dedication would not make a public highway. It becomes so on being legally laid out as such. Trustees of Jordan v. Otis, 37 Barb. 50. Nor a mere use when the road has not been accepted and opened; and the commissioners cannot proceed for an encroachment. Doughty v. Bull, 36 Barb. 488; affi'd, 3 Keyes, 612. See as to acceptance by the public authorities, fully, *ante*, p. 647, "Dedication." The above act of 1813, 2 R. L. p. 277, as, also, the Revised Statutes (amended Law of 1861, ch. 311), provided that highways and private roads then laid out and dedicated to public use not opened and worked within six years from the time it was or should be laid out, should cease to be a road for any purpose. The time of any suit, certiorari, &c., is to be no part of the six years. Also, 1 Rev. Stat. p. 520, § 99. The act of 1813 has been held not to have any relation to highways dedicated by the owners. McMannis v. Butler, 51 Barb. 436. By Law of 1861, ch. 311, highways disused for six years, cease to be highways. The act of 1861 is to apply to highways or private roads laid out and dedicated to the public within six years of the act (Ap. 17, 1861), and to every highway thereafter laid out (*vide* the law). This act applies, also, to highways created by twenty years' *user*. The law is not retroactive. Amsbry v. Hinds, 48 N. Y. 57. See, also, 2 Cow. 426; 31 N. Y. 62; 46 Barb. 317, 622, as to above provisions. As to *sidewalks* over highways, *vide* Law of 1860, ch. 61. As to carrying *wild beasts* over highways, Law of 1862, ch. 112. As to animals at large thereon, 1862, ch. 459. As to roads through *vineyards*, *vide* Law of 1869, ch. 24. Through *graveyards*, Law of 1868, ch. 843; 1869, ch. 708.*

Turnpike Roads and Toll-bridges.—When the corporation owning such is dissolved, the road or bridge is to be a highway. Law of 1838, ch. 262. See, as to the use of such roads after abandonment, Law of 1855, ch. 855; and as to ownership, *ante*, p. 568.

Trees on Highways.—Trees belong to the owners of the highway bed, and they may remove them at pleasure, but cannot plant so as to obstruct the highway. The Village of Lancaster v. Richardson, 4 Lans. 137. *Vide*, as to shade trees and their removal for repairing the highway or bridges, Laws of 1853, ch. 573; 1 R. S. 525, §§ 126, 127; Laws of 1863, ch. 93; 1869, ch. 322; also, as to planting trees, Law of 1869, ch. 322; 1870, ch. 595; also, 31 N. Y. 156.

Private Roads.—*Vide ante*, Title II.

The Use of Highways for Railroads.—As to this, *vide* fully, *ante*, ch. 2, pp. 43 to 48.

* An act was also passed, 1873, ch. 315, amending materially the Revised Statutes, as to laying out and altering public roads; also chs. 773, 395, as to altering, repairing, laying out, &c.; also ch. 63, as to pipes in; also ch. 69, as to discontinuance of.

See, also, Law of 1864, ch. 582. Railroads may cross highways by consent of the commissioners of highways. Laws of 1835, ch. 300; see 14 N. Y. 520. As to highways over railroad tracts, *vide* Laws 1853, ch. 62.

Title IV. Right of Common.

This is a right of infrequent occurrence in this State. It is a right that persons have in the lands of another, generally existing for purposes of pasturage or piscary, or for obtaining wood for fuel or otherwise. It may exist by prescription. Lands may also be dedicated or appropriated in common. Common appendant is a right annexed to the ownership of arable land as such. Common appurtenant arises by grant or prescription; common in gross is annexed to the person, and not the land. There are a few cases among the early reports in this State on the subject, viz.:

Watts v. Coffin, 11 Johns. 495; Livingston v. Ten Broek, 16 Johns. 14; Layman v. Abeel, 16 Johns. 30; Van Rensselaer v. Radcliff, 10 Wend. 639; Livingston v. Ketcham, 1 Barb. 592. The general principles established by the above cases are that common of pasture is apportionable, but that common of estovers cannot be, and becomes extinguished if apportioned or divided. That common in gross may be aliened and descends, but that it must be exercised or transferred jointly by the various grantees or heirs, and cannot be separately used by them. The right of rural residents to pasturage on the public highways, under regulation of the town authorities, has been a matter of some discussion in the State. Prior to the highway acts, under the Revised Statutes, the right was held not to exist. *Vide* Hallady v. March, 3 Wend. 147; Jackson v. Hathaway, 15 Johns. 453; Gedney v. Earle, 12 Wend. 98; Tonawanda R. R. Co. v. Munger, 5 Den. 264. Under the more recent highway acts, where the use of the entire highway bed is taken from the owner, the right is held to exist. Griffin v. Martin, 7 Barb. 297; Hardenburgh v. Lockwood, 25 Barb. 9; *contra*, White v. Scott, 4 Barb. 56.

Extinguishment of Rights of Common.—This may be done by release, by unity of possession, or by a severance of the right. If a part is released, it is considered that the whole right is extinguished. The unity of possession necessary to extinguish the right requires the union of an estate equal in duration and right with that to which the right belongs. The right is extinguished by severance, when the estate is conveyed free from the right.

Title V. Licenses.

A license is an authority to do a particular act or series of acts upon another's land, without possessing any estate therein. A license by parol to enjoy a special privilege is not an interest in land, within the statute of frauds requiring a writing. It is founded on personal

confidence, and not assignable. If an actual interest in land is transferred, however, it is no longer a mere license, but comes within the statute of frauds, and requires a writing.

Prince v. Case, 10 Conn. 375; Kerr v. Connell, Birton (N. B.) 133; Woodbury v. Parshley, 7 N. H. 237; Mumford v. Whitney, 15 Wend. 380; Cook v. Stearns, 11 Mass. 533; Ricker v. Kelly, 1 Greenl. 117; Clement v. Durgin, 5 Greenl. 9. A license by parol to use a way is revocable; also, any licenses which, if given by deed, would create an easement. Foster v. Browning, 4 R. I. 47; Cocker v. Cowper, 1 Cromp. Mees. & Ros. 418; Wallis v. Harrison, 4 Mees. & W. 538; Morse v. Copeland, 2 Gray, 302; Jamieson v. Milleman, 3 Duer, 255; Coleman v. Forster, 37 Eng. L. & Eq. 489. But a license to do some act which has been acted on, and rights of property created under it, would be sustained, in equity, as an estoppel, and would not be revocable, if, when revoked, the licensee would not be in *statu quo*. Wilson v. Chalfant, 15 Ohio, 248; Collins v. Marcy, 25 Conn. 239; Winter v. Brockwell, 8 East, 308; Le Fevre v. Same, 4 Serg. & R. 241; Resick v. Kern, 14 *Ib.* 267; Bridges v. Blanchard, 3 Nev. & Marm. 691; Wood v. Manley, 11 Adol. & Ell. 34: Ameriscoggin Bridge v. Bragg, 11 N. H. 102; Liggins v. Inge, 7 Bing. 682; Addison v. Hack, 2 Gill. 221. The English cases on the subject were extensively reviewed in the case of Wood v. Leadbitter, 13 Mees. & W. 838; and the court held that a right to enter and remain on land of another for a certain time could be created only by deed, and that a parol license to do so was revocable at any time; and that a right of common or right of way, or right in the nature of an easement, could only be granted (when the subject of a grant) by deed. That a mere license passed no interest; but that a license, coupled with an interest, was not revocable. The courts of this State also hold that a license is revocable by parol; although an interest in land cannot be so revoked or transferred, nor can a license, when it is annexed to and a part of the grant. *Vide* Jamieson v. Milleman, 3 Duer, 255, and cases *infra*. If a license has been granted for a temporary purpose, it terminates when the purpose of the license has been fulfilled. Hepburn v. McDowell, 17 Serg. & Rawle, 383. An agreement to set a house at a given distance from the street, is an interest in lands and void, unless in writing. Wolfe v. Frost, 4 Sand. Ch. 72. A parol license may be given to enter land and remove the soil. Syron v. Blakeman, 22 Barb. 336. A person giving a parol license, when it should be in writing, cannot object to acts done under it, before revocation. Pierrepoint v. Barnard, 2 Seld. 279. A parol license to a tenant to remove buildings is valid. Dubois v. Kelly, 10 Barb. 496. Or to divert a water course. Rathbone v. McConnell, 20 Barb. 311; affi'd, 21 N. Y. 466. A license to do a thing is to do it with all its natural consequences. Winchester v. Osborne, 62 Barb. 338. A parol license to cut trees is not valid. McGregor v. Brown, 6 Seld. 114; see Carpenter v. Otley, 2 Lans. 451; see also 6 Hill, 61, as to license by parol.

Revocation.—A license while executory is revocable. Until notice of revocation, a party may act under it. As a general rule, a transfer of the land, as to which a license has been given, is a revocation.

Dubois v. Kelly, 10 Barb. 496. A license, coupled with and forming part of a grant, would be irrevocable. Winchester v. Osborn, 62 Barb. 338; Jamieson v. Milleman, 3 Duer, 255.

TITLE VI. PARTY WALLS AND DIVISION FENCES.

The following is a brief summary of the views of the courts of this State on the rights and obligations of parties with reference to party walls. As a general rule, adjoining proprietors have each an easement in the land of the other covered by a party wall; and the title of each owner is qualified by the easement to which the other is entitled. This right to the mutual easement is an appurtenance passing with the title to the land. The right exists so long as the wall continues sufficient for the purpose, and the respective buildings remain in condition to need and enjoy the support.

It has been held in England that the owners of a party wall built at joint expense and standing partly on the lands of each, are not tenants in common, but each party continues owner of his land, and has a right to the use of the wall, and a remedy for the disturbance of that right. But common use of a wall separating adjoining lots belonging to different owners is *prima facie* evidence that the wall, and the land on which it stands belong equally to the different owners in equal undivided moieties, as tenants in common. Watts v. Hawkins, 5 Taunt. 20; Cubitt v. Porter, 8 Barn. & Cress. 257. In this State it is held that there is no obligation in the owners of adjacent lots to unite in building a party wall. If one owner place half the wall on an adjoining lot, the owner of the lot is not liable to contribute on subsequently using the wall on his own land. The respective owners of the wall are not tenants in common; each owns in severalty the portion of the wall on his own land, though neither has the right to pull it down without the owner's consent. Sherred v. Cisco, 4 Sand. 480; Potter v. White, 6 Bos. 644. A party wall is not an *incumbrance* under the covenant against incumbrances. Hendricks v. Stark, 37 N. Y. 106. A party wall may be so constituted by long acquiesence or by parol. Maxwell v. E. R. Bk. 3 Bos. 124. A right to use a part of a lot for a party wall is an incorporeal hereditament, and a covenant thereof runs with and binds the lands. Kettletas v. Penfold, 4 E. D. Smith, 122. It is a servitude on both lots, irrespective of their ownership. Rogers v. Sinsheimer, 50 N. Y. 646; Hendricks v. Stark, 37 N. Y. 106; Partridge v. Gilbert, 15 N. Y. 601; Eno v. Del Vecchio, 4 Duer, 53. A party wall in common between two houses is of common property, and if taken down by one must be reinstated by him as before in a reasonable time. Partridge v. Gilbert, 15 N. Y. 601. It cannot be taken down except by mutual consent, if sound. Potter v. White, 6 Bos. 644; Sherred v. Cisco, 4 Sand. 480. It can be used for no other purpose than the one agreed on, nor in any other way. Fettretch v. Leamy, 9 Bos. 510. Either party may increase the height of the wall, if done without detriment to the strength of the wall, or to the adjoining property, or so as to make a different use of the wall. He is liable for damages caused by any different use. Brooks v. Curtis, 50 N. Y. 639; affirming, 4 Lans. 284.

Rebuilding and Repairs.—Repairs must be contributed ratably, but extra expense for the advantage of one must be borne by him alone. Potter v. White, 6 Bosw. 644; Campbell v. Meiser, 4 Johns. Ch. 334; 6 *Ib.* 21.

As also a rebuilding after a fire. Sherred v. Cisco, 4 San. 480. There is no right in either party to compel the other to rebuild in case of destruction of the wall, or to claim half compensation should one rebuild. Sherred v. Cisco, 4 Sand. 480; limiting Campbell v. Meiser, *supra;* Partridge v. Gilbert, 15 N. Y. 600. If the wall becomes dilapidated, either may take it down, and he is not responsible in damages for injury or loss to the other, if done on reasonable notice, and with proper diligence and skill. *Ib.*

City of New York.—By Law of April 1, 1857, ch. 225, provision was made as to making an increase of thickness of party walls erected prior to the building act of April 15, 1846. *Vide* said acts.

Division Fences.—At common law the owner of a close was not bound to erect a division fence, unless by force of prescription. He was bound, however, to keep his cattle on his own grounds, and prevent them from escaping, and was liable in trespass for their migration elsewhere. Any legal obligation to fence arises either from special prescription or statutory enactment. See as to the necessity of maintaining fences in this State, and damages for not so doing, Wells v. Howell, 19 Johns. 385; Holladay v. Marsh, 3 Wend. 143; Clark v. Brown, 18 Wend. 213; also Laws of 1838, ch. 261; 18 N. Y. 210; 5 Den. 260; 4 Den. 101; 3 Hill, 38. By the Rev. Stat., adjoining owners are bound to maintain each a fair proportion of a division fence, where one-half or more of each adjoining farm is cleared or improved. The same rule applies to all adjoining owners unless one chooses to let his land lie open to the public. If he afterwards enclose it, he is to refund a just proportion of the cost of the fence erected by the other. If one-half his farm lies open, one-half being cleared or improved, he shall refund one half, or else build his proportion. Disputes are to be settled by "Fence Viewers," as provided. 1 R. S. 1st ed. p. 353, as amended laws of 1866, ch. 540, which contains other provisions as to valuation and ownership of the fence on a sale of lands, and as to removal of fences, &c. See also, 22 Barb. 579; 18 *Ib.* 400; 11 *Ib.* 412; 9 How. P. 455; 17 Wend. 320; 35 Barb. 16; 41 *Ib.* 159; 44 *Ib.* 136; Laws of 1860, ch. 267. As to fences by railroad companies, and as to "Virginia or crooked fence," *vide* Ferris v. Van Buskirk, 15 Barb. 397; Davis v. Townsend, 10 Barb. 333. There may be valid prescription binding a party to maintain a division fence. In such cases, fence viewers have no jurisdiction. No such prescription arises presumptively since the statutes requiring fencing. Adams v. Van Alstyne, 25 N. Y. 232; affirming, 35 Barb. 9.

Fences in New York City.—By statute of March 19, 1813, ch. 35, which appears still in force, the corporation are authorized to make regulations for partition and other fences. An ordinance was passed in 1833 relative to the subject.

TITLE VII. OTHER RIGHTS AND SERVITUDES.

There other rights in the nature of easements, which allow one person certain advantages or rights in the land of another, and which arise by grant or the prescription which presumes a grant.

Rights of Support.—Among incorporeal and prescriptive rights are those falling under the technical head of "*servitudes*," or rights to the use of another's land under certain circumstances, as the right that one has to rest the timbers of his house in an adjoining wall of another. This may arise by grant or prescription, and if a new wall is built the right is re-

stored and continued. *Vide* Hide v. Thornborough, 2 Carr. & P. 250; Bonomi v. Backhouse, 1 Ell. B. & Ell. 622. A license to insert beams for support has been held not an interest in lands required to be in writing. McLarney v. Pettigrew, 3 E. D Smith, 111. Also where one erects two or more houses adjoining, and so constructed as to mutually support each other, a right is created which continues after division of ownership. Richards v. Rose, 24 Eng. L. & Eq. 406; Eno v. Del Vecchio, 4 Duer, 53; same case, *Ib.* 17. And neither can remove the support without the consent of the other. *Ib.* and Webster v. Stevens, 5 Duer, 553. Reversioners however, are not bound by such constructions. *Ib.* See further as to "Rights of support," *supra*, "Party Walls."

Excavations.—It has been held in this State, that a person may dig on his own land, but not so near that of one adjoining as to cause the land of the latter to fall into the pit dug, and lose its support. Farrand v. Marshall, 21 Barb. 410; same case, 19 Barb. 380; Lasala v. Holbrook, 4 Pai. 169. This view, however, does not appear to be sustained by the general current of opinions in this State, and it is supposed that a man may dig so near his neighbor's land as to unsettle his foundations and precipitate his soil, provided he uses ordinary care; and that no person is entitled by law to a lateral support of his land. Radcliff's Ex'rs v. The Mayor, 4 Com. 195; Panton v. Holland, 17 Johns. 92; Gardner v. Heart, 1 Com. 528; reversing 2 Barb. 165; Auburn, &c. Co. v. Douglass, 5 Seld. 444. A landlord is not bound to protect his tenant from the effects of an excavation adjoining, Sherwood v. Seaman, 2 Bos. 127. If the owner of a house finds it necessary to pull it down, he must give due notice to adjacent owners, and remove his walls with reasonable and ordinary care. The same rule would apply to the digging and grading of a street. Jones v. Bird, 5 B. & Ald. 837; Richard v. Scott, 7 Watts, 460; 4 Paige, 169; Radcliff's Exec'rs v. The Mayor, 4 Com. 195. Although by law each may remove his own foundations for a reasonable excavation, after due notice to another contiguous, by law of the State, April 10, 1818, ch. 106, foundations must be at least six feet below the street; also by law of 1855, ch. 6, relative to the cities of New York and Brooklyn, parties excavating below ten feet must support a contiguous or party wall. Under the law of 1855, a person is not bound to protect the adjoining building unless he have full explicit license to enter on the land. Sherwood v. Seaman, 2 Bos. 127.

Vaults Under a Street.—See as to these in the city of New York, Carter v. Peters, 5 Robn. 192.

Right of Deposit.—A right to use another's ground for deposit may be gained by prescription, *i. e.*, to deposit logs for a saw-mill; it would pass by a conveyance of the mill as an appurtenance, even if there might be the parol evidence of a contrary intent. Voorhees v. Burchard, 6 Lans. 176.

Right of Drain, &c.—Another servitude is the right of drainage over another's land. This gives no right to the owner of the land to use the drain. It may arise where an owner conveys to different parties two houses with a drain under each leading into a common sewer. The grant of such a right is the grant of an easement and not of a right in land. Pyer v. Carter, 40 Eng. L. & E. 410; Lee v. Stevenson, 1 Ell. B. & Ell. 512; Butterworth v. Crawford, 3 Dal. 57. The existence of such an easement is an "incumbrance" but not a breach of covenant for quiet enjoyment. McMullin v. Wooley, 2 Lans. 394. The rule of law giving the easement where an owner sells adjoining houses, is confined to cases where there is an apparent sign of servitude. So held in the case of a drain. Butterworth v. Crawford, 46 N. Y. 349.

Right of Drip.—There is also the servitude of drip, by which falling water from the house or land of one is allowed to drip over or on another's

land. See as to an action for damages for injuries by "drip." Bellows v. Sackett, 15 Barb. 96. It has been held in Maryland, that the owner of land the eaves of whose house extend over the adjoining lot without objection, for twenty years, acquires an easement in such lot. Cherry v. Stein, 11 Md. 1. Such easements and servitudes as the above, may be created by reservation but not by parol, although they may arise by prescription or dedication. Hills v. Miller, 3 Pai. 256; Child v. Chappell, 5 Seld. 246; Rose v. Bunn, 21 N. Y. 275; Day v. N. Y. C. R. R. 31 Barb. 549. And see *ante*, p. 489, and this chapter as to title by *prescription*, *supra*.

Agreements as to Building.—Owners of lots on a block may be mutually bound in equity by a plan, established by parol and acted on, as to setting back buildings from the street line, if they purchase with notice. Tallmadge v. E. Riv. Bk. 26 N. Y. 105.

Air and Light.—Neither light, air or prospect can be the subject of a direct grant. They can only be secured by covenant, agreement or condition. The doctrine of prescription is also often invoked on questions of "air and light" to edifices. The law has been here, and still in a measure elsewhere exists, that ancient lights of twenty years' standing cannot be obstructed by an erection of another, even on his own land. The Supreme Court of the State, however, have decided that the law was not applicable to the condition of the cities and villages of this country. Parker v. Foote, 19 Wend. 309. See also, 10 Barb. 537; Mahan v. Brown, 13 Wend. 263; Banks v. The Am. Tract So. 4 Sand. Ch. 464; although a prescriptive title may be established. The views of the courts in the above cases are that no grant of such right may be presumed, but that it may exist if found as a fact; and that to authorize the presumption of a grant there must not only have been uninterrupted enjoyment of the easement of air or light for twenty years, but that it must have been adverse, under claim and assumption of right, and with the knowledge and acquiescence of the owner. Rights of the above and the like nature are not lost, but continue after severance or division of the estate, if necessary to the enjoyment of the severed portions. Kieffer v. Imhoff, 26 Peun. 438; Burwell v. Hobson, 12 Gratt. 322.

CHAPTER XXXVII.

THE LIEN OF JUDGMENTS.

TITLE I. THE LIEN OF JUDGMENTS OF THE COURTS OF THIS STATE.

The existing statutory provisions creating the lien of judgments, are founded upon those of the Laws of 1813 (1 Rev. Laws, p. 500), the Revised Statutes of 1830, the Law of 1840, ch. 386, and the Code of Procedure. The provisions of the Revised Statutes and of the Code are given separately, as a distinct reference may be desirable to be made to each. The provisions of the Revised Statutes were not repealed directly by any provisions of the Code.

Judgments a Lien.—The Revised Statutes enact that all judgments thereafter rendered in any *court of record*, should be a charge upon the lands, tenements, real estate, and chattels real, of every person against whom the judgment should be rendered, which he may have at the time of *docketing such judgment* or shall acquire at any time thereafter.

2. R. S. 1st ed. p. 358, § 3. The statute also provides that such real estate and chattels real shall be subject to be sold upon execution to be issued on such judgment.

Filing Necessary.—Time of Filing Record to be Noted.—No judgment shall be deemed valid so as to authorize any proceedings thereon, until the record thereof shall be signed and filed. The time of filing is to be indorsed by the clerk. *Ib.* § 11.

Unless Record is Filed and Docketed, it is not to Affect Lands, &c., or have

preference as against other judgment creditors, purchasers, or mortgagees. *Ib.* § 12. Until the judgment roll is made up and filed and docketed, there is no judgment or lien under it; and the docketing, until the judgment is made up and filed, is void, and creates no lien. Townsend v. Wesson, 4 Duer, 342; Blydenburgh v. Northrop, 13 How. P. 389.

Lien on Trust Estate.—The lien of a judgment does not in equity attach on the mere legal title to lands existing in the defendant, when the equitable title is in another. Lounsbury v. Purdy, 18 N. Y. 515; aff'g 16 Barb. 376; Averill v. Lucks, 6 Barb. 20; Lounsbury v. Purdy, 11 Barb. 490, and a purchaser with notice is not protected.

On Leases.—Judgments are a lien on all estates for years or chattels real (*ante*, p. 668), but do not become liens on leasehold premises unless or until the judgment debtor, the lessee, is entitled to possession. Crane v. O'Connor, 4 Edw. C. R. 409. See, also, Mason v. Lord, 40 N. Y. 477, and *post*, Sale on Executions.

Revival.—The revival of a judgment by *scire facias* does not create a new lien so as to operate against purchasers or incumbrancers subsequent to the original judgment. Mower v. Kip, 2 Edw. 165; 7 Cow. 540; Tufts v. Tufts, 18 Wend. 621; Mower v. Kip, 6 Pai. 88.

Extinguishment.—One judgment recovered on another extinguishes the lien of the first. 1 Pai. 558. If a judgment debtor proves his debt in bankruptcy he loses his lien against real estate of his bankrupt debtor. Briggs v. Stevens, 7 Law R. 281. A judgment does not lose its lien by lying dormant in the sheriff's hands. Muir v. Leitch, 7 Barb. 341. A judgment lien is not an incumbrance within the meaning of § 132 of the Code, as to *lis pendens*. Proceedings under the right of eminent domain supersede the lien of a judgment. Watson v. N. Y. C. R. R. 47 N. Y. 157. A stay of proceedings does not take away the lien of a judgment. Cowdrey v. Carpenter, 17 Abb. 107; s. c. 2 Rob. 601. The lien is general, not specific, and the judgment creditor cannot bring an action of waste, and he is subject to all prior liens or claims. Lansing v. Carpenter, 48 N. Y. 408; Rodgers v. Bonner, 45 N. Y. 379. A statute depriving a party of the benefit of his judgment on a contract, is unconstitutional. Hadfield v. The Mayor, 6 Rob. 501. Tender of payment, if not accepted, does not discharge the lien. People v. Beebe, 1 Barb. 379.

Transcripts in other Counties.—By Law of May 14, 1840, ch. 386, after the act takes effect, when a judgment has been perfected in the Supreme Court, or within five years thereafter, a transcript may be filed with any county clerk who shall docket the judgment. If not docketed within ten days from when it is perfected, it is to be lien from when docketed. If docketed within ten days, it is to be a lien from the time it was perfected, except as against *bona fide* purchasers and mortgagees.

Superior Court of New York City, and Mayor's Court.—By Law of 1840, ch. 386, § 28, judgments in said courts had to be docketed with the county clerk where rendered, in order to be a lien.

Docketing with County Clerk.—By Law of May 14, 1840, ch. 386, § 25, it is also provided that no judgment or decree which shall be entered after the act takes effect, shall be a lien on real estate, unless the same be docketed in books to be provided and kept for that purpose by the *county clerk of the county* where the lands are situated. As to the provisions affecting judgments theretofore recovered, *vide* Clark v. Dakin, 2 Barb. Ch. 36. This provision, it was held, did not dispense with the provision of the Revised Statutes requiring clerks of the Supreme Court to docket judgments therein in order to make them liens. Corey v. Cornelius, 1 Barb. Ch. 572. See, however, Johnson v. Fitzhugh, 3 Barb. Ch. 360, to the contrary. The above provisions do not apply to judgments *in rem*, which are

settled by the judgment, viz., partition suit. Van Orman v. Phelps, 9 Barb. 500; Lynch v. The Rome Co. 42 Barb. 591. Nor a suit to recover real property. Sheridan v. Andrews, 49 N. Y. 478. They prevent the common law lien of a judgment from attaching until the docketing. Buchan v. Sumner, 2 Barb. Ch. 165.

Priority.—Judgments have priority according to the time of filing them or docketing. Judgments filed and docketed out of office hours take effect at the next office hour, and become a lien only from that time. France v. Hamilton, 26 How. 180; Wardell v. Mason, 10 Wend. 573; Law of 1860, ch. 276, as to the time when county clerks and clerks of courts of record should keep their offices open. Where the lien of a judgment is suspended by an order vacating the judgment, when such order ceases to have any validity by being vacated, the lien is revived, as though it never had been suspended, where no new rights have been acquired by others. King v. Harris, 34 N. Y. 330, aff'g 30 Barb. 471.

Control over Dockets and Amendments.—By Law of Ap. 1, 1844, ch. 104, the Supreme Court, the Court of Chancery, the Superior Court, and Common Pleas of New York, and Mayor's Courts, are to have the same power over the dockets of their judgments, by county clerks, as the Supreme Court has over its dockets. The court may correct mistakes in the docket, and amend it. Geller v. Hoyt, 7 How. 265; Aylesworth v. Brown, 10 Barb. 167; Roth v. Schloss, 6 Barb. 308. The clerk acts ministerially, and his erroneous entries cannot conclude parties. Booth v. The Farmers', &c. Bank, 4 Lans. 301; Williams v. Wheeler, 1 Barb. 48.

Indexing.—The clerk is also to index the names of all the defendants alphabetically, and note the amount and time of entry of judgment. § 13, Rev. Stat. *supra.* Unless properly indexed, the docket makes no lien, if a party would be prejudiced by the mistake. Buchan v. Sumner, 2 Barb. Ch. 165; Sears v. Burnham, 17 N. Y. 445.

Judgments of New York Superior Court and Common Pleas.—By the same law of 1840, § 29, transcripts of judgments of Superior Court of New York city, and of any Common Pleas, might be docketed in any other county, so as to be a lien there, with the like effect as above provided as to judgments of the Supreme Court.

Surrogates' Decrees.—By Law of 1837, May 16, ch. 460, § 64, certificates of surrogates' decrees for the payment of money, had to be filed with the clerk of the Supreme Court, and were thenceforth to be a lien on the lands, &c. of the person against whom they were entered. This section was repealed by Law of April 1, 1844, ch. 104, and provision made for the certificate being filed with the *county clerk.* The docket is to have the same effect as a judgment of the Court of Common Pleas; the same to be a lien, from the time of docketing, on lands in the county where the certificate is filed of any person against whom the decree is entered. By the Law of Ap. 1, 1844, also, the word "decrees," as used in the Law of May 14, 1840, *supra*, was to mean surrogates' decrees for the payment of moneys by executors, administrators, or guardians, as well as decrees in chancery.

Justices' Judgments.—The Code, § 63 (amended in 1849), provides that a transcript of a judgment rendered before a justice of the peace, for twenty-five dollars and upwards, exclusive of costs, may be filed and docketed in the office of the clerk of the county where the judgment is rendered, and from that time it shall be a lien on real estate, and be a judgment of the county court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with the like effect, and shall be a lien only from the time of filing and docketing the transcript. The judgment must be docketed as are judgments of courts of record. Blossom v. Barry, 1 Lans. 190. And the judgment must have

been duly entered by the justice in his docket. Stephens v. Sanborn, 51 Barb. 532. As to the law before the Code, and sales under the judgment, *vide* Waltermire v. Westover, 4 Ker. 16; overruling, Young v. Remer, 4 Barb. 442. Since the Code, a justice's judgment is held to stand on the same footing as a judgment in the Supreme Court, so far as the statute of limitation is concerned. Nicholls v. Atwood, 16 How. 475. The transcript and docketing are all that is necessary to establish the judgment as a lien. Dickinson v. Smith, 25 Barb. 102.

Justices' Courts of Cities, Marine Court, and Justices' Courts in New York.—By § 68, *Ib.* (amended in 1849 and 1851), the foregoing provision relative to the liens of justices' judgments are made applicable to the *justices' courts* of cities, to the *Marine Court*, and the *justices'* courts in *New York city*, except that in the city and county of New York, a judgment for twenty-five dollars or over, exclusive of costs, the transcript whereof is docketed with the clerk of that county, shall have the same effect as a lien, and be deemed a judgment of the Court of Common Pleas for said city.

District Courts of New York City.—By Laws of April 13, 1857, it is enacted that the provisions of § 55 to § 64, both inclusive, of the Code, and of § 68, shall apply to these courts, except that the transcript of judgment specified in the latter section shall be furnished by the clerk of the court in which the judgment was rendered, and also that the execution may issue as well out of the District Court in which the judgment was rendered as out of the Court of Common Pleas.

Jury Fines.—By Laws of 1870, ch. 539, unpaid jury fines may be entered as judgments in the Supreme Court, in the county clerk's office, and shall thereupon be liens on real estate.

Decrees in Chancery.—Decrees in chancery are to be docketed in the Court of Chancery, in the same manner and with like effect as judgments of the Supreme Court. 2 R. S. p. 182, § 96; Laws of 1840, 386, § 27. Section 25 required them to be docketed with the county clerk where the lands lay, to be liens thereon.

Tribunals of Conciliation.—By Law of April 3, 1861, ch. 128, p. 245, establishing tribunals of conciliation in the sixth judicial district, the judgments of such tribunals are made liens on real estate when docketed in the clerk's office thereof, and the docketing a transcript with the county clerk. This tribunal was abolished by Laws of 1865, ch. 336.

City Court of Brooklyn.—By Law of 1849, which went into operation on May 1, 1849 (Laws of 1849, p. 170), it is provided relative to "The City Court of Brooklyn," that every judgment of said court may be docketed, and shall be a lien in the like manner, and to the same extent, as judgments recovered in the *Supreme Court.*

Common Pleas of New York City.—By Laws of 1844, ch. 104, no judgment recovered in said court should be a lien on lands in said county, until a transcript thereof be filed with, and the judgment be docketed by, the clerk of said county; in which case, if such transcript be filed within ten days after the docketing in said Court of Common Pleas, it shall be a lien from the time of its rendition, except as against mortgagees and purchasers in good faith, who have become such before the filing of such transcript. If not filed within that time, it shall be a lien only from the time of filing and docketing with the clerk of the said county. § 6.

The Lien for Ten Years only.—After *ten* years from the time of docketing, judgments shall cease to bind or be a charge upon such property, as *against purchasers in good*

faith, and as against incumbrances subsequent to such judgment, by mortgage, judgment, decree, or otherwise.

1st ed. 2 Rev. Stat. 359, § 4.

Effect of Injunction or Appeal.—The time the plaintiff might be restrained by injunction or writ of error is to be deducted from the ten years, if a notice to that effect is filed with the clerk of the court within the ten years, to be noted by him in the margin of the docket. *Ib.* § 5.

Law of 1840 *as to Lien.*—The Law of May 14, 1840, p. 335, altered the Revised Statutes, by providing that the lien of judgments and decrees should continue only *five* years from the day when judgment was perfected or the decree entered.

Repeal Thereof.—This alteration, however, was repealed by Law of May 7, 1844, p. 466, and the lien restored to *ten* years.

Provisions of the Code.—§ 282 of the Code (amended in 1851, ch. 479, and 1867, ch. 781, and also in 1869; provides that on filing a judgment roll upon a judgment directing in whole or in part the payment of money, it may be docketed with the *clerk of the county* where *the judgment roll was filed* (1867), (formerly "where it was rendered,") and in *any other county*, upon the filing with the clerk thereof, a transcript of the original "docket;" and shall be a lien on the real property in the county where the same is docketed, of every person against whom such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter for *ten* years from the time of docketing the same in the county where *the judgment roll was filed* (1867), (formerly "where it was rendered.")

Effect of Appeal or Injunction.—But the time during which the party recovering or owning such judgment shall be or shall have been restrained from proceeding thereon by any order of injunction, or other order, or by the operation of any appeal, shall not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders, or making such appeal, or any other person who is not a purchaser, creditor, or mortgagee, in good faith. Amendment of 1867, § 282.

When Undertaking on Appeal Filed.—Where an undertaking to stay execution has been given on an appeal from the judgment, the court may direct an entry on the docket that the judgment is secured on appeal, and thereupon it shall cease, during the pending of the appeal, to be a lien on the real property of the judgment debtors (or a portion thereof, to be specified), as against purchasers and mortgagees in good faith. *Ib.*

The provisions of the Code make the docketing of a

judgment with a county clerk necessary in all cases to make it a lien on lands in the county. It is supposed that the provisions of the Code would control those of the Revised Statutes where there is any difference. According to the general principle of construing statutes, such interpretation should be given to diverse statutes on the same subject as that they should, if possible, stand together.

Effect of Judgments after the Ten Years.—The judgment after ten years ceases to be a lien as against subsequent purchasers and subsequent incumbrancers, although the land was taken with full knowledge of the judgment. 4 Kern. 16; Little v. Harvey, 9 Wend. 157; Tufts v. Tufts, 18 Wend. 621; Lansing v. Vischer, 1 Cow. 431; Scott v. Howard, 3 Barb. 319; Muir v. Leitch, 7 Barb. 341; Chosier v. Archer, 7 Pai. 137. Except where there was actual fraudulent intent. *Ib.;* Scott v. Howard, 3 Barb. 319. Lands purchased in good faith during the ten years are held free of the lien, if there be no sale within that time, even if the party had knowledge. Tufts v. Tufts, *supra.* The ten years run from the original docket, and the lien is not saved by subsequent revivals. *Ib.* A purchaser from a judgment debtor more than ten years after docketing the judgment is deemed a purchaser in good faith, unless he purchased with fraudulent intent. Notice of the judgment will not render the purchase *mala fide.* Reynolds v. Darling, 42 Barb. 418. The judgment continues a lien after ten years as against the judgment debtor and his heirs and grantees without value. Scott v. Howard, 3 Barb. 319; *ex parte* Peru Co. 7 Cow. 540; Mower v. Kip, 2 Edw. 165; Pettit v. Shepherd, 5 Pai. 498; Mohawk Bank v. Atwater, 2 Pai. 54. The above § 282 of the Code does not apply to judgments rendered and docketed before it took effect. 4 Sand. 712; 17 Abb. 107, 109; 2 Rob. 601.

Title II. Discharge and Satisfaction of Judgments.

The judgment may be discharged by filing with the clerk an acknowledgment of satisfaction. A satisfaction piece should be entitled in the cause, and state that satisfaction is acknowledged between the parties therein for the amount of the judgment. It is signed and acknowledged by the judgment creditor or his assignees or executors or administrators. On payment of the judgment, satisfaction "*shall be*" acknowledged by the attorney, or plaintiff receiving the money, on payment of fees by the defendant.

2 Rev. Stat. p. 362, §§ 22, 25.

By Attorney.—It may be acknowledged by the attorney of record within two years from the time the record was filed, but then it is not conclusive

against the plaintiff if actual notice was given of revocation of the authority of the attorney. § 24. An attorney, where the judgment is secured by levy, cannot discharge it without payment in full. Benedict v. Smith, 10 Pai. 126. He has only authority to satisfy on payment of the judgment in full, as between plaintiff and defendant. Lewis v. Woodruff, 15 How. 539; Carstens v. Barnstorff, 11 Abb. N. S. 442; Beers v. Hendrickson, 45 N. Y. 665. The owners of the judgment could of course discharge it on the payment of any amount.

To be acknowledged.—It must be acknowledged before the clerk of the court or a judge of the court or of a county court, or commissioner of deeds, who shall certify that the party was known or was made known to such officer by competent proof. As amended 1834, ch. 262. Officers with the powers of commissioners may of course also act. § 23.

Transcript filed in other Counties.—The clerk cancels the judgment of record; and by giving a transcript or certificate of the satisfaction or the reversal or vacation of a judgment, any other clerk where the judgment is docketed is required to satisfy or cancel it. Laws of 1844, ch. 104.

If Party out of the State.—By law of 1834, ch. 262, if the party reside out of the State, the certificate may be acknowledged before any person authorized to take acknowledgments out of the State.

By one Party.—A judgment in favor of several may be discharged by a satisfaction piece executed by one. People v. Keyser, 28 N. Y. 226; 17 Abb. 214; reversing 39 Barb. 587.

By Power of Attorney.—If acknowledgement is through a *power of attorney*, it must be acknowledged or proved before the clerk of the court or an officer before whom conveyances are acknowledged, and in the same manner, and filed with the satisfaction piece. Law of 1834, ch. 262.

In Another County.—By Laws of 1860, ch. 6, a copy of a satisfied execution on a judgment entered in another county, may be filed with the clerk of a county where the judgment has been docketed and paid, and he shall enter satisfaction of said judgment, and give transcripts to be filed in other counties.

Vacation of the Satisfaction.—If the satisfaction is vacated, intermediate *bona fide* purchasers are protected. Taylor v. Ramsay, 4 Hill, 619. It will be vacated by order of the court when there is fraud, mistake or collusion. McGregor v. Comstock, 28 N. Y. 237.

Duty of Clerks.—On a judgment in the Supreme Court being discharged, the clerk, where the record was filed, is to transmit a certificate of discharge to the other clerks of the court, who shall enter it in their dockets. 2 R. S. 1st ed. § 27, p. 363.

Unauthorized Discharge.—A discharge by the clerk, without the satisfaction piece as required by law being filed, is void, and the parties must see as to the clerk's authority to make an entry of satisfaction. Booth v. Farmers, &c. Bank, 4 Lans. 301. This case was reversed in 50 N. Y. 396, on the ground that a satisfaction piece by a corporation which showa that it was executed by the president in his official capacity was binding on the corporation, although not executed in the name of nor under the seal of the corporation.

Surrogate's Decrees.—By law of April 25, 1867, ch. 782, § 9, any decree or order of a surrogate for the payment of money may be discharged by filing with him a release of the amount, ackuowledged or proved as deeds are required to be; and a surrogate's certificate of discharge may be filed with a county clerk, who shall enter it in his docket.

Other Discharges.—A judgment is also discharged by being satisfied under execution or otherwise, or released; or by valid discharge under bankrupt or insolvent laws. Where the judgment has been paid, the court

may, on motion, quash the execution, and enter satisfaction of record. U. S. v. McLennore, 4 How. U. S. 86. A judgment is also satisfied by return of execution satisfied (2 Rev. Stat. 362), and the clerk is to satisfy it, and also any reversal or vacating is to be entered on the docket (Laws of 1844, ch. 104), which removes the lien of the judgment on a certificate thereof being presented. 4 Com. 417. A mere levy does not operate as satisfaction unless it was defeated by the act or fault of plaintiff or his assignee. People v. Hopson, 1 Den. 574; McChain v. Duffy, 2 Duer, 645; Denvrey v. Fox, 22 Barb. 522; Ostrander v. Walter, 2 Hill, 329. A levy on real estate is no satisfaction. Shepard v. Rowe, 14 Wend. 260. But if the property is taken and lost or destroyed by the sheriff, it is satisfaction. Peck v. Tiffany, 2 Com. 451. The lien of the judgment is also removed by the body of the defendant being taken in execution. Dininny v. Fay, 38 Barb. 18; Cooper v. Searls, 1 Cow. 56.

Discharge in Bankruptcy.—A valid discharge in bankruptcy also extinguishes a judgment. Ruckman v. Cowell, 1 Com. 505. Even if the judgment was recovered on a prior debt after petition filed. Clark v. Rowling, 3 Com. 316.

Effect of the Discharge.—When a judgment has been once paid, and the lien discharged, the parties cannot restore the lien to the prejudice of third persons who are then incumbrancers. Angel v. Bonner, 38 Barb. 425. An execution cannot issue upon a judgment discharged of record. If wrongfully discharged, the discharge must be first vacated. Ackerman v. Ackerman, 14 Abb. 229.

Presumption of Payment.—Every judgment and decree hereafter rendered in any court of this State, or of the United States, or of any other State or territory within the United States, shall be presumed to be paid and satisfied after the expiration of twenty years from the time of signing and filing such judgment or decree. Such presumption may be repelled by proof of payment, or of written acknowledgment of indebtedness made within twenty years, of some part of the amount. In all other cases it shall be conclusive Rev. Stat. Part 3, ch. iv, Title ii. As to the rebuttal of the presumption, *vide* 3 Sandf. 22; 14 Barb. 15; 2 Duer, 1; 14 Wend. 190; 16 *Id.* 430. Also the Code, §§ 90, 110, as to actions on judgments, and new promises.

TITLE III. JUDGMENTS IN UNITED STATES COURTS.

These judgments became liens under the judiciary act of 1789. By a law of the United States, passed July 4, 1840 (5 U. S. Stat. p. 393, repealing the act of March 3, 1839), it is provided that judgments and decrees thereafter rendered in the Circuit and District courts of the United States, within any State, shall cease to be liens on real estate or chattels real, in the same manner and *at like periods as judgments and decrees of the courts of such State now* cease by law to be liens thereon, and the respective clerks of the United States courts in such State shall receive the like fees for making searches and certificates respecting such liens as are now allowed for

like services to the clerks of the Supreme Court of such State.

Although judgments are now a lien against real estate in this State for *ten* years, at the time the *said statute was passed*, and until May 7, 1844, judgments and decrees were liens on real estate in this State only for the period *of five* years from the time of their being docketed. State law of 1840, May 14, ch. 386. From the strict reading of the law of the United States, *supra*, therefore, the lien would only be in force for *five* years. It has been doubted, however, whether the lien of the United States judgments is not for ten years, as other judgments in the State now are. As regards judgments where the United States are plaintiffs, it has been questioned whether the lien would likewise cease as above provided, although as a general rule, a sovereignty is privileged against any statute of limitations. *Vide* People v. Van Rensselaer, 8 Barb. 189. Inasmuch, however, as there is no exception made in favor of judgments obtained by the United States, the lien, it is supposed, equally ceases in judgments obtained by the United States, as it would in judgments where others are plaintiffs.

Extent and Nature of the Lien.—A judgment of a court of the United States is a lien upon real estate of the debtor, in accordance with the local law of the place where the land lies. 8 How. U. S. 107; 2 Pa. 252; 2 Bl. C. C. 341; 2 Bl. 430. It is co-extensive with the *district* of the court in which it is recovered. Taylor v. Thompson, 5 Pet. 358; *vide* 7 How. U. S. 760; Lellan v. Corwin, 5 Ohio, 398; Crandell v. Cropsey, 10 N. Y. Leg. Obs. 1; 2 Blatch. C. C. R. 341; 2 McL. 78; 9 How. U. S. 530; 4 McL. 607; Manhattan Co. v. Evertson, 6 Pai. 457.

No Transcript need be Filed.—No transcript need be filed with the clerk of any county of the district; nor is any compliance with the statutory requirements of the State necessary. Cropsey v. Crandall, 2 Bl. C. C. R. 341; Lombard v. Bayard, Wall. Jr. 196; Carroll v. Watkins, 1 Abb. U. S. Ca. 476. It seems that a judgment recovered in a Federal court out of the State is not a lien upon lands within it. 6 Pai. 457, *supra*.

State Laws may not Impair the Lien.—Where a lien has attached in the courts of the United States, a State has no power by legislation or otherwise to modify or impair it. 7 How. U. S. 760; § 282 of Code held to apply to U. S. judgments. Massinger v. Downs, 10 N. Y. L. Obs. 1; Carroll v. Watkins, 1 Abb. U. S. Cases, 474.

Admiralty.—An admiralty decree for payment of money is a lien. 2 McL. 78; Ward v. Chamberlain, 2 Black. 430.

May be Docketed in other Counties.—By Laws of 1832, ch. 210, and 1847, ch. 470, § 39, transcripts of judgments rendered in this State, in any court of the United States, duly certified by the clerk of such court, may be filed and docketed by the clerk of any county in this State, in the same manner as judgments rendered in the Supreme Court of this State. By the Revised Statutes, 2 R. S. p. 557, §§ 38 to 45, direction was given to the clerks of the Supreme Court at New York City, Albany and Utica to procure certified copies of dockets of judgments from the United States Courts in the State, since Jan. 1, 1830, and to enter them in books as also transcripts of future judgments. §§ 43, 46, were repealed by law of 1832, ch. 210.

TITLE IV. JUDGMENTS, MISCELLANEOUS.

The following miscellaneous provisions and decisions

with reference to the lien or discharge of judgments, it may be desirable to notice:

Judgment after Decease of Defendant.—A judgment filed and docketed after the decease of the defendant does not bind real estate. Nichols v. Chapman, 9 Wend. 452; Clark's Case, 15 Abb. 227; Borsdorff v. Dayton, 17 Abb. 36.

Verdict before Decease of Defendant.—If a verdict has been rendered before the death of a defendant, upon which proceedings shall be stayed, the court may authorize the filing and docketing a record of judgment within one year after the death of such party, subject to the power of the court to vacate the same. 2 R. S. p. 359, § 8.

Where the Record is Docketed within One Year of the Decease of the Defendant.—The Revised Statutes also provide that where a judgment shall be filed and docketed, within one year after the death of the defendant, a suggestion of such death, if it happened before judgment, shall be entered on the record, and if after judgment rendered, the fact shall be certified on the back of such record by the attorney filing the same. Such judgment shall not bind the real estate which such party shall have had at the time of his death, but shall be considered as a debt to be paid in the usual course of administration. 2 Rev. Stat. p. 372, § 7.

Judgments against Executors, &c.—Real estate of any deceased person shall not be bound by, or sold under, any judgment against his executors or administrators. 2 Rev. Stat. p. 449, § 12, 1st ed.

Consideration Money Mortgages.—As to the lien of such mortgages having preference over judgments, *vide ante*, pp. 550, 587.

Unrecorded Mortgage.—Preference of, over a judgment, *vide ante*, p. 586.

Equitable Interests.—Equitable interests are not bound by a judgment. Jackson v. Chapin, 5 Cow. 485; and see *ante*, p. 315.

Equitable Claims.—An equitable claim on land, which existed prior to the recovery of a judgment, is preferred over a judgment docketed afterwards. Cook v. Kraft, 41 How. P. 279. The general lien of a judgment is subject to all equities existing against the real property of a debtor in favor of a third person, at the time of recovery of the judgment. White v. Carpenter, 2 Pai. 217; 2 Barb. Ch. 338; 7 Barb. 341; Buchan v. Schuner, 2 Barb. Ch. 165; Matter of Howe, 1 Pai. 125; Kersted v. Avery, 4 Pai. 9. Judgment creditors are entitled to only such rights in the premises as the judgment debtor rightfully possessed.

Voluntary Insolvent Assignments under art. v, ch. v, part 2, tit. 1, Rev. Stat. do not destroy the lien of judgments. 3 R. S. 5th ed. p. 105. Nor under art. iii, where the judgment creditor does not petition. Kelly v. Thayer, 34 How. P. 163.

Judgments for Moneys advanced to pay Taxes.—Judgment for moneys advanced to pay taxes on the lands of the plaintiff and another, shall not be entitled to the priority conferred by title 3, ch. 13, of part 1, Rev. Stat. unless at the time of docketing the plaintiff cause an entry to be made by the clerk in the docket thereof, specifying that such judgment has priority as a lien on certain lands over mortgages and other judgments. 2 R. S. 1st ed. p. 361, § 14. The provisions of said title are to the effect that when lands shall be sold for taxes, assessed conjointly on the lands of another, who shall not pay his proportion of the taxes, the person whose lands may be sold may redeem and recover from the other person a joint proportion of the redemption money and interest. And if the land should not be redeemed, but conveyed to the comptroller, such owner may recover

from such other person the same proportion of the land conveyed that he ought to have paid of the tax, interest, and charges, for which the land shall have been sold. It is provided that every judgment obtained under the last two sections shall have priority as against the lands of the defendant therein on which the tax was assessed, to all mortgages executed and all judgments recovered since April 23d, 1823. Laws of 1855, p. 792, ch. 427.

Foreclosure Suits.—Between May 14, 1840, and May, 1844, it was not necessary to make judgment creditors subsequent to the mortgage, parties to foreclose suits. Laws of 1840, p. 289; Laws of 1844, p. 531. It is now necessary in order to bar their right to redeem. *Vide ante*, p. 599.

Lands under Contract.—It has been seen above, p. 483, that the interest of a person holding a contract for the purchase of lands is not bound by the docketing of a judgment or decree. As to executions against such person affecting such contract, *vide post*, ch. 38. As to the effect of a judgment against the vendor, *vide ante*, p. 484.

Heirs and Devisees.—As to the effect and lien of judgments against them, *vide ante*, p. 392; and as to the practice of their being made parties, De Agreda v. Mantel, 1 Abb. 130.

Lien of Judgment on Land Descended, vide ante, p. 390.

Judgments against Stockholders in Banking Corporations and Associations.—As to the lien, compromise and discharge of such judgments, *vide* Act of April 5, 1849, amended by Act of May 2, 1863, ch. 372.

Judgments against Husband and Wife for a cause accruing after marriage, do not bind the wife's separate estate. Tisdale v. Jones, 38 Barb. 523. By Laws of 1853, ch. 576, a judgment against husband and wife, for debts of the wife contracted before marriage, binds the *separate* estate of the *wife* only, and not that of the husband, except to the extent of the property he has acquired from her. A judgment against husband and wife, for damages, &c., in ejectment, is a lien on the real estate of the wife. Morris v. Wheeler, 45 N. Y. 708. See also, *ante*, pp. 80 to 86, as to actions against husband and wife.

Judgments for Future Advances.—*Vide* Truscott v. King, 2 Seld. 147; reversing 6 Barb. 146; Hammond v. Bush, 8 Abb. 152; Averill v. Loucks, 6 Barb. 19; and *ante*, p. 537.

Actions on a Judgment of any court in any of the States or United States, are to be brought within twenty years. 2 R. S. p. 295, § 90, 1st edit.

Judgments and Liens in favor of Department of Health in the City of New York.—These are made liens, if the judgment so states. They may be discharged by the court on motion. A lien is also created for expenses incurred in executing any order of said Board, on the lien being filed as are mechanics' liens. Law, May 25th, 1867, ch. 956. The powers of the Metropolitan Board transferred to the Health Department, 1870, ch. 383.

Judgments against the City or County of New York.—As to such judgments and how enforced, *vide* Laws of 1865, ch. 646; 1866, ch. 887; 1867, ch. 586; 1868, ch. 854; 1869, ch. 873; 1870, ch. 382; 1871, ch. 583. This last law held constitutional. Lowenthal v. The Mayor, 5 Lans. 532.

CHAPTER XXXVIII.

TITLE THROUGH SALE ON EXECUTION.

Title to real estate through "execution" arises by statute authorizing the sale of a defendant's lands on the recovery of judgment.

Former Laws.—In 1732, the statute of 5 George II, ch. 7, was passed, making houses, lands, negroes, real estate, and other hereditaments, within any of the English plantations, subject to the like process of execution as personal estate. The law as it stood in 1813, by the statutes of this State, will be found in Revised Laws of 1813, p. 500. This made real estate of a judgment debtor liable to be sold on execution, and declared the judgment a lien for ten years from docketing. Subsequent acts were passed in 1820 (p. 167), 1828 (Rev. Stat.), 1836 and 1847, relating to the subject, that are all incorporated in the present fifth edition of the Revised Statutes.

TITLE I. GENERAL PRINCIPLES AS TO JUDICIAL SALES.

It may be stated, as a general principle regulating judicial sales, that rights acquired thereunder, while the judgment is in force and unreversed, will be protected, even if the judgment or process be subsequently declared erroneous. But purchasers under such sales are only protected where the power to make the sale is clearly given, and the court has jurisdiction over the subject-matter and the parties, and the rule does not apply to sales made under interlocutory or conditional orders. Purchasers also would in any case be protected, unless there were prompt action to set aside the sales.

Vide Gray v. Brignardello, 1 Wallace, 627; Voorhees v. Bank of U. S. 10 Peters, 449; Grignon v. Astor, 2 How. U. S. 319; Bigelow v. Forrest, 9 Wall. 351; Holden v. Sacket, 12 Abb. 473; Wood v. Jackson, 8 Wend. 9; Woodcock v. Bennet, 1 Cow. 734; Dater v. Troy T. & R. R. 2 Hill, 629; Blakely v. Colder, 15 N. Y. 617; Kissock v. Grant, 34 Barb. 144; McGoon v. Scales, 9 Wall. 23. See the case of Darvin v. Hatfield, 4 Sand. 468 (reversed, Seld. Notes, 36), as to how far and when a purchaser may object to the regularity and validity of a judgment of sale; and also the above cases.

Irregularities, &c.—It is a principle, also, that if the court rendering judgment had jurisdiction, and the officer who sold had authority to sell, the sale will not be void by reason of errors in the judgment or irregularities in the officer's proceedings, which do not reach the jurisdiction of the one or the authority of the other. The title of a *bona fide* purchaser without notice, will not be affected by *irregularities*, if the execution and judgment are regular and subsisting. 1 Cow. 622; 4 Barb. 180; 4 Den. 480; 17 Abb. 137; Wood v. Morehouse, 1 Lans. 405, affirmed, 49 N. Y. 160; McGoon v. Scales, 9 Wall. 23. Questions of irregularity cannot be raised by strangers. Smith v. McGowan, 3 Barb. 404. If a judgment, however, is entirely void, or had been satisfied before a sale on execution, it is held, that even a *bona fide* purchaser would derive no title from the sale, whether he had notice of the payment or not. Wood v. Colvin, 2 Hill, 566; Jackson v. Anderson, 4 Wend. 474; Swan v. Saddlemire, 8 Wend. 676; Stafford v. Williams, 12 Barb. 240; Neilson v. Neilson, 5 Barb. 565; Craft v. Merril, 14 N. Y. (4 Kern.) 456; Wood v. Colvin, 2 Hill, 566; Jackson v. Roberts, 11 Wend. 422. A purchaser is protected, if anything is due or the execution has only been satisfied in part. Peet v. Cowenhoven, 14 Abb. 56; Peck v. Tiffany, 2 Com. 451. Declarations by a sheriff, even if deceased, to prove payment will not be allowed. Woodgate v. Fleet, 44 N. Y. 1. If the process is void the sale will be invalid, but not so if the process were merely erroneously issued. Jackson v. Bartlett, 8 John. 361; Same v. Delancey, 13 *Id.* 537. There must have been a judgment duly entered and docketed. Townshend v. Wesson, 4 Duer, 342. No formal entry or levy on the land is necessary. Wood v. Colvin, 5 Hill, 228. After a tender of the amount of the execution and fees, a sale to one with notice is void. 2 Johns. Ch. 172. So if the sheriff had no jurisdiction or authority to sell, or there had been redemption. Harris v. Murray, 28 N. Y. 574; Stafford v. Williams, 12 Barb. 240.

TITLE II. THE EXECUTION.

The statutory regulations for selling real estate under execution, and the redemption thereof, are too minute and extended to be particularly here detailed. They will be found in part 3, ch. 6, title 5, of the Revised Statutes, vol. 3, p. 647 (5th ed.), to which the sections below indicated refer.

The Code.—The Code provides (§ 289) that existing provisions as to execution, sale and redemption, except where in conflict with any special provisions of the Code, shall continue in force. The prominent features of the

proceedings, so far as title to real estate is made under them, are as follows :

Execution to Issue.—After judgment, filed an execution may be issued against the goods and chattels, *lands*, tenements, and *chattels real*, of the defendant, 2 R. S. p. 365, § 12. Before an execution can be levied on real estate, the personal property is to be first levied on and exhausted (§ 289). The Code (§ 289) directs the execution to be satisfied out of the real property belonging to the debtor *on the day when judgment was docketed in the county, or at any time thereafter.*

Variance.—A slight variance between the judgment and the execution will not vitiate. 4 Wend. 462. A neglect first to exhaust the personalty will not avoid the sale. Neilson v. Neilson, 5 Barb. 565. The regularity of the execution cannot be questioned. Jackson v. Cadwell, 1 Cow. 622; Neilson v. Neilson, 5 Barb. 565; Chautauque Co. Bk. v. Risley, 4 Den. 480; Averill v. Wilson, 4 Barb. 180; and see *ante*, title i. The Revised Statutes provided that, on the filing the record, and within two years thereafter, execution might issue. The Code (§§ 284, 285), provides that execution can only be issued within five years after entry of judgment, except by leave of the court. The leave is not necessary, if the judgment has been returned unsatisfied within the five years.

Wrong Name.—A judgment and execution against one by a wrong name will not authorize the sale of his property. Farnham v. Hildreth, 32 Barb. 277.

Remaining Property after Conveyance.—Where part of the judgment debtor's real estate has been conveyed to a *bona fide* purchaser, and enough remains to satisfy the execution, the court will direct the execution to be levied on what remains. Welch v. James, 22 How. Pr. 474.

Decease of Defendant.—If a party die after judgment and before execution, the remedy shall not be suspended by reason of nonage of any heir; but no execution shall issue until one year after death of the party. 2 R. S. 1st ed. p. 308, § 27; 19 Wend. 644; 9 Wend. 455; 5 Cow. 440. New executions may be issued against lands where a party dies under execution against his body, but not against lands sold after judgment by him, in good faith nor under other judgments against said party. §§ 28, 29, 30. By the Revised Statutes, whenever judgment had not been issued within the time allowed by law, the plaintiff might have proceedings by *scire facias*, to cause one to be issued; also to revive a judgment for or against personal representatives, or continue a suit by the representatives of a deceased party, and for other purposes. The proceedings under the writ of *scire facias*, are found in art. 1, tit. 2, ch. ix, Part 3, of the Rev. Stat. The writ of *scire facias* was abolished by the Code, § 428; but its has been questioned whether proceedings against heirs and terre-tenants are not still necessary, unless the law of 1850, *supra*, is considered as a substitute. *Vide* Finck v. Morrison, 13 Abb. 80; Wilgus v. Bloodgood, 33 How. 289. By law of Ap. 10, 1850, ch. 295, execution may be issued, on the death of a party after judgment, against his lands, etc., *on which the judgment is a lien* either in law or equity; except that it cannot issue within a year after his decease, nor in any case without permission of the surrogate of the county, who has jurisdiction

over the estate, and who on cause shown may make an order granting permission for the execution. This act is to apply as well to past judgments. By the Code, § 376, provision is made for summoning heirs, devisees, legatees, and tenants of realty owned by a defendant dying after judgment, but not until three years after letters granted. This section of the Code does not apply where the judgment is only formally entered against defendant. Foster v. Howard, 30 How. 284. The above act of 1850, is held not to take away the power of the Supreme Court over its judgments. A motion must also be made in said court, for leave to issue execution against the estate of a deceased judgment debtor. Marine Bk. v. Van Brunt, 61 Barb. 361; affirmed, 49 N. Y. 160. This case approves of Alden v. Clarke, 11 How. 209; Finck v. Morrison, 13 Abb. 80; and disapproves of Wilgus v. Bloodgood, 33 How. 289; Flanagan v. Tinin, 53 Barb. 587. If no execution has issued at all, there had to be a *scire facias* or a revival for which the application to the surrogate is a substitute. Such application must be on notice to heirs and terre-tenants, and to the claimants of the property and personal representatives in case of leasehold premises; and without such notice the jurisdiction of the surrogate is improperly exercised. Wood v. Morehouse, 45 N. Y. 369; affirming, 1 Lans. 405; Marine Bk. v. Van Brunt, 49 N. Y. 160; affirming, 61 Barb. 361. Executions issued without a *scire facias*, or an order of a court where it is required, are not void, but irregular, and cannot be questioned collaterally. Jackson v. Delaney, 13 Johns. 537; Jackson v. Robins, 16 *Id.* 537; Finck v. Morrison, 13 Abb. 81; Alden v. Clarke, 11 How. P. 209; Jackson v. Bartlett, 8 Johns. 363; Bank of Genesee v. Spencer, 18 N. Y. 150; Winebrenner v. Johnson, 7 Abb. 202. The above more recent cases however seem to require the notice or revival to heirs, etc., to be made in order to make the execution *valid*. As to when an execution will be set aside for having been issued after the death of the judgment debtor, contrary to the above statutes, *vide* Finck v. Morrison, 13 Abb. 84, and the various cases above cited. Marine Court v. Van Brunt. Court of Appeals, 1872, *supra*.

Heirs, Devisees, and Terre-tenants.—As to execution against, for debts of the ancestor, *vide* 2 R. S. Stat. p. 367, § 25; also Wood v. Wood, 26 Barb. 356, and *ante*, p. 389.

TITLE III. WHAT PROPERTY IS LIABLE TO SALE.

Our statutes exempt certain lands from liability to sale under execution.

Burying Ground.—Land not over a quarter of an acre, set apart, and a portion of which has been actually used for a family or private burying ground, if the owner have recorded a certificate with the county clerk. Laws of 1847, ch. 85; 3 Duer, 527; see also, Law of 1869, ch. 708, exempting rural cemeteries, and also *ante*, p. 563.

Homestead.—By Laws of 1850, ch. 260, the residence occupied and owned by the debtor, being a householder, and having a family, to the value of one thousand dollars. This exemption continues until the death of the widow of the owner, and until the youngest child comes of age. No release or waiver of the exemption is valid unless subscribed and acknowledged by the householder, as are conveyances. A description of the lands to be recorded with the county clerk in a book known as *The Homestead Exemption Book.*" This exemption does not run with the

land, on its transfer; and it may be waived; and a judgment will take precedence of a mortgage subsequently executed on the land. Smith v. Brackett, 36 Barb. 571; Robinson v. Wiley, 15 N. Y. 489; Allen v. Cook, 26 Barb. 374. This act does not exempt from executions on judgments for torts; nor for costs therein. Lathrop v. Singer, 39 Barb. 396; Robinson v. Wiley, 15 N. Y. 489; Scharten v. Kilmer, 8 How. 527; Cook v. Newman, *Id.* 523. The land shall not be exempt, however, from sale for taxes and assessments, nor for a debt contracted for the purchase thereof, nor prior to the recording of the notice, § 2. 15 N. Y. 489. If the land is worth over one thousand dollars, the sheriff may sell the residue over that value, or the debtor shall pay the surplus value to the sheriff, or the land shall be sold. *Ib.* §§ 3, 4, 5.

Exemptions are Personal.—These exemptions are *personal*, and may be waived, but not transferred to another. 26 Barb. 374; 16 Wend. 562; 22 Barb. 656.

Land in another State.—Cannot be sold under a judgment in this State. Runk v. St. John, 29 Barb. 585. The following lands and interests in land are subject to sale as specified.

Rents charges and rights of entry cannot be sold on execution. Thompson v. Trustees, &c., 3 Pet. 131, 177; Jackson v. Varick, 7 Cow. 238; Payn v. Beal, 4 Den. 405; overruling People v. Haskins, 7 Wend. 463; Huntington v. Forkson, 6 Hill, 149.

Equity of Redemption.—As to the sale thereof, *vide ante*, p. 542 to 546.

Leasehold property is subject to the provisions relative to the sale and redemption of real estate where there is an unexpired term of five years. Laws of 1837, ch. 462. This means five years from the time of sale. 7 Hill, 150; see also, 1 Hill, 324; Westervelt v. The People, 20 Wend. 416.

Tenancy by the curtesy initiate may be sold on execution. *Ante*, p. 176.

Contingent Remainders.—Cannot be sold under execution. So held as to a sale in 1851. Jackson v. Middleton, 52 Barb. 9.

Reversion.—A reversionary interest may be sold although contingent. Woodgate v. Fleet, 44 N. Y. 1; Burton v. Smith, 13 Pet. 464.

Married Women.—By the Code, § 287. An execution against a married woman must direct the levy and collection against her, from her separate property and not otherwise. See Charles v. Lowenstein, 26 How. 29; see also, Laws of 1860, ch. 90; and 1862, ch. 172, as fully set forth, *ante*, p. 80–83, as to judgments against married women.

Estates at Will or Sufferance, or a mere possession, cannot be sold on execution, but a tenancy from year to year may be. The purchaser takes nothing however, if the tenancy expires before he gets his deed. Bigelow v. Finch, 17 Barb. 394; to the contrary was Talbot v. Chamberlain, 3 Pai. 219. A certain possession, *e. g.*, of five years however, is sufficient to raise the presumption of a legal estate, upon which the judgment would attach as a lien. Dickinson v. Smith, 25 Barb. 102. See also as to the sale of a possessory interest, 6 Hill, 525; 9 Cow. 73; 6 Barb. 116.

Trust Estates.—*Vide ante*, p. 315; as to liability of trust estates, also *ante*, p. 677, and as to resulting trust, p. 281. Land is not liable on a judgment against a trustee. As to how a trust estate is to be reached by a creditor. Mallory v. Clark, 20 How. 418; 9 Abb. 358.

Contracts for the Sale of Land.—By the Rev. Statutes the interest of a person holding a contract for the sale of land cannot be sold on execution, and this is so even if he has paid the full purchase money. *Ante*, p. 483; Watson v. Le Row, 3 Barb. 481; Brewster v. Power, 10 Pai. 562; Griffin v. Spencer, 6 Hill, 525; Brighton v. the Bank of Orleans, 2 Barb. Ch. 458; *Ib.* 423; Bigelow v. Finch, 17 Barb. 394. A sale on execution against

the grantee of one holding a contract gives no title. Sage v. Cartwright, 5 Seld. 40; and see *ante*, p. 484. When an execution has been returned wholly or partially unsatified against a party holding a contract for the purchase of lands, a suit may be instituted against the defendants and the party bound to perform the contract, to prevent the transfer of the contract, and to obtain satisfaction out of the interest of the defendant in the contract, which interest may be sold or transferred to the plaintiff by the court; and the court may decree a specific performance, and apply the interest of the defendant to satisfy the judgment. 1 R. S. 1st edit. p. 743; 2 Barb. 206; see also *ante*, p. 483, 484; and 9 N. Y. 51; 12 Barb. 653; 6 Barb. 116, 127; 9 Pai. 76; 3 Pai. 220.

TITLE IV. THE SALE.

The Advertisement and Notice of Sale.—Advertisement of the sale of real estate shall be made, giving time and place of sale, for six weeks successively, as follows:

1. "A notice shall be fastened up in three public places in the town where such real estate shall be sold, and if such sale shall be in a town different from that in which the premises to be sold are situated, then such notice shall also be fastened up in three public places of the town in which the premises are situated. 2. "A copy shall be printed once in each week in a newspaper of the county, if there be one. 3. "If there be none, and the premises are not occupied by any person against whom the execution is issued, or by a tenant or purchaser under such person, then such notice shall be published in the State paper once in each week." 3 Rev. Stat. p. 650, § 48. Sales in Hamilton county, *vide* laws of 1860; amend. 1870, ch. 662. The notice need not be published six full weeks prior to the sale, if it is published weekly for six weeks. Olcott v. Robinson, 21 N. Y. 150; reversing 20 Barb. 140; Wood v. Moorhouse, 45 N. Y. 369; affirming 1 Lans. 405.

Second Sale and New Notices.—If the time for selling pursuant to notice has passed, or a new sale becomes necessary by default of purchaser, the sale must be readvertised in full, unless there be an order of the court. Bicknell v. Byrnes, 23 How. 486. So held as to mortgage sales.

How Described in the Notice.—The real estate must be described in the name of township or tract, number of lot, or other appropriate description, and with common certainty. 4 Barb. 159; 11 Barb. 173; 13 J. R. 97.

Time of Sale.—The sale must be at *public vendue*, between 9 A. M. and sunset. A sale after sunset would be void (14 Barb. 9), or before sunrise. Wood v. Moorhouse, 1 Lans. 405; affi'd 45 N. Y. 369. A sale on election day is not necessarily void. King v. Platt, 37 N. Y. 155. See also 21 N. Y. 151; 14 Barb. 10.

Lots Sold Separately.—The *sheriff if required* is to expose lots for sale *separately*, and no more is to be sold than sufficient to satisfy the execution. § 38. This is directory only, and voidable. 1 Johns. Ch. R. 503; 7 Abb. 183; 18 Johns. 355; 17 N. Y. 276; 17 Abb. 137. The irregularity may be ratified or waived. 7 Abb. 183. See also 5 Barb. 568; 6 Wend. 523; 9 Pai. 262. By the Rev. Statutes, also, the omission to give the proper notice of or the taking down or defacing, such notice, shall not affect the validity of any sale made to a purchaser in good faith without notice. 2 R. S. p. 368, § 34, 1st edit.; *vide* also, 13 N. Y. 189; 22 Barb. 171; 3 Barb. 409; Wood v. Moorhouse, 1 Lans. 405; affi'd 45 N. Y. 369. A failure on the part of the sheriff to comply with the statutory directions as to

the sale, will not invalidate it. Goff v. Jones, 6 Wend. 522; Neilson v. Neilson, 5 Barb. 565; R. S. p. 651; 5 Cow. 269, 529; Cunningham v. Cassidy, 17 N. Y. 276. The purchaser cannot be affected by any matter subsequent to the sale, arising between the parties to the judgment to which he is a stranger. Jackson v. Bartlett, 8 John. 361. One defendant may be purchaser of the land of his co-defendant. Neilson v. Neilson, 5 Barb. 568. See also Hill & D. 265.

Officer may not Purchase.—The officer or any deputy cannot purchase on such sale, directly or indirectly. If so, the sale is void (§ 41), unless the deputy be plaintiff. Jackson v. Collins, 3 Cow. 89.

Misnomer.—On a judgment against defendant by one name, the sale of his land under another is held void. 22 Barb. 277.

Decease of Defendant after Advertisement.—A sale where the defendant died after advertisement and before sale held valid. Wood v. Moorhouse, 1 Lans. 405; affi'd 45 N. Y. 368.

Sheriff's Certificates.—On making the sale, the officer shall deliver to the purchaser or purchasers *certificates* containing,

1. A particular description of the premises sold. 2. The price bid for each lot or parcel. 3. The whole consideration money paid. 4. The time when such sale will become absolute, and the purchaser will be entitled to a conveyance pursuant to law. 2 Rev. Stat. *Ib.* § 42, p. 370, 1st edit. These provisions requiring the giving of a certificate were first enacted by law of 1820, p. 167.

Certificate to be Filed with County Clerk.—Another certificate shall be filed by the officer with the *clerk of the county*, within ten days after the sale. § 43.

Laws of 1820, *Ib.* An omission to do this will not prejudice the purchaser's title. Jackson v. Young, 5 Cow. 269.

Niagara County.—As to certificates in Niagara county, *vide* laws of 1868, ch. 586.

Record of Certificates and Index.—The clerk or register of any county shall record and index the same in the name of the defendants, in a book kept by him for that purpose. The record, &c., to be evidence.

Laws of 1857, ch. 60.

Sheriff's Certificates.—As to when they may be amended, *vide* 8 How. 79; 1 Cow. 430. As to assignments of the certificate, and further as to certificates, *vide, infra*, tit. v and vi. The grantee of the land from the defendant may become the purchaser at the sale, and the titles are not merged. Chautauque Co. Bank v. Risley, 19 N. Y. 369.

Title V. Redemption.

Redemption by Defendant, or his Heirs, Devisees, &c.—Within one year, the land, or a distinct part of it, separately sold, may be redeemed by payment of the purchase money and interest at ten per cent., by the defendant in

execution whose title was sold, or his devisees, or heirs, or grantees, in the mode and order specified in the statute.

1 R. S. 1st ed. p. 370, §§ 45, 46. Under a sale before the Revised Statutes of 1830, the right of redemption is governed by the previous law. 6 Hill, 149; overruling 7 Wend. 463.

Leases.—The above provisions apply also to the sale and redemption of *leasehold* property having five years or more unexpired, and any buildings thereon. Laws of 1837, ch. 462. See, also, Westervelt v. People, 20 Wend. 416; Huntington v. Forkson, 6 Hill, 149. As to the redemption of demised premises for five years or over by the lessee or mortgagees or judgment creditors, when there has been dispossession under § 28, Title 10, ch. 8, Part 3 of R. S. *vide* law of April 12, 1842, ch. 240.

Part Ownership.—Section 47 of the Revised Statutes provides that owners of portions may redeem the whole and enforce contribution; § 48 that persons having undivided shares may redeem.

Effect of Payment.—On such payment, the sale of the premises and the certificates shall be *null and void.* § 49; Rankin v. Arndt, 44 Barb. 251. If a deed were thereafter executed by the sheriff, it would be void. 15 Wend. 248. A grantee to redeem must have the *legal* estate. Lathrop v. Ferguson, 22 Wend. 116. The effect of redemption by a judgment debtor is to restore the lien of a junior judgment, under which the sale was also had. Bodine v. Moore, 18 N. Y. 347. Payment within the year by the debtor, entirely extinguishes the power of the sheriff to make the sale; but he may advance money to another to take the certificate. Rankin v. Arndt, 44 Barb. 251. The purchaser and the debtor may make an agreement extending time to redeem, and it will affect other parties, without their consent. Miller v. Lewis, 4 N. Y. 554. But a junior judgment creditor does not acquire any interest under the agreement. *Ib.* After redemption by the debtor, the property may be resold for the balance of the judgment. Titus v. Lewis, 3 Barb. 70.

Redemption by Creditors.—If not so redeemed within the year, then redemption may be made by *creditors*, by judgment or decree obtained within fifteen months of the sale, or those holding as their assignees, representatives, trustees, or otherwise. Such redemption may be made within *three months* after the year's expiration, according to certain rights and conditions, and in an order as specified in §§ 51 to 61 of the Revised Statutes. The details of this proceeding cannot be here given. Section 51 was amended by Law of 1847, ch. 410.

Creditors with judgments over ten years old may redeem. 7 Cow. 540; 18 Wend. 621. The right of the judgment creditor to redeem cannot be prevented by the purchaser paying his judgment, nor by a stranger so doing. People v. Beebe, 1 Barb. 379. As to redemption by creditors where the land was sold under two executions, *vide* Buck v. Fox, 23 Barb. 259. As to the proof of redemption by parol, and the proceedings on redemption, *vide* Stafford v. Williams, 12 Barb. 240. A county clerk (not deputized) cannot act for the sheriff in the proceedings for redemption. People v.

Chase, 15 N. Y. 528; affirming 15 N. Y. 278. The rights of parties are strictly established at the end of the 15 months. *Ex parte* Raymond, 1 Den. 272. The redemption cannot be made after the 15 months. 1 Cow. 443; 7 *Id.* 658. They are calendar months. Snyder v. Warren, 2 Cow. 518. The *plaintiff* in execution, however, shall not be entitled to acquire title of the original purchaser, or of any creditor, unless under another judgment or decree. § 58. An assignee of a judgment is a creditor, and may redeem. 1 Cow. 443. The three months begin to run on the day succeeding the expiration of the year, and that day is counted inclusively. 19 Wend. 87. It may be made before midnight on the last day. 7 Hill, 177. If last day is Sunday, redemption must be made the day before. People v. Luther, 1 Wend. 42.

Mortgagees.—A mortgagee or his assignee or representatives may redeem if the mortgage is a lien and recorded within 15 months from the sale. § 51, Laws of 1836, ch. 525; Laws of 1847, ch. 420. Under the act of 1820, a mortgagee could not redeem; nor under the act of 1836, unless the mortgage was executed by defendant. Hodger v. Gallup, 3 Den. 527. The provisions of the Revised Statutes are to apply to liens by mortgage in the same manner as they do to the liens by judgment or decree. Laws of 1847, ch. 410. As to proceedings by the mortgagee to redeem, *vide* Law of 1836, ch. 525; and Law of 1847, ch. 410. A mortgage on a portion of the lands will entitle a mortgagee to redeem. Neilson v. Neilson, 5 Barb. 565. To the contrary was People v. Beebe, 1 Barb. 379.

Superintendents of the Poor.—As to their right to redeem on sheriffs' sales, *vide* Law of 1862, ch. 473.

If Redemption is Made, Statement to be Filed.—When any redemption shall be made within the fifteen months, the officer shall immediately file with the county clerk a statement of such redemption, which shall contain the title of the cause, or, if it be a mortgage, the parties to the mortgage, the amount of the judgment, decree or mortgage, the assignee, representatives, or trustees thereof, if any, and the amount paid to redeem, the time when such redemption was made, and the sum claimed to be due upon judgment, decree, or mortgage, at the time of such redemption.

Laws of 1847, ch. 410, § 3. Since the act of 1847, a redemption by the creditor on or after the last day of redeeming must be made at the sheriff's office. Laws of 1847, ch. 410; Gilchrist v. Comfort, 34 N. Y. 235. No deed upon any sale or redemption shall be executed until after the lapse of twenty-four hours after the last redemption. Laws of 1847, ch. 410. By its terms, the provisions of the Law of 1847 were not to apply to previous sales. Any creditor may redeem within twenty-four hours of a preceding redemption. Law of 1847, ch. 410. If full payment be not made on the redemption (unless by mistake of the sheriff), the redemption is void, and the purchaser is entitled to the deed. Hall v. Fisher, 1 Barb. Ch. 56; Dickinson v. Gilliland, 1 Cow. 481; *ex parte* Peru Co. 7 *Id.* 540; The People v. Rathbun, 1 Smith, 528. The law requires certain evidences of the right to redeem to be exhibited to the sheriff duly verified. If erroneous, the right to redeem is lost. See above sections of the statutes 59 to 61; also,

Laws of 1847, ch. 410; and 25 N. Y. 619; 20 N. Y. 354; Hall v. Thomas, 27 Barb. 55; Griffin v. Chase, 23 Barb. 278; affi'd, 15 N. Y. 278.

Certificate of Redemption, its Record and Effect.—A certificate is to be executed by the officer, to each party redeeming, which may be proved and acknowledged, and being duly recorded in the county clerk's office where the real estate is, "shall have the same effect against subsequent purchasers and incumbrancers as deeds and conveyances duly proved and recorded."

Law of 1847, ch. 410. On redemption, the original certificate of sale becomes void, and any deed under it would be inoperative. 15 Wend. 248. The certificate or the record of a duly authenticated copy is made *prima facie* evidence of the facts therein. Laws of 1847, *supra*. Before the Law of 1847, there was no provision for the filing of the certificate of redemption as *notice*. It has been questioned whether, if no such certificate were filed, a *bona fide* assignee of the original certificate of sale would not be now protected against any redemption, even if fairly made. The law does not so state, but the general impression is that he would be so protected, if the filing of the evidence of redemption is omitted.

Title VI. The Deed.

Deed to be Given.—The title of the defendant shall not be divested by the sale until the expiration of fifteen months thereafter; but if the lands are not redeemed, a *deed* shall be executed in pursuance of the sale, and the grantee shall be deemed vested with the legal estate, from the time of the sale, for the purpose of maintaining an action for any injury to such real estate.

Rev. Stat. § 61. It seems the deed may be executed at any time after the fifteen months, no matter how remote. Reynolds v. Darling, 42 Barb. 418. But purchasers without knowledge of the sale after more than ten years after the judgment would be protected, even if they knew of the judgment. *Ib.*

Completion of the Sale after Fifteen Months.—§ 79. [§ 62.] "After the expiration of the fifteen months, if any part of the premises sold shall remain unredeemed, the officer shall complete the sale by executing a conveyance of the premises, either to the original purchaser, or to the creditor who may have acquired the title of such original purchaser, or to the creditor who may have purchased such title from any other creditor, as the case may be; which conveyance shall be valid and effectual

to convey all the right, title, and interest, which was sold by such officer." § 62.

The deed cannot be subsequently altered or amended by the sheriff. Clarke v. Miller, 18 Barb. 269. A deed may be given to a third party by the creditor's direction. Merrit v. Jackson, 1 Wend. 46.

Deeds, to Whom Executed.—In all cases where any sale of real estate has been or shall hereafter be made under execution, and a *certificate* thereof given to the purchaser, and no deed has been executed, the deed is to be executed, if the land is unredeemed, to any person to whom the certificate has been issued, or to any *assignee* of the certificate, or to *his executors or administrators.*

Laws of 1835, ch. 189, as amended by Laws of 1867, ch. 116.

By Law of 1867, ch. 116, the deed is to be given to any person or persons to whom such certificate shall be or shall have been duly issued, or shall be or shall have been duly assigned, or to any person who shall have duly redeemed the said real estate, other than the execution debtor or his heirs or assigns, the executors or administrators of any deceased assignee, or of the person who shall have so redeemed the same.

Assignments to be Recorded.—Any assignment of the certificate must be acknowledged or proved, and filed by the county clerk, before the assignee is entitled to a deed, or his representatives. Laws of 1835, ch. 189. An omission to record the assignment will not vitiate the purchaser's (from a redeeming creditor's) title. Chatauque Bank v. Risley, 4 Den. 480; Bank of Vergennes v. Storrs, 7 Hill, 91; see People v. Muzzy, 1 Den. 239. As to assignment by a bank, *vide* same case. A sheriff may waive the recording of an assignment of certificate of sale, and give a deed without it. Wood v. Moorhouse, 45 N. Y. 369; aff'g, 1 Lans. 405. See this case also as to a junior judgment creditor redeeming from the assignee of the certificate. As to form of acknowledgment of the assignment, *vide Ex parte* Newell, 4 Hill, 608. Also the People v. Newell, 1 Den. 239, as to a judgment creditor's rights, in redeeming, who is also assignee of the certificate of sale. The sheriff cannot be compelled to give the deed, until the assignment has been filed. People v. Ransom, 4 Den. 145; aff'd, 2 N. Y. 490. Assignments of sheriff's certificates made prior to the law of 1835, ch. 189, were not invalidated by that act, although they were not acknowledged, proved or filed. Phillips v. Schiffer, 64 Barb. 548.

Authority of the Sheriff.—There must be an existing power in the sheriff at the time of the execution of a conveyance by him, or he can confer no title. Therefore, if redemption be made, a deed to the purchaser would be void, and it might be shown by parol. Stafford v. Williams, 12 Barb. 240.

Execution of Deed.—If the sheriff die, or be removed, the under-sheriff

may conduct the proceedings and execute the deed as if done by sheriff (Law of 1813), or a person to be appointed by the court. 7 Cow. 739; 9 *Ib.* 233; 10 Wend. 662, §§ 65, 66; see also, laws of 1835, ch. 189; 1837, ch. 462; 1836, ch. 525, *infra.* By law of 1867, ch. 116, the deed is to be executed by the sheriff making the sale, or in case of his death or removal, his under-sheriff, or in case of his death or disqualification, the deputy who made the sale, or the successor of the sheriff. By Revised Laws of April 13, 1813, where the sheriff died before signing the deed, his executors or administrators might sign it. Vol. 1, p. 506. A deed from the sheriff is necessary to pass the title under the statute of frauds. 8 Johns. 520. Without a substantial compliance with the statute provisions, the redeeming creditor acquires no right by the sheriff's deed. 18 Wend. 598; 19 *Id.* 87; 20 *Id.* 555.

If Purchaser Deceased.—In case of death of the person entitled, the deed is to be executed and delivered to the *executors or administrators* of the deceased to be held *in trust* for the heirs, subject to the dower of the *widow*, but may be sold for debts by the surrogate. § 64, Laws of 1847, ch. 410.

Recitals in the deed of various assignments of the certificates are not conclusive, but those as to the executions or reservations at the sale are so. Stafford v. Williams, 12 Barb. 240; Jackson v. Roberts, 11 Wend. 422; Griffin v. Chase, 23 Barb. 278; affi'd 15 N. Y. 528. If recitals are omitted or are erroneous, the deed is not vitiated. Jackson v. Streeter, 5 Cow. 529; Jackson v. Jones, 9 Cow. 182; Jackson v. Pratt, 10 Johns. 381; also 4 Barb. 180; 16 N. Y. 567; Jackson v. Paige, 4 Wend. 585. And the recitals under certain circumstances will be presumed correct in default of other proof. Phillips v. Schiffer, 54 Barb. 548.

Description.—If the land is not definitely described, no title passes. Jackson v. De Lancey, 13 John. 537; affi'g 11 *Id.* 365; Peck v. Mallams, 6 Seld. (10 N. Y.) 509, 533; Jackson v. Roosevelt, 13 John. 97. A purchaser under misrepresentation may be relieved. 15 Ab. 259.

Ejectment Necessary.—On obtaining the deed, the purchaser has no right to enter on the premises unless they are vacant. He is left to his ejectment suit, or to proceed under the Revised Statutes, under act to obtain possession of real property by summary proceedings. 3 Rev. Stat. p. 836, § 28. Evertsen v. Sawyer, 2 Wend. 507; People v. Nelson, 13 Johns. 340. To recover in ejectment, the plaintiff must show the judgment *defendant* in possession at the time of the recovery of the judgment against him, and a continued possession from that time to the time of the commencement of the action, and that the plaintiff acquired the title under the sheriff's sale by a conveyance. 6 Barb. 116; 25 Barb. 102; 17 Barb. 157. He must prove the judgment. 11 Barb. 498; 2 Coms. 373. He must prove the judgment by the production of the judgment roll, duly filed, and must show that it was docketed. Townshend v. Wesson, 4 Duer, 342. The plaintiff also may proceed under the Revised Statutes to get possession or recover rent. Spraker v. Cook, 16 N. Y. 257.

Effect of the Deed.—The deed relates back to the time of the sale, although executed afterwards. But the title of the judgment debtor is not gone until the money is paid and deed delivered. 2 R. S. 273; 3 *Ib.* 337, 5th edit.; Jackson v. Dickinson, 15 Johns. 309; Jackson v. Ramsay, 3 Cow. 75; Wright v. Douglass, 2 Com. 373; reversing 3 Barb. 554; Rich v. Baker, 3 Den. 79; Boyd v. Hoyt, 5 Pai. 65; Talbot v. Chamberlain, 3 Pai. 219; Farmers' Bank v. Merchant, 13 How. 10; Vaughn v. Ely, 4 Barb. 159; Smith v. Colvin, 17 Barb. 157; 9 Cow. 13; 1 Seld. 151; 13 How. P. 10; 3 Seld. 564; reversing 10 Barb. 97. The purchaser's title before the deed, however, is but a lien or conditional right, the naked title being in

the vendor, who has the enjoyment of the property until the expiration of a year. Evertsen v. Sawyer, 2 Wend. 507. The retroactive effect is only as to recoveries for injury to the property under the sale. Schermerhorn v. Merrill, 1 Barb. 511. The deed extinguishes all junior liens. *Ex parte* Stevens, 4 Cow. 133. Until the expiration of a year the judgment debtor is entitled to possession, rents and profits. Evertsen v. Sawyer, *supra;* Marsh v. White, 3 Barb. 518; Schermerhorn v. Merrill, 1 Barb. 511. A lease given after the sale by the debtor would be extinguished by the deed. 5 Barb. 619. By a sale of land under a judgment, the lien of the judgment and the right to redeem under it are extinguished. 4 Barb. 125: 17 Abb. 137; 5 Hill, 228. The purchaser, or one redeeming, takes all the title of the judgment debtor, the benefit of all estoppels and covenants running with the land (Sweet v. Green, 1 Pai. 473; Kellog v. Wood, 4 *Id.* 578), and subject to all prior incumbrances or liens of which he has legal notice. Bartlett v. Gale, 4 Pai. 503. Extrinsic evidence cannot be given to explain the sheriff's deed as to his intent, but it may as to location of land, &c. or as to parcels. Mason v. White, 11 Barb. 173; *vide* 21 N. Y. 200.

Record.—The recording of a sheriff's deed has been held not notice to a party who contracted with the judgment debtor to purchase the land, and entered into possession before judgment. Moyer v. Hinman, 3 Ker. 13 N. Y. 182; also Smith v. Gage, 41 Barb. 60; overruling 17 Barb. 139. One who purchases land without notice of a prior sale under execution, is protected if he records his deed prior to the sheriff's deed. Reynolds v. Darling, 42 Barb. 418. And see *ante*, p. 583 to 588. Registration is no notice except in cases where registry is made necessary by statute, and registering a sheriff's deed is not notice. 2 Cow. 246. But if a deed from a sheriff is recorded prior to a deed from the debtor before judgment, it will prevail. 15 Wend. 588. See also Cook v. Travis, 23 Barb 338: affi'd 20 N. Y. 400. A purchaser (without notice) at sheriff's sale will hold the same, although the defendant had previous to the judgment conveyed the lands, provided the sheriff's deed is first recorded. Jackson v. Chamberlain, 18 Wend. 620.

U. S. Marshal's Sales.—As to sales under process out of the Federal courts, *vide* law of 3d March, 1797, 1 U. S. Stat. 515; law of 7th May, 1800, 3 U. S. Stat. 61; law of 20th May, 1826, 4 U. S. Stat. 184; law of 19th May, 1828, 4 U. S. Stat. 281; law of 1st August, 1842. Also the rules of U. S. courts of the *Circuit and District. Vide* rule 21, of Admiralty rules, amended 1 Black, 1862. Also 9 Peters, 361; 3 *Ib.* 45.

TITLE VII. REMEDIES FOR FAILURE OF TITLE TO REAL ESTATE SOLD BY EXECUTION, AND TO ENFORCE CONTRIBUTION.

Revised Statutes. Part 3, chap. 6, title 5, art. 3, § 68. If the purchaser of any real estate sold under execution, his heirs, or assigns, shall be evicted from such real

estate, or if in an action for the recovery thereof, judgment shall be rendered against him in consequence: 1. Of any irregularity in the proceedings concerning such sale; or, 2. Of the judgment upon which such execution issued being vacated or reversed. Such purchaser, his heirs, or assigns, may recover of the party for whose benefit such real estate was sold, the amount paid on the purchase thereof, with interest; and the latter party, if there has been irregularity as above, may have further execution on the judgment, except that it shall not be valid against any purchaser in good faith, or any incumbrancer by mortgage, judgment or otherwise, whose title or whose incumbrance shall have accrued before the levy of such further execution. §§ 70, 71, 72, provide for contribution when the lands liable and levied on are owned by several persons, and the order in which lands are to contribute—and that the original judgment may be used to enforce contribution, and shall continue a lien for ten years on the lands from the time of docketing. § 73. But such original judgment "shall not remain a lien upon any lands, nor shall they be subject to an execution as herein provided, unless the person aggrieved, within twenty days after the payment of any sum of money by him, for which he shall claim a contribution, shall file an affidavit with the clerk of the court in which the original judgment was rendered, stating the sum paid, and his claim to use such judgment for the reimbursement thereof." § 74. "On the filing of such affidavit, the clerk shall make an entry in the margin of the docket of such judgment, stating the sum so paid, and that such judgment is claimed to be a lien to that amount. If such judgment be in the Supreme Court, such clerk shall also transmit a copy of such entry to the other clerks of that court, at the same time with his dockets of judgment, and the like entry shall be made by such clerks in the margin of their dockets of such judgments."

See as to the above provisions, 8 Pai. 143; 5 Cow. 38; 1 Pai. 228; 5 J. C. R. 235.

CHAPTER XXXIX.

RECEIVERS UNDER PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

Order for Receiver.—After execution unsatisfied under supplementary proceedings against the judgment debtor, a judge of the court may, by *order*, forbid a transfer or other disposition of the property of the judgment debtor, and may appoint a receiver of his property; or may order any "property" not exempt to be applied on the judgment, §§ 297, 298, of Code.

Order to be Filed and Recorded.—The order for the appointment of the receiver shall be filed in the office of the clerk of the county where the judgment roll (or a transcript of judgment from a justice's court) is filed. The clerk is to record the same in a special book, and note the time of filing; and *the receiver is vested with the property and effects of the judgment debtor from the time of filing and recording.* § 298.

The above provisions for the recording and filing of said order were first passed by amendment to the Code, of *April* 23, 1862. By amendment of *May* 4, 1863, the following provision was added to the section.

When Real Property to Vest.—"But before he (the receiver) shall be vested with any *real* property of such judgment debtor, a certified copy of such order shall also be filed and recorded in the office of the *clerk of the county* in which any *real estate* of such judgment debtor sought to be affected by such order is *situated*, and also in the office of the clerk of the county in which such judgment debtor *resides*." § 298.

Ordinarily the mere appointment of a receiver does not vest in him the *real* estate of the debtor. The court can compel a *conveyance* thereof, to pass the title. Chatauque Co. Bk. v. Risley, 19 N. Y. 370; overruling, 5 Seld. 142; Wilson v. Wilson, 1 Barb. Ch. 592; Moak v. Coats, 33 Barb. 498; People v. Hurlburt, 5 How. 446. Since the amendments of 1862–3, it is supposed that under these proceedings no conveyance is now necessary to the receiver. The following cases had, theretofore held that no conveyance was necessary. Porter v. Williams, 5 Seld. 142; Beamish v. Hoyt, 2 Rob. 307.

Appointment.—The receiver's appointment is not complete until his bond is filed. Conger v. Sands, 19 How. 8. The regularity of the appointment of the receiver cannot be questioned collaterally. 12 Abb. 465.

His Title.—The title of the receiver relates back to, and takes effect only from, the date of the order appointing him. Becker v. Torrance, 31 N. Y. 631 [1864]. He is vested from the time of filing and recording the order. Bostwick v. Menck, 40 N. Y. 383; reversing 10 Abb. 197; Rogers v. Corning, 44 Barb. 229. The lien does not date back to the time of commencing supplementary proceedings. Becker v. Torrance, 31 N. Y. 631; Voorhees v. Seymour, 26 Barb. 569; Conger v. Sands, 19 How. 8. The *lien* as against assigned property only begins from the time of commencement of action by the receiver. Field v. Sands, 8 Bos. 685; Conger v. Sands, 19 How. 8; Bostwick v. Menck, *supra*, see Watson v. N. Y. C. R. R. 6 Abb. N. S. 91.

His Authority.—The receiver represents only those who procured or are represented by his appointment. Bostwick v. Menck, 40 N. Y. 383; reversing 10 Abb. 197. The above and various cases also show that the receiver may bring an action to set aside all fraudulent transfers theretofore made as against, and *to the extent* only of the interests represented by him. As to the rights of judgment creditors who are not parties to the proceedings, *vide* Chautauque Bk. v. Risley, 19 N. Y. 370.

What Property Passes.—A widow's right of dower may be reached under these proceedings; and a conveyance compelled. Moak v. Coats, 33 Barb. 498; Stewart v. McMartin, 5 *Id.* 438. An estate by the curtesy will also pass under these proceedings. Beamish v. Hoyt, 2 Rob. 307.

Property out of the State.—Such property it seems may be reached under these proceedings by compelling a conveyance to a receiver. Fenner v. Sanborn, 37 Barb. 610; Bailey v. Ryder, 10 N. Y. 363; Bunn v. Forda, 2 Code R. 70. The property vested in the receiver, is only such as the debtor owned at the time of granting the order for examination. That subsequently acquired does not pass. Bostwick v. Menck, 40 N. Y. 383; reversing, 10 Abb. 197, *sub nom.* Bostwick v. Beizer; Campbell v. Genet, 2 Hilt. 290; Sands v. Roberts, 8 Abb. 343; Potter v. Low, 16 How. 549; Graff v. Bonnett, 25 How. 470; affi'd, 31 N. Y. 9. The receiver would not take an interest in a trust estate that was inalienable, by the mere force of his appointment. Genet v. Foster, 18 How. 50; Campbell v. Forster, 35 N. Y. 361; Locke v. Mabbett, 2 Keyes, 457; Graff v. Bonnett, 31 N. Y. 9; aff'g 2 Rob. 54; 25 How. 470. Such an interest can be reached only through the agency of a court of equity, *vide ante*, p. 283; and Stewart v. Foster, 1 Hilt. 505; Genet v. Foster, 18 How. 50.

Action of the Receiver.—Sales are made by the receiver, by order, on application to the court. By the Code also, if there are adverse interests or claims, the court may forbid transfer by others until the interest is determined, in an action to be brought by the receiver. Code, § 299; Scott v. Nevius, 6 Duer, 672; Dickerson v. Van Tyne, 1 Sandf. 724; Wardell v. Leavenworth, 3 Ed. Ch. 244. The above § 299, has been held in many cases to apply merely to proceedings under the chapter as to supplementary proceedings. A delay in taking possession,—*e. g.*, of ten months—would not postpone the lien of the receiver. Fessenden v. Woods, 3 Bos. 550. As to the form and manner of the action to be brought by the receiver to set aside other transfers, *vide* Coope v. Bowles, 42 Barb. 88; Livingston v. Staessel, 3 Bos. 19. Where the receiver's title is vested, it cannot be disturbed by any order in proceedings to which he was not a party. Rogers v. Corning, 44 Barb. 229.

CHAPTER XL.

TITLE UNDER ATTACHMENT PROCEEDINGS.

Property of foreign corporations, and of non-residents, or of absconding and concealed defendants, may be attached and sold under certain circumstances, as will be seen more particularly by reference to the provisions of the Code of Procedure (§§ 227 to 243), the details of which cannot be here given. The sheriff is to hold the property to abide the judgment in the action, and is authorized to take legal proceedings for its recovery. He is to take possession of the real estate, and proceed according to the provisions of the Revised Statutes as regards attachments against absent debtors (2 R. S. p. 3, 1st ed). After judgment for plaintiff he may sell sufficient of the attached property to meet the judgment if so ordered by the court, unless he has theretofore sold sufficient on execution. The attachment may be discharged before judgment in the action on security being given.

Attachment of Real Estate.—Real estate may be attached without the officer going on the property, or having it in view, or leaving a copy of the warrant. He need only do some act, by way of memorandum or entry, with intent to make the property liable to the process. This will constitute a seizure and create a lien against the debtor, and all claiming under him by subsequent title, except *bona fide* purchasers and incumbrancers.

Rodgers v. Bonner, 55 Barb. 9; aff'd, 45 N. Y. 379; Burkhardt v. McClellan, 15 Abb. 243. The sheriff may attach any property the defendant may have fraudulently disposed of. Rinchey v. Stryker, 31 N. Y. 140; Gage v. Dauchy, 34 N. Y. 293. The possessory right of a mortgagor may be attached. Hall v. Sampson, 23 How. 84; Fairbanks v. Bloomfield, 5 Duer, 434. Sale under the attachment confers no greater title than the debtor had when judgment was docketed. Lamont v. Cheshire, 6 Lans.

234. The attachment lien is not lost by the decease of the defendant before judgment. Thacher v. Bancroft, 15 Abb. 243. Real estate of a non-resident situated out of the State, cannot be sold under an attachment here. Runk v. St. John, 29 Barb. 585.

Lis Pendens.—The clause of § 132, Code, by which subsequent purchasers and incumbrancers are bound by all proceedings in the action taken after the filing of the *lis pendens*, to the same extent as if they were parties to the action, is not applicable to attachment cases. Lamont v. Cheshire, 6 Lans. 235.

Execution.—A special execution should be issued directing a sale of debtor's interest, as of the date of the attachment. *Ib.*

CHAPTER XLI.

EJECTMENT AND OTHER PROCEEDINGS TO RECOVER POSSESSION OF LAND.

TITLE I. THE ACTION OF EJECTMENT.

This action lies to recover the possession of land wherever a right of entry *in præsenti* exists, and the interest is visible and tangible, or of such a character that possession of the land can be delivered in execution of a judgment for its recovery.

Rowan v. Kelsey, 18 Barb. 484; Bryan v. Butts, 27 Barb. 503; aff'd, 28 How. 582; Child v. Chappel, 5 Seld. 246; Trull v. Granger, 4 Seld. 115; Hunter v. Trustees, 6 Hill, 411; McLean v. McDonald, 2 Barb. 534; 5 Duer. 130.

Limitation.—As to limitation of time as to actions for real property, *vide ante*, ch. 39.

Ejectment is brought to establish through a judicial determination the title to land, and to remove therefrom those wrongfully in possession or whose title has been determined by limitation, forfeiture, or otherwise. By the Code, § 455, the general provisions of the Revised Statutes relative to actions concerning *real* property shall apply to actions brought under the Code, according to the subject-matter of the action, without regard to its form.

See as to the interpretation of this (§ 455 of the Code), in its application to ejectment suits, St. John v. Pierce, 22 Barb. 362. holding that where there is a right or remedy the Code virtually repeals inconsistent provisions of the Revised Statutes. By § 123, real actions must be tried in the county where the subject of the action or some part of it is situated, subject to the power of the court to change the place of trial in the cases provided. By the Revised Statutes the action of ejectment is retained, and may be brought as theretofore subject to changes by the statutes. It may be brought in the cases where a writ of right might

be; and by any person claiming an estate in lands, tenements or hereditaments, as heir, devisee or purchaser, or by a widow for dower, after six months from the time her right accrued. 2 R. S. 1st ed. p. 303, §§ 1, 2. The Revised Statutes also abolish all writs of right, writs of dower, writs of entry, and writs of assize, all fines and common recoveries, and all other real actions known to the common law, except as enumerated in the chapter; and all process except as retained therein. 2 R. S. part 3, ch. 8. By laws of 1847, ch. 337, the Revised Statutes were amended as to the pleading in the action and notice to be given.

Parties to the action and when it Lies.—The question as to what parties may or should be made plaintiffs or defendants, is one of practice in the proceedings, and not within the purview of this treatise. It may be stated briefly, however, that married women may bring the action alone for their separate estate, 14 How. 456; 5 Duer, 130; 16 N. Y. 71; that one tenant in common may sue for the others, 6 Barb. 117; but cannot bring the action against the others without showing *ouster*, 4 Com. 61; R. S. § 26, and that an infant, on arriving at age, cannot bring ejectment for land sold during infancy, without some prior act of disaffirmance, 24 Barb. 150. By the Revised Statutes, part 3, title 1, ch. 5, no person can recover in ejectment unless he have a valid subsisting interest in the lands, and a right to recover the same or the possession thereof, or of some share, portion, or interest. A right of *possession* must be shown at the time of the commencement of the suit by the plaintiff, as heir, devisee, purchaser or otherwise (§ 25), and this is stated to be sufficient. *Ib.* By the Code, § 111, the grantee may bring the action in the name of the grantor, or his heirs or representatives (Laws of 1866), when the grant is void by reason of adverse possession. By the Revised Statutes, joint tenants or tenant in common may bring one action for their aggregate shares, or separate actions. By law of 1865, ch. 357, on the decease of a plaintiff his representative in the title may be substituted. The Revised Statutes provide that the action shall not abate by the death of a plaintiff after issue and before verdict or judgment. But the plaintiff's successors in the title shall be substituted. § 32.* The provisions of the above law of 1865, ch. 357, are not to affect the provisions of the Code, title 2, part 2 (§ 2 of the act). There cannot be several plaintiffs having distinct titles. People v. Mayor, 10 Abb. 144; Code, § 161. Plaintiff must have the legal title. Wright v. Douglass, 3 Barb. 566; reversed, 3 Seld. 564. It will not lie by the people unless they have an interest in the subject-matter. People v. Booth, 32 N. Y. 397. See further as to ejectment by the people, 1 R. S. 1st ed. pp. 180, 181, as to when ejectment may be brought in the name of the people, for the benefit of an individual; and also, p. 282, as to ejectment by the people on an escheat of land. It will lie by a lessee before entry against a stranger. Trull v. Granger, 4 Seld. 115; Spencer v. Tobey, 22 Barb. 260. Plaintiff must show title at the time of commencement of the action. Layman v. Whiting, 20 Barb. 559. But he must *not* have possession, Taylor v. Crane, 15 How. 358, and must so aver. *Ib.* Executors of one who has granted land in *fee*, cannot bring ejectment for non-payment of rent; otherwise of one who has leased for years. Van Rensselaer v. Hayes, 5 Den. 477. It must be brought against the actual occupant, and all occupants, 3 Seld. 201; 13 Barb. 526; 6 Seld. 280; 8 Barb. 244; 25 Barb. 54; 37 Barb. 350, and by and against the real parties by their real

* By law of 1869, ch. 883, a judgment in favor of a party dying subsequent thereto, may be revived and execution issued within a year of his death, or afterwards, on supplemental complaint. Code, § 121.

names, without the former fictions. When an infant is defendant, the plaintiff may have a guardian *ad litem* appointed for him. 2 R. S. 341. By law of 1865, ch. 357, on the decease of a defendant the action may be continued against his representatives in the title. The Revised Statutes provide that the action shall not abate by the death of plaintiff or one of several defendants after issue and before verdict or judgment. It would, by the decease of a sole defendant, however, at least before 1865. Kissam v. Hamilton, 20 How. 369; see also, 1 Dean. 57; 10 Wend. 540; 14 How. 73; 10 How. 253. It will not lie against the mere servant of the owner. He must be tenant. Seaver v. McGraw, 12 Wend. 558. *Vide infra*, as to substitution of landlords. If there are no occupants it must be brought against some one exercising acts of ownership, or claiming title or interest at the commencement of the suit, § 4, R. S. *ante*. See as to claim, Lucas v. Johnson, 8 Barb. 244; Banyer v. Empie, 5 Hill, 50. It must be a serious, distinct claim of title. *Ib.* See, also, Edwards v. Farmers' Co. 21 Wend. 467. It lies against one holding unlawfully after default on a contract to purchase, and no demand or notice is necessary. Powers v. Ingraham, 3 Barb. 576; Hotaling v. Hotaling, 47 Barb. 163. Also by a lessee against his lessor. Olendorf v. Cook, 1 Lans. 371; Trull v. Granger, 4 Seld. 115. It will not lie for an easement, Child v. Chappel, 9 N. Y. 246; Withlow v. Lane, 37 Barb. 244; nor against a mortgagee in possession, Bolton v. Brewster, 32 Barb. 389; nor by mortgagee against mortgagor, Sahler v. Singer, 37 Barb. 329; nor by plaintiff holding land as security, Murray v. Walker, 31 N. Y. 399; nor for a mere projection, *e. g.*, a gutter, Aiken v. Benedict, 39 Barb. 400;* nor against a municipal corporation for the public use of a street, Cowenheven v. Brooklyn, 38 Barb. 9; nor against several not jointly possessed, Dillaye v. Wilson, 43 Barb. 261; nor where one occupies by license and permission, Corkill v. Landers, 44 Barb. 218; nor by grantee of land held adversely against the one so in possession, 17 Abb. 452; 9 Bos. 494; nor by a married woman against her husband from whom she has separated, Gould v. Gould, 29 How. 441. It will not lie against a remainderman during the continuance of the particular estate. Seaver v. McGraw, 12 Wend. 558. It will not lie against a person not in possession, although he may have leased to one who is. It must be against one in possession, exercising ownership and claiming title. Champlain, &c. R. R. v. Valentine, 19 Barb. 484; Van Buren v. Cockburn, 14 Barb. 118; Redfield v. The Utica R. R. 28 Barb. 54; *see infra*, Allen v. Dunlap, 42 Barb. 585. Ejectment was held not to lie against a railroad company, for using an easement over streets. Redfield v. Utica R. R. *supra*. This case, however, on that point, and also, Adams v. Saratoga and Wash. R. R. Co. 11 Barb. 454, and *Ib.* 6 Seld. 228, were overruled by the cases of Carpenter v. The Oswego, &c. R. R. 24 N. Y. 655; Wager v. The Troy U. R. R. 25 *Id.* 526, and Lozier v. N. Y. C. R. R. 42 Barb. 468.

Reversioners.—By the Revised Statutes, reversioners may be allowed to defend, when those having life interests are sued. 2 R. S. 1st ed. p. 339.

Highways.—We have seen *ante*, p. 658, what are the rights of owners of the bed of highways, as against trespassers and others. They may maintain ejectment for encroachments. Etz v. Daily, 20 Barb. 32.

Land under Water.—Ejectment will lie for land under water granted by the commissioners of the land office, for erecting docks, &c. The Champlain, &c. R. R. v. Valentine, 19 Barb. 482; and see *post*, ch. 43.

Ejectment for Forfeiture.—Ejectment may also be

* But see Sherry v. Frecking, 4 Duer, 451, where ejectment lay for an overhanging wall.

brought by a grantor or his heirs against parties in possession under a lease or conditional fee, to recover possession for forfeiture, or non-performance of a covenant or condition; and this may be done without any clause in the deed providing for re-entry.

4 Kent, 123: and see *ante*, ch. V. As to ejectment for forfeiture of conditions in a lease, *vide ante*, p. 148. Where there is a clause of re-entry on forfeiture, no actual entry is necessary before suit. Lawrence v. Williams, 1 Duer, 585, said to be reversed on other grounds in 18 N. Y. 122.

Ejectment by Landlord.—It has been seen also, *ante* p. 148, that a landlord may have ejectment to remove his tenant if the latter hold over after the expiration of his term, although the simpler remedy by summary proceedings is generally adopted. Independent of any provision of statute, however, the landlord may re-enter upon the tenant holding over, and remove him and his goods, if no force is necessary for the purpose; and the tenant would not be entitled to resist or sue him therefor. Formerly the decisions allowed a gentle force for the purpose. Our statutes have made provision against a forcible entry by a landlord; as seen *post*, title ii. By the Revised Statutes, also, the landlord may have ejectment for non-payment of rent under certain circumstances. As to re-entry and ejectment for non-payment of rent, see *ante*, pp. 59, 191, 192 to 196. A demand for rent need not be first shown; although, as has been seen, under the common law, a demand had to be first made under circumstances of great particularity;* nor even under the Revised Statutes could the action be brought if there was sufficient property liable to distress. An act was passed, however, in 1846 (ch. 274) abolishing distress for rent. *Vide* fully as to this *ante*, p. 146.

It is held in a case in the Superior Court that a mere assignee of the lease and rent cannot bring ejectment or take proceedings to recover possession. His only remedy is on the personal covenants. Huerstel v. Lorillard, 6 Robt. 260. But see fully as to the rights of heirs and assignees of lessors and lessees, *ante*, p. 143. By the Revised Statutes, part iii, ch. 8, art. 2, tit. 9, § 30, provision is made for recovery of land by ejectment

* See the cases reviewed as to a demand being still necessary to authorize a re-entry and forfeiture of lease. N. Y. Acad. of Music v. Hackett, 2 Hilt. 217.

against a tenant when a half-year's rent or more is due. The service of the "declaration" is to stand in lieu of demand and re-entry. By § 32 the proceedings are to cease if the tenant pay the rent and costs at any time before judgment. At any time, also, within six months after possession taken under the executions by the landlord—by paying the rent and costs, &c., the lessee shall be restored to the premises; otherwise he shall be barred and the lease discharged. The mortgagee of the lease, not in possession has the same right to redeem on performance of all agreements of lessee and payment as above, § 36. The lessee or other party interested, may, within such six months, also file a bill for relief, and have an action at law restrained on certain terms. § 37. The lessor is to be charged with the use of the premises. § 38. *Vide* 19 N. Y. 100; 2 *Ib.* 141; 27 Barb. 104; 19 *Ib.* 484; 18 *Ib.* 484.

Re-Entry on Notice.—Where the right of re-entry is reserved in default of sufficient distress, re-entry may be made after any default in payment of rent, on fifteen days' written notice, whether there is sufficient distress or not. Laws of 1846, ch. 274. This act abolished distress for rents. This rule only applies to re-entry for non-payment of rent. 6 Duer, 262. The above provision extends also where the right of re-entry was given before the act of May 13, 1846. Williams v. Potter, 2 Barb. 316; Van Rensselaer v. Snyder, 9 Barb. 302; 13 N. Y. 299. The notice may be waived. 2 Barb. 316, *supra.* *Vide* also, *ante*, p. 59, § 41, fully as to the above statute.

Tenants.—Tenants served with process must give notice to the landlord under penalty of the value of three years' rent. 1 R. S. 1st ed. 748.

Lis Pendens.—A notice of *lis pendens* is held unnecessary, in an action to recover possession of real property, even as against a purchaser *pendente lite;* and no notice is necessary to make the judgment effectual as against parties claiming under a party, by transfer subsequent to the judgment. The judgment is held full notice. Sheridan v. Andrews, 49 N. Y. 478; reversing 3 Lans. 129.

Ejectment against Defendant by Purchaser on Sale under Execution.—Possession of defendant, at time of recovery of judgment continued to the time of the ejectment suit must be shown, and the judgment and filing must be proved, and that the plaintiff acquired the title of defendant under the sale. See *ante*, p. 690; Kellogg v. Kellogg, 6 Barb. 126; 25 *Id.* 102; 11 *Id.* 498; 17 *Id.* 157; 4 Duer, 342.

No Action by a Mortgagee.—No action of ejectment can be maintained by a mortgagee or his assignees, for the recovery of the mortgaged premises. § 57, see *ante*, p. 544, and 27 Barb. 54; 9 Barb. 284; 13 Wend. 486; 11 Wend. 538.

Lands Yielded by Default by Tenant for Life or Years.—If a tenant for life or years make default or give up lands demanded, so that judgment is obtained against him, the heir, reversioner, or remainderman may, after the decease of such tenant, have ejectment to recover the lands. Rev. Stat. vol. 1, p. 339, § 2–3, 1st ed.

Remedy of Wife on Default of Husband, and Rights of Remaindermen, Reversioners, Lessees, &c.—Provision is also made allowing a wife to recover after a default or neglect of her right suffered by her husband, and also rendering void all recoveries by fraud or collusion as against reversioners or remaindermen, or their heirs or judgment debtors; and providing against "feigned recoveries." §§ 4 to 8, *Ib.* It is proper, therefore, in taking title under ejectment, to see that the reversion or remainder is represented in the action; similar provisions are also made in favor of lessees for years who may falsify fraudulent recoveries for their term. § 9, *Ib.;* 23 N. Y. 142.

Landlords to be Parties.—Where ejectment is brought against a tenant, the landlord and every person having privity of estate with them may be

made defendants. § 17, *Ib.*; and where parties recover, they have the same rights for rents, services, &c., as lessors had. § 10.

Alienation of Interest.—By § 18, the action shall not be barred or delayed by any alienation of the interest by party in possession, either before or after suit, and the alienee is liable for mesne profits. If one of two plaintiffs die after judgment, execution may issue in the name of both. Harell v. Eldridge, 21 Wend. 678. If during the action all the right of defendant is determined or transferred to another, the latter cannot be substituted. Moseley v. Albany N. R. R. 14 How. 71; Putnam v. Van Buren, 7 *Id.* 31. If right of plaintiff or defendant expires after suit brought, damages only are recovered. § 31. *Vide* 2 Barb. 162; 2 Du. 171.

The Verdict.—The Revised Statutes contain special provisions as to what verdict shall be given. P. 307. When defendants are in possession of separate rooms in a house, *vide* Fosgate v. The Herkimer, &c. Co. 9 Barb. 287; 12 N.Y. 880. The verdict is to specify the premises and the estate which shall have been established on the trial. See also § 261 of the Code. To recover, the plaintiff must show, 1st, a prior actual possession, or 2d, a paramount legal title. 20 Barb. 559, § 18; 5 Seld. 246; 4 *Id.* 115; 1 Duer, 585; 5 Duer, 130.

The Judgment.—The judgment shall be (if plaintiff recover) that the plaintiff recover possession of the premises according to the verdict; or if by default, according to the description in the declaration.

The plaintiff recovering judgment is entitled to a writ of possession.

Effect of Judgment.—§ 36. Every judgment on verdict, referee's report, or on a judge's decision on the facts, shall be conclusive as to the title established, upon the party against whom the same is rendered, and against *all persons claiming from, through, or under such party by title accruing after the commencement of such action*, subject to the exceptions as to new trials, *infra.*

As amended, law of 1862, p. 977, ch. 485, repealing law of 1861, ch. 221. The law of 1861 held not to apply to judgments prior to its passage. 36 Barb. 447.

New Trials.—The court, however, on the application of the party defeated, his heirs or assigns, within three years, may vacate the judgment and grant a new trial. Within two years after the *second judgment*, it may vacate it and grant another new trial. § 371. It will be seen, therefore, that a party is not safe in taking title through an ejectment suit, until the expiration of at least three years from the first judgment, and two years from a second judgment, if rendered. These provisions remain in force. 5 How. 50; 4 How. 360; 1 Duer, 701. The statute applies only where there has been a trial by jury and a verdict. The three years are to be computed from the *first* judgment in the *action* (23 N. Y. 349, *infra*), and not within three years after its *affirmance* in an appellate court. When the judgment is by *default*, the security of the title is even more likely to be disturbed. *Vide infra.* The statute applies only where there has been a verdict. Chautauqua Bank v. White, 23 N. Y. 349. These new trials,

however, apply strictly to possessory actions of ejectment, and not to ejectment for rent. Shumway v. Shumway, 1 Lan. 474; s. c. 42 N. Y. 143; Christie v. Bloomingdale, 18 How. 12. The orders granting them are not appealable to the Court of Appeals. Evans v. Millard, 16 N. Y. 619. See when they will be refused. Wright v. Millbank, 9 Bos. 672. See also, as to the effect of the judgment against parties and their privies, Ainslie v. Mayor, 1 Barb. 169; Beebe v. Elliot, 4 *Id.* 457; Briggs v. Wells, 12 *Id.* 567; Dunckle v. Wiles, 6 *Id.* 515; Wilson v. Davol, 5 Bosw. 619. As to the effect of a recovery before the Revised Statutes barring a present action, *vide* Bates v. Stearns, 23 Wend. 482. Where the title is not in issue under notice to the landlord, or he is not a party, a judgment against a tenant is not conclusive against the landlord's title. Ryers v. Rippey, 25 Wend. 432; Ryers v. Wheeler, *Ib.* 437. As to the judgment where there has been a change of the plaintiff's interest during suit, *vide* the provisions of the Rev. Statutes, and Van Rensselaer v. Owen, 48 Barb. 61. Each party cannot have two new trials. Bellinger v. Martindale, 8 How. 113. As to stay of proceedings by bills of exceptions, *vide* law of 1846, ch. 159.

When Judgment by Default.—In case of judgment by *default*, after three years from the time of docketing, it shall be conclusive upon the defendant, and upon all persons claiming from or through him by title accruing after the commencement of the action. But within five years after the docketing, on the application of the defendant, his heirs or assignees, and on terms, &c., the court may vacate such judgment and grant a new trial. If, however, at the time of docketing the judgment, the defendant be either, 1. Within the age of twenty-one years; 2. Insane; or, 3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life; or 4. A married woman: any such person may bring an action for the recovery of such premises after the three years, and within three years after such disability shall be removed. If such person shall die during such disability, before any judgment, his heirs may commence the action after the time above limited, and within three years after his death. § 38. The plaintiff's possession is not to be disturbed by vacating the judgment, and if the defendant recover, he may have a writ of possession. § 41. See Huntington v. Forkson, 7 Hill, 195.

When the Action is for Dower.—If the recovery be for dower, the court shall appoint commissioners to admeasure the dower out of the land in suit; and on the confirmation of their report, a writ of possession shall put the dowress into possession. It will lie before dower was assigned. Ellicot v. Mosier, 11 Barb. 574; 3 Seld. 201. It must be brought against the actual occupant, and the occupant of a single floor. *Ib.* Prior demand is not necessary. *Ib.* After admeasurement, the widow may bring ejectment, in which her claim to dower, marriage, siren of husband, &c., may all be contested. Parks v. Hardy, 4 Brad. 15. As to ejectment for dower, *vide ante*, "*Dower*;" Yates v. Paddock, 10 Wend. 529; and 2 R. S. part 3, ch. 8, tit. 7; also, law of 1840, ch. 239, as to the plea of tender. As to limitation of ejectment for dower, *vide* Chamberlain v. Chamberlain, 3 Lans. 349.

Mesne Profits.—Provisions are also found in the Revised Statutes as to the recovery of mesne profits; and also, by law of April 10, 1865, ch. 357, as to such profits against a substituted defendant.

TITLE II. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF LAND.

The following are the leading features of these pro-

ceedings as to the recovery of the possession of land. They are based upon the provisions of Part III, ch. 8, tit. 10, art. 2 of the Revised Statutes.

Summary Proceedings, Deserted Premises.—Landlords may resume the possession of deserted premises when rent not paid, by certain proceedings before justices of the peace, on not more than twenty or less than five days' notice to be affixed. *Vide* 22 Wend. 611; 16 How. 450; 2 Hilt. 520; 2 Ab. 123; 15 Ab. 434.

Removal of Tenants Holding Over, &c.—Tenants or lessees at will or at sufferance, or for any part of a year or for one or more years, their assigns, under-tenants, or legal representatives, may be removed by statutory proceedings before certain courts and officers. 1. Where they hold over and continue in possession after the expiration of the term, without permission of the landlord. 2. Where they hold over without permission after default in payment of rent, and a demand of the rent has been made, or three days' notice given requiring payment or possession of the premises. 3. Where the tenant or lessee of a term of three years or less has taken the benefit of any insolvent act, or been discharged under any act relieving his person from imprisonment during the term. 4. Where any person shall hold over, and continue in possession of any real estate sold under an execution against him, after a title under such sale shall have been perfected. Also by law of 1868, ch. 764, if a house is occupied as a bawdy house.*

The failure of a tenant to pay taxes as covenanted in the lease, does not authorize his removal under these proceedings. Wilson v. Swayne, 15 Abb. 432. The details of the statutory proceedings are not applicable to this volume. On the termination of the proceedings favorably to the applicant, a warrant is issued by the officer directing the removal of all persons on the premises, and the putting the applicant in possession thereof.

Redemption.—If there is an unexpired term of five years, *the lessee or a mortgagee of the lease may resume possession within a year, by paying rent, expenses, &c. A judgment creditor has the same privilege, vide infra.*

The Trial.—Provision is made for the traverse and trial of the allegations of the parties. These provisions are technical, and have to be strictly pursued. They are applicable when the conventional relation of landlord and tenant exists. The statute was amended in many particulars by law of 1851, ch. 460; 1857, ch. 684; 1863, ch. 189; 1868, ch. 828, relative to the form of the proceedings. The amendments apply to the details of the proceedings. By the law of 1868, a law, as to the proceedings in New York and Kings Co. of 1866, ch. 754, was repealed. An *expectant* reversioner cannot institute summary proceedings on a lease made by him. Buck v. Binninger, 3 Barb. 391.

Lessees and Mortgagees as to Redemption.—Lessees of an unexpired term of five years, or their assigns or representatives, at the time the warrant is issued, under sub. 2, § 28, tit. 10, ch. 8, part 3, may, within a year after delivery of possession to the landlord, redeem by pay or tender. Also any mortgagee of the lease not in possession, or any judgment cred-

* By law of 1873, ch. 583, also, leases are made void, and a landlord may enter and have the same remedies as in a case of a holding over against a tenant using premises for an illegal trade, manufacture, or business; and the landlord is made jointly liable for damages, if cognizant of such business.

itor within a year after execution of the warrant. Law of April 12, 1842, ch. 240, repealing law of April 25, 1840.

TITLE III. MISCELLANEOUS.

Squatters.—By laws of 1857, ch. 396, squatters upon land in a city or village without authority, may be compelled to quit on ten days' notice, and they and their structures removed. See *ante*, p. 643, more fully.

Forcible Entry and Detainer.—By the Revised Statutes (part 3, ch. 8, tit. x, art. I), no entry shall be made into any lands or other possessions but in cases where entry is given by law; and in such case only in a peaceable manner, nor with strong hand, nor with multitude of people. Where a person is forcibly turned or kept out of possession, he may be restored to possession on complaint made to a county judge, supreme court and other specified justices and officers, and restitution may be awarded. *Ib.* He may also have an action of trespass and recover treble damages assessed. 2 R. S. title vi, ch. 5, part 3; Code, § 471. The title could not be tried in these proceedings. 12 Johns. 31; The People v. Rickert, 8 Cow. 226; 7 How. pp. 441 and 166. Though the defendant might impeach plaintiff's title (People v. Brinckerhoof, 13 Johns. 340), possession is enough for the complaint. People v. Reed, 11 Wend. 157; People v. Van Nostrand, 9 Wend. 50; People v. Field, 52 Barb. 198. And possession of a house is possession of the land. *Ib.* Part II of the Code is made applicable to these proceedings. § 471. The above cases also show that actual occupancy at the time of the entry is not necessary, and the entry ought to be accompanied by some circumstances of actual violence or terror. An entry made by a party entitled to possession is not unlawful, although made against the will of the party in possession. Such person may enter peaceably. The People v. Fields, 1 Lans. 223. See the above case as to proceedings on a trial for forcible entry and detainer, and what must be shown. In ejectment a party who has entered forcibly is not debarred from showing title in himself. Jackson v. Farmer, 9 Wend. 201.

CHAPTER XLII.

PROCEEDINGS TO COMPEL THE DETERMINATION OF CLAIMS TO REAL PROPERTY.

By Revised Statutes, part 3, ch. 5, title 2, "Where any person singly, or he and those whose estate he has, shall have been for *three years* in the actual possession of any lands or tenements, claiming the same in fee or for life, or for a term of years not less than *ten*, he may compel a determination upon any claim which any other person may make to any estate in fee or for life, or for a term of years not less than ten, in possession, reversion, or remainder, to such lands and tenements, in the manner and by the proceedings hereinafter specified."

As amended, Laws of 1848, ch. 50. *Vide* Laws of 1855, ch. 511, as to the details of the proceedings; also the said Law of 1848. The proceeding is only authorized, when the claims are adverse to the party in possession, and the party instituting them must be in possession. Onderdonk v. Mott, 34 Barb. 106; Burnham v. Onderdonk, 41 N. Y. 425. They cannot be instituted by one having a life estate against devisees in remainder. Onderdonk v. Mott, *supra*. The proceedings are given in detail in the Revised Statutes, vol. 2, p. 313, 1st ed. See also, Laws of 1860, ch. 173, applying these proceedings to estates for ten years. Laws of 1864, ch. 219, making them applicable to married women. A judgment obtained by either party under these proceedings shall be *conclusive* against the other party, "as to the title established in such action or proceeding, and also against all persons claiming under such party by title accruing subsequently to the service of the notice provided." By Code, § 449, these proceedings may be prosecuted by action under the Code without regard to the *forms* of the proceedings as prescribed by the Revised Statutes, and it was questionable whether the proceedings under the statute were not repealed, but held not so repealed in 42 Barb. p. 304. By Laws of 1854, ch. 116, these provisions also extend to corporations. These proceedings by notice are not abrogated by the Code. Burnham v. Onderdonk, 41 N. Y. 425; Barnard v. Simms, 42 Barb. 304. In the case of Hammond v. Tillotson, the mode of proceeding under the Code is given, 18 Barb. 332; the proceedings are subject to the same rules as other actions. *Ib.* overruling, Crane v. Sawyer, 5 How. 372. As to the pleadings and judgment in such proceedings, *vide* Hager v. Hager, 38 Barb. 92; Tanner v. Tibbits, 18 Wend. 546. A party can either proceed by notice under the statutes, or by action under the Code. Fisher v. Hepburn, 48 N. Y. 41. The complaint must set up everything required by the statute. Austin v. Goodrich, 49 N. Y. 266. As to defaults, Maim v. Provost, 3 Abb. 446. Appeals Law of 1855, ch. 511; Malin v. Rose, 12 Wend. 260. All persons claiming may be joined as defendants. Fisher v. Hepburn, *supra*.

Certificates under Assessment Sales.—It is held that these proceedings may be instituted to determine the validity of certificates held under assessment sales. Burnham v. Onderdonk, 41 N. Y. 425.

What the Judgment Effects.—The judgment is conclusive against defendant, and all persons claiming under him by title accruing subsequent to the service of the notice. Malonner v. Dimmick, 4 Barb. 566.

CHAPTER XLIII.

TITLE TO LAND UNDER WATER AND WATER RIGHTS.

The subjects of the title to land under water, and to rights in water, are of great interest and importance, as part of the law of realty. They abound in curious learning and nice distinctions, and have been the special topics of investigation in many and voluminous treatises. It is not pretended in a volume of this diverse character, to give more than a summary of the various general legal principles relating to these subjects, and the most important modifications or applications of them, as embodied in the reports of the tribunals of this State.

TITLE I. STREAMS ABOVE TIDE WATER.

It has been seen above (p. 105), that a grant of water does not pass the soil beneath, but a mere right of piscary or user, and that a grant to carry the water must convey the land under it. It has been seen above, ch. xx, that grants of land, bounded on rivers, or by rivers, or along or up to rivers or streams above tide water, even if to a certain extent navigable, carry the right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, or some local custom may override the general principle. The proprietors of the adjoining banks are presumptively owners to the centre of the stream, and have a right to use the land under, and the water of the river in its flow, in any way not inconsistent with the rights of others,

or with the *jus publicum* or common-law right of the public to use the stream as a highway or easement. This easement may exist not only for purposes of navigation, where the stream is sufficient for the purpose, but for any general use, such as floating logs, rafts, etc., as the stream may be adapted to. This public right to use navigable streams as highways is paramount to that of the riparian proprietor; and the owner of the bed of streams of that character has no right, as such, in the waters thereof, which can authorize him to impede or obstruct navigation upon it. In the statutes of this State, will be observed various acts declaring from time to time certain inland streams to be *highways*, and imposing penalties for their obstruction by dams, booms or otherwise. It is considered, however, that rivers of sufficient capacity to float products to a market are subject to the general right of passage independent of legislation. As to the power of the United States and State governments to regulate streams and waters for the purposes of commerce, *vide ante*, p. 40.

For a verification of the above general principles, see the cases cited, *ante*, p. 497; and also Canal Commissioners v. People, 5 Wend. 423; 17 *Ib.* 571; Browne v. Chadbourne, 31 Maine, 9; Moore v. Sanborne, 2 Gibbs, Mich. 519; Morgan v. King, 18 Barb. 277; s. c. 30 Barb. 9; Loman v. Benson, 8 Mich. 18; Barclay R. R. v. Benson, 36 Penn. St. 194; Munson v. Hungerford, 6 *Id.* 265; Commissioners, &c. v. Kemshall, 26 Wend. 404; Child v. Starr, 4 Hill, 369; Walton v. Tefft, 4 Barb. 216; Avery v. Fox, West District Mich. 1868; 1 Abb. U. S. 246; Brown v. Scofield, 8 Barb. 239; Morgan v. King, 30 Barb. 9.

The following cases show exceptions to or modifications of the above general principles.

The bed of a private river cannot pass as incident or appurtenant to a grant. Child v. Starr, 4 Hill, 369. An owner on a stream although not owning the bed, may construct necessary wharves and landings. Railroad Co. v. Schurmeir, 7 Wall. 272.

The Large Lakes and Rivers as Boundaries.—The right of possession and ownership in riparian proprietors to streams above tide water does not apply to the large navigable lakes of this country, nor to rivers constituting national boundaries; and, by recent decisions in this State, the great navigable fresh water rivers of this State are held not subject to the principle of individual appropriation allowed by the common law. See *ante*, p. 498, and Morgan v. King, 30 Barb. 9. The same principle is held in Pennsylvania, and riparian proprietorship does not give to the middle of the stream on the great inland rivers of that State. 2 Binn. 475; 14 Serg. & Rawle, 71; 1 Watts & Serg. 351. So also the rule has

been laid down by the Supreme Court of the United States, and the ebb and flow of the tide is considered as no test of the navigability of rivers in a legal sense. *In re* Ball, 10 Wall. 557. See as to a river bounding the State, Kingman v. Sparrow, 12 Barb. 201.

Islands.—Belong to the person on whose side of the dividing line they are situated or formed by accretion. If on the dividing line, they belong to each owner proportionately to their position on either side of it. See more fully *ante*, p. 498, as to islands, and also *infra*. If the stream is divided by an island, the riparian owner is entitled to the whole water flowing on his side. Crooker v. Bragg, 10 Wend. 260.

Jurisdiction in this State over a River Boundary.—By our Revised Statutes, it is declared that whenever two counties are separated from each other by a river or creek, the middle of the channel is the division line, and if the boundary line crosses an island, the whole of the island is deemed to be within the county within which the greater part of it lies; and the officers of the counties bordering on Seneca lake, and of the counties of Kings, Richmond and New York, on the waters in Kings and Richmond, south of New York, have concurrent civil and criminal jurisdiction for the purpose of serving process.

Accretion.—The general doctrine as to alluvion on waters is as follows: If a river, running between the lands of separate owners, insensibly or by imperceptible degrees, gains on one side or the other, the title to each continues to go *ad filum medium aquæ;* but if the alteration be sensibly and suddenly made, or by artificial means, the ownership remains according to the former bounds. If the river should establish its channel in the lands of the owner on one side, he would own the whole river so far as it is enclosed by his land.

Where water is diverted by artificial means from the land of a proprietor bounded by low water, he acquires no title to the derelict bed of the stream unless perhaps the diversion were a wrongful act. Halsey v. McCormick, 18 N. Y. 147; see also as to the general principle, Chapman v. Haskins, 2 Md. Ch. 485; Municipality v. N. Orleans Cotton Press, 18 Louis. 122; Child v. Starr, 4 Hill, 369; and the cases quoted, *ante*, p. 498. Imperceptible or slow accretion of islands or land on navigable tide water rivers would belong to the sovereign. Otherwise such islands belong to the adjacent owners, according to their position on the dividing line. Deerfield v. Arms, 17 Pick. 41; The King v. Yarborough, 3 Barn. & Cress. 91; N. Orleans v. U. States, 10 Pet. 662; Atty. Gen. v. Chambers, 4 De Gex & J. 55; People v. Lambier, 5 Den. 9.

The Right of Eminent Domain as Applied to Inland Waters.—It has been seen above, Ch. II, that where lands are appropriated or used for the public advantage by the State, under the exercise of the right of eminent domain, compensation has to be made to the owners for the lands taken or the damage caused. So also it is

determined, that neither the State, nor any individual has the right so to use an inland stream, as to render it less useful to the owners of the soil. The riparian owners are entitled to the usufruct of the waters flowing in the river bed, as appurtenant to the fee of the adjoining banks; and for an interruption in the enjoyment of the owners' privileges, in that respect, in consequence of improvements made by the State, for a public purpose, they are entitled to compensation, for damages sustained.

The Canal Appraisers v. The People, 5 Wend. 432; reversing, 13 *Id.* 355; same case, 17 Wend. 571; Walton v. Tefft, *Id.* 316; The Commissioners, &c. v. Kempshall, 26 Wend. 404; approved, Child v. Starr, 4 Hill, 369. In the above case of the Canal Appraisers v. The People, all rivers in fact navigable were deemed public rivers, and subservient to public uses, and the State had, it was held, a right to erect dams for the public benefit, even if it impaired individual rights. The doctrine in this case, however, and in that of others holding to the same general effect, seems overruled in the case of the Commissioners of the Canal Fund v. Kempshall, 26 Wend. 404, which holds that although the public may have the public right of navigation in fresh water rivers, any interruption of riparian owners in their enjoyment of the flow of the waters, in consequence of public improvements, must be compensated in damages. See also *ex parte* Jennings, 6 Cow. 518. And see fully as to the taking or interruption of such waters for a public purpose, *ante*, p. 40. If a stream is diverted by a railroad company, they are bound to restore and preserve it in its former usefulness. Cott v. Lewiston R. R. 36 N. Y. 214.

Adverse Possession, &c.—As to an adverse possession of water lots, *vide ante*, p. 642. As to a prescriptive right therein, *vide ante*, p. 642, also *ante*, ch. 36. As to adverse possession, also, 45 How. P. 357.

Title II. Water-courses.

The general principles regulating the use of flowing waters running naturally, as between proprietors through or over whose lands they run, are as follows: Such a proprietor has ownership of but an equal right to the use of such waters, in a reasonable manner, and without alteration or diminution or offensive contamination; and no one proprietor can so use the water as to injure, prejudice or annoy others whether above or below him, or impair their rights in the enjoyment of the water, unless he have some special right to divert it, or to enjoy it exclusively. Each opposite owner is entitled to use a moiety of the adjacent stream for power, unless there

exist a prescriptive or other legal right to the contrary. The water must be returned to its natural channel, if temporarily detained or diverted (which may be done for a reasonable time), and it must be returned without its being polluted or poisoned by admixture with unwholesome substances, to the injury of the owner below. The use or quantity of water used may be varied as occasion may require.

The above principles have been held not to apply to mere drainage water, nor to a water-course created by an owner of the land for a special purpose; but they would, where there is an habitual accumulation of water, from natural causes, confined in a well-defined channel. See as to the above principles, Arkwright v. Gell, Exch. E. 7, 1839; Rawstron v. Taylor, 33 Eng. L. & Eq. 428; Broadbent v. Ramsbotham, 34 *Id.* 533; Ashley v. Wolcott, 11 Cush. 192; Luther v. Winisimnick Co. 9 Cush. 171; Earl v. DeHart, 1 Beasely, 280; Van Bergen v. Van Bergen, 3 Johns. Ch. 282; Brown v. Bowen, 30 N. Y. 519; Sackrider v. Bears, 10 Johns. 241; Van Bergen v. Van Bergen, 2 Johns. Ch. 272; Housee v. Hammond, 39 Barb. 89; Merritt v. Brinckerhoff, 17 Johns. 306; Marshall v. Peters, 12 How. Pr. R. 222; Thomas v. Brackney, 17 Barb. 654; Pollitt v. Long, 58 Barb. 20; Arthur v. Case, 1 Pai. 447; aff'd, 3 Wend. 632; Carhart v. The Auburn Gas Co. 22 Barb. 297; O'Reilly v. McChesney, 49 N. Y. 672; Clinton v. Myers, 46 N. Y. 511; Crooker v. Bragg, 10 Wend. 260. Where the water is used for milling purposes, if diverted, so as to injure others, damages will be awarded; so also if unreasonably detained, and injunctions will be granted in proper cases. Corning v. Burden, 6 How. Pr. 89; The People v. The Canal Appraisers, 17 Wend. 572; reversing, 13 *Id.* 355; Walton v. Tefft, *Id.* 216; Van Hoesen v. Coventry, 10 Barb. 518; Brown v. Bowen, 30 N. Y. 519. Water rights pass by a conveyance of the adjacent and subjacent soil, as a necessary and inseparable incident of ownership, unless there be a legal adverse enjoyment. Corning v. Troy, &c., Fac. 39 Barb. 311; aff'd, 40 N. Y. 191. A party owning lands on a stream, where there is an island, has a right to all the water flowing on his side of the island, though it be twice as much as that on the side of the other owner. Crooker v. Bragg, 10 Wend. 260. The grant of a mill carries with it the use of the head water necessary to its enjoyment with all incidents and appurtenances and all rights of overflow, as far as the right to convey to this extent existed in the grantor. Voorhees v. Burchard, 6 Lans. 176; McTavish v. Carroll, 7 Md. 752; LeRoy v. Platt, 4 Paige, 78; *vide* Russel v. Stout, 9 Cow. 279; see also Preble v. Reed, 17 Maine, 169. The Maine reports abound with cases on this subject, also those of Massachusetts. As to rights of parties in a mill stream and dam, and obligations to repair under a special agreement, *vide* Jones v. Turner, 46 Barb. 527. The owner of a mill, etc., may change or improve the race way in which he has an easement by deposit of earth on the servient estate; and the right to use a mill race includes the right to float logs thereon. Beale v. Stewart, 6 Lans. 408. A party may have a prescriptive right to use flush boards on a dam. Hall v. Augsbury, 46 N. Y. 622. A dam may be repaired, even if the water is retained more constantly at an upper level. Hynds v. Shultz, 39 Barb. 600; to the contrary in Stiles v. Hooker, 7 Cow. 266. Property in a stream of water is indivisible. Vandenburgh v. Van Bergen, 13 Johns. 212. A reservation in a grant of

so much water as is necessary for a certain purpose does not restrict its use to that purpose, but only the quantity. Olmsted v. Loomis, 5 Seld. 423; Canal Co. v. Hill, 15 Wall. 94. There can be no dower in a hydraulic right. Kingman v. Sparrow, 12 Barb. 201.

Artificial Channels.—In the absence of agreement, adjoining owners to artificial channels, if streams, have the same rights to the use of the water, as if the artificial were the natural channel of the stream. Townsend v. McDonald, 2 Ker. 381; reversing, 14 Barb. 460. If a stream is diverted by the owner of land who afterwards divides and sells, the channel cannot be changed back to the natural one on the other portion sold. Lampman v. Milks, 21 N. Y. 505.

Adverse Possession.—Water-courses may be the subject of adverse possession, *vide ante*, p. 640.

Ice.—As to an action brought for interfering with a grant to cut ice from a mill pond, *vide* Marshall v. Peters, 12 How. Pr. 218.

Obstructions, Barriers, &c.—One who without legislative authority or right obstructs a running stream is responsible for all damages resulting. If he have such authority, he is only responsible for damages resulting from want of skill or care. Bellinger v. N. Y. C. R. R. 23 N. Y. 42; Waggoner v. Jermaine, 7 Hill, 357. A party cannot impede the usual flow by erecting machinery or dams for water greater than the stream in its ordinary course would flow, nor can he hold the water in reservoirs. Clinton v. Myers, 46 N. Y. 511. But those owning the stream bed have a right to build dams and make a necessary detention, if the flow is resumed, as of the natural course. If damages result from an overflow or percolation, they are only liable for damage resulting from want of care and skill. Pixley v. Clark, 32 Barb. 268; Livingston v. Adams, 8 Cow. 175. A barrier or embankment may be erected to confine the waters into an original channel, after its diversion by a flood, but a party is not under obligation to erect or maintain it. Pierce v. Kinney, 59 Barb. 56. But any barrier must be so placed as to not injure a neighbor, by flooding his land. This, however, could not apply to extraordinary floods. Wallace v. Drew, 59 Barb. 413; *vide* Bailey v. The Mayor, 2 Den. 433. Actions for obstructions to a river, if navigable, are to be brought by the people. People v. Gutchess, 48 Barb. 656. As to actions against the city of New York, for injuries caused by the Croton Aqueduct, *vide* Bailey v. The Mayor, 3 Hill, 531; aff'd, 2 Den. 433; see also Blake v. Ferris, 1 Seld. 48; Floyd v. N. Y. &c., *Id.* 369.

Drainage.—Overseers of highways have no right, in making repairs, to change a natural water-course, or the natural course of surface water drainage, or to increase the same on another abutting owner. Moran v. McClearns, 63 Barb. 185. Nor may one relieve his land of standing water or prevent accumulations thereon by discharging it through drains or ditches upon the land of his neighbor, but it may be drained into a natural stream without regard to any injury that may follow therefrom. Foote v. Bronson, 4 Lans. 47. Owners of lands have no rights in the surface water of adjoining lands. *Ib.* A person may drain his own land, even if thereby a natural stream is increased and damage ensue. Waffle v. N. Y. C. R. R. 58 Barb. 413.

An exception to the above general principles exists in favor of parties who have so used or detained running water for a special purpose, or in special manner, as to have a prescriptive right to such peculiar use, and a

grant for such use will be presumed. In this State such a continuous and uninterrupted adverse use for twenty years establishes a prescriptive right; that period being the time necessary to raise the presumption of a grant. In such cases the natural and common-law right of the other riparian proprietors becomes subservient to the acquired right of the party claiming and establishing the prescription.

Sanders v. Newman, 1 B. & Ald. 258; Van Beuren v. Van Beuren, 3 Johns. Ch. 282; Sherwood v. Burr, 2 Day, 244; Haight v. Price, 21 N. Y. 241; Platt v. Johnson, 15 Johns. 213; Belknap v. Trimble, 3 Pai. 577; Smith v. Adams, 6 *Id.* 435; Baldwin v. Calkins, 10 Wend. 167; Townsend v. McDonald, 2 Ker. 381; Pollitt v. Long, 58 Barb. 20; Van Hoesen v. Coventry, 10 Barb. 518; Brown v. Bowen, 30 N. Y. 519; Hammond v. Zehner, 21 N. Y. 118; Parker v. Foote, 19 Wend. 309; Townsend v. McDonald, 12 N. Y. 381; Olmstead v. Lewis, 9 N. Y. 423. An undisputed assertion and claim to use, and the use of water in a peculiar manner for over twenty years, will establish such use as a right. Olmsted v. Graves, 5 Seld. 423; *in re* Water Commissioners, &c. 4 Ed. Ch. 545; Belknap v. Trimble, 3 Paige, 577; Smith v. Adams, 6 *Id.* 435. The right will not be lost by non-user. Townsend v. McDonald, 2 Ker. 381; nor can the right be taken away by diversion of the stream nor diminishing it. Van Beuren v. Coventry, 10 Barb. 518. The use of water, in a particular way, may be extinguished by unity of possession and title of both the parcels of land connected with the easements. Manning v. Smith, 6 Conn. 289. A parol license to divert water is valid. Rathbone v. Lane, 20 Barb. 311; affirmed, 21 N. Y. 406. The enjoyment must be continuous, or no easement is established. Pollard v. Barnes, 2 Cush. 191; Branch v. Doane, 18 Conn. 233; Pierce v. Selleck, *Id.* 321. The prescriptive right, although enjoyed for a less time than twenty years, may also be established through the operation of the equitable principles flowing from the doctrine of estoppel. Brown v. Bowen, 30 N. Y. 520; Lewis v. Carstairs, 6 Whart. 193. And see fully, as to a right obtained by "prescription," *ante*, ch. 36.

Wells and Springs.—The above principles apply, to a certain extent, to subterraneous streams. A person has a right to their reasonable but not to their exclusive use; nor so as to maliciously divert them from their natural course. In this State it is held also that a party may dig a well intercepting underground currents of water without a distinct course, but cannot do so when the water has actually reached and become a part of a spring or stream, and is subtracted from it.

Smith v. Adams, 6 Pai. 435; Trustees of Delhi v. Yeoman, 45 N. Y. 362; affirming 50 Barb. 316; Arnold v. Foot, 12 Wend. 330. The use of a spring on one's land for twenty years will not entitle the owner to a prescriptive right to its continued exclusive use in the same manner, unless it has been a use hostile or adverse to an adjoining owner. The

Trustees, &c. v. Delhi, *supra*. As to interference with another's well, *vide* Greenleaf v. Francis, 18 Pick. 117; Beach v. Driscoll, 26 Conn. 542; Ellis v. Duncan, 21 Barb. 230. The general principle is, that no one can maliciously divert water from his neighbor's well, but may dig one on his own land, if necessary, even though it interfere with that of another. Ellis v. Duncan, 21 Barb. 230. And springs may be subject to a necessary use, but cannot be so entirely used as to be diverted from their natural course over another's land. Arnold v. Foot, 12 Wend. 330. A party may change the form or shape of a spring on his land, or increase its flow, and will not be thereby deprived of his right of easement to flow it over the land of another. Waffle v. N. Y. C. R. 58 Barb. 413; Waffle v. Porter, 61 Barb. 130. The grant of a right to conduct water by pipes from a spring is the grant of an easement. The use of such an easement is no breach of a covenant for quiet enjoyment or warranty, but it is an incumbrance. McMullin v. Wooley, 2 Lans. 394.

Title III. Tide-Water Streams and Arms of the Sea.

It is a well-established principle of the common law, that the sovereign, or in this country, the people of a State, on whose maritime border and within whose territory it lies, own the land under water of navigable streams and arms of the sea, or rivers which have the flux and reflux of the tide, and have a power of disposal thereof. The riparian owners on such waters, as a matter of right, do not own the soil under water in front of their upland between high and low water. The shores of such waters, and the soil under them beyond ordinary high-water mark, belong to the State in which they are situated, as sovereign. This State, deriving its title by succession from the King and Parliament of Great Britain, became, by its independence, absolute proprietor of all lands under the navigable streams within its territorial limits, and within the ebb and flow of the tide, which remained ungranted by its predecessors. The State, therefore, is presumed to have title in all such lands, and those who assert title thereto as against the State must show a grant or its equivalent.

All arms of the sea, and streams where the tide ebbs and flows, are, by the common law, deemed "*navigable*." For distinction of what are and what are not navigable streams reference may be made to The People v. Canal Appraisers, 33 N. Y. 461; reviewed, *ante*, p. 498; Curtis v. Kessler, 14 Barb. 511; Munson v. Hungerford, 6 Barb. 265. The above principle of ownership on tide waters is established and shown in the following cases: Lansing v. Smith, 4 Wendell, 9; The Champlain, &c. R. R. v.

Valentine, 19 Barb. 484; Gould v. Hudson R. R. R. Co. 6 N. Y. (2 Selden), 522; Furman v. The Mayor, 10 N. Y. 568; affirming, 5 Sandford, 16; People v. Tibbets, 19 N. Y. 523; The People v. The Canal Appraisers, 33 N. Y. 461; Den v. The Association, &c. 15 How. U. S. 426; Smith v. The State of Maryland, 18 Howard U. S. 71; Martin v. Waddell, 16 Peters, 367; and see *ante*, p. 498.

Intruders.—A mere intruder on land is limited to his actual possession, and whatever rights a riparian owner may have do not attach to him. Watkins v. Holman, 16 Pet. 26. Ejectment will lie by the people, for made land beyond high water, without proof of any title to the land. The People v. Health Com. 5 Den. 389; see also as to ejectment for such land, *ante*, p. 699.

As to the Title of the United States thereto.—As regards any conflicting claims between the respective States and the United States as to the ownership of such land within their respective borders, it has been determined that such navigable waters, and the soil under them, were not vested by the Constitution of the United States in the United States or General Government, but were reserved to the States respectively within whose boundaries they were; and any grants of such lands by the United States are void.

Goodlitte v. Kibbe, 9 Howard U. S. 471; Pollard v. Hagan, 3 Howard U. S. 212; The People v. The Canal Appraisers, 33 N. Y. 461; Doe v. Beebe, 13 Howard U. S. 25.

Regulation and Disposal of Land under Water.—It has been established in this State by judicial decision that the Legislature of the State has an inherent right to control and regulate the navigable waters within the State, and to dispose of its title to the land under water within its jurisdiction. This may be done irrespective of the claims of the riparian owner adjoining, who, by a disposition of the land beyond high water, may have his riparian advantages interfered with, and be cut off from the benefits incident to the contiguity of his property to the waters. The individual right of the riparian owner is considered as determined by the courts of this State, subject to the right of the State to abridge or destroy it at pleasure, and that, too, without compensation made.

Lansing v. Smith, 4 Wend. 9; Gould v. Hudson R. R. R. Co. 6 N. Y. (2 Sel.) 522; The People v. Tibbets, 19 N. Y. 523; Furman v. The Mayor, 10 N. Y. 567. The same principles have been established in New Jersey. Stevens v. The Paterson & Newark R. R. Co. N. J. Court of Errors, etc., December, 1870. The above has long been recognized as the established

law of this State. A modification, if not a radical change, of these principles has been laid down by the Supreme Court of the United States in several cases, and particularly in the recent one of Yates v. The City of Milwaukie (10 Wall 497). In that case there had been an attempt by the City of Milwaukie, under a delegated power from the State, to prevent a riparian owner on a navigable stream from docking out over flats belonging to the State to the channel, and to abate his wharf as a nuisance. The court held that a riparian owner to high-water mark, whose land is bounded by a navigable stream, has a right of access to the navigable part of the river from the front of his lot, by making a landing wharf or pier for his own use, or for the use of the public, subject to such general rules and regulations as the Legislature may impose for the public benefit. That this riparian right cannot be arbitrarily destroyed or impaired. That it is a right of which, when once vested, the owner cannot be deprived except in accordance with existing law; and if necessary that it be taken for the public good, then only upon due *compensation.* That if such an owner has built out a wharf, which does not interfere with navigation, if the authorities deem its removal necessary, in the prosecution of any general scheme of widening the channel and improving navigation, they *must first make such owner compensation* for his property so taken for the public use. This decision, unless a distinction is found between it and the above cases decided in this State, seems subversive of the principle that the State may destroy, at will, the aquarian right of a riparian owner by disposing of land in front of his upland, or by restricting the exercise of his rights. See also Dutton v. Strong, 1 Black, 25; St. Paul v. Schurmier, 7 Wall. 272. The principle, as laid down in the above case of Yates v. The City of Milwaukie, seems, from the tenor of the leading opinion, by Justice Miller, to hold that the owner of lands bordering on navigable waters has the common-law right to build and maintain piers and wharves from the shore, through the adjacent shallow waters, to a point where, in fact, the waters in their natural state are navigable, and that, too, without regard to the distinction whether the lands border *upon fresh or tide water.* It may be remarked that the dogmas laid down in the opinion are broader than the facts before the court. It is evident that there is still a wide field of discussion open on these important questions, and it is probable that in the various States local custom or law may modify the general principles. The following cases uphold the right of a party owning a wharf, by grant from a municipal corporation, to recover damages for a destruction of his aquarian advantages by an addition to the wharf constructed by the same body. Van Zandt v. The Mayor, 8 Bos. 375; Taylor v. Brookman, 45 Barb. 106.

Made Land.—It is held that if the State fill in the shallow water upon the bank of a navigable lake, the part filled in is to be deemed no longer navigable, and the riparian owner has a title to it as against all but the State. Ledyard v. Ten Eyck, 36 Barb. 102.

A grant to individuals authorizing them to fill up in front of their several lands on tide water, is a grant to each in severalty.* As to the rules and their variations for drawing the boundary lines of the made land between them, *vide* O'Donnell v. Kelsey, 4 Sand. 202; affirmed, 10 N. Y. 412; also as to how far the coterminous proprietors are bound by an actual location acquiesced in; see also People v. Schermerhorn, 19 Barb. 541.

* See Beach v. Mayor, 45 How. Pr. 357, as to parties taking jointly if they desire, and that any right to land in front of water lots would pass under the terms "water rights" or "privileges," "hereditaments and appurtenances."

Rights of the United States, and of the Public, as Controlling State Action.—The right of the public is considered superior to that of the State where a nuisance or encroachment is authorized, or where there is an abridgment of the common right of navigation, of which the State is considered a trustee of the public, and which is deemed inalienable. In a proper case of excess of action by the State, in authorizing encroachments on the common water highway, there would be a remedy in the United States Courts in behalf of the public against official bodies or others, and for the abatement of an undue encroachment as a nuisance. Under the Constitution of the United States, the proprietary right of the State and its grantees is subject to the authority of Congress over navigation and navigable waters. This is a restriction on the State power. Congress may interpose, whenever it shall be deemed necessary, by general or special laws; and whenever State laws militate against its constitutional provisions or authority for the regulation of commerce, they will be deemed inoperative by the United States Courts, at the instance of individuals, corporations, or States, where damage is shown. Offending bridges or other obstructions over navigable waters may be enjoined or removed by judicial action.

Gibbons v. Ogden, 9 Wheat. 1; The People v. The Rensselaer, &c. R. R. Co. 15 Wendell, 114; The People v. Tibbets, 5 N. Y. 523; Hart v. The Mayor, 9 Wend. 607; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Baird v. Shore Line R. R. 6 Blatch. 276; U. S. v. Duluth, 1 Dill. 469. See the Passenger cases, 7 How. U. S. 283; State of Pennsylvania v. Wheeling Bridge Co. 9 How. U. S. 647, and 17 Wheaton, 518, and also 18 How. U. S. 421; Renwick v. Morris, 3 Hill, 621; affirmed, 7 Hill, 525; People v. Central R. R. of New Jersey, 42 N. Y. 468. An act of Congress declaring a bridge a lawful structure legalizes it, and it cannot be removed as obstructing navigation. Gray v. Chicago R. R. U. S. Supreme Ct. 1870. As to when a bridge would be considered as obstructing navigation, *vide* Gilman v. Philadelphia, 3 Wall. 713, and also p. 782 of said Reports. As to when it would be deemed a nuisance, as erected in opposition to a franchise or State law, *vide* Chenango Bridge Co. v. Lewis, 63 Barb. 111. In the absence of congressional legislation, or unless the legislation of a State conflicts with that of Congress, or with the Constitution of the United States, Courts will not annul or impede the legislation of a State in its regulation of ferries, bridges, &c. Silliman v. Hud. Riv. Bridge Co. 4 Blatch. 395. Riparian proprietors have the right to erect bridge piers and landing places on the shores of rivers, lakes, and arms of the sea, if

they conform to State regulations, and do not obstruct the paramount right of navigation. Dutton v. Strong, 1 Black U. S. 23. As to the power of the United States and State Governments to regulate streams for the purposes of commerce or the public good, *vide ante*, p. 40. The Legislature may pass acts as to structures, &c., even if its action may involve a partial obstruction or inconsiderable detention to navigation, but it has not power to authorize any serious obstruction to those streams which are channels of commerce between the States. Woodman v. The Kilbourn Man. Co. Dist. of Wisconsin C. Ct. reported 1 Abb. U. S. 158; Neaderhauser v. The State, 28 Indiana, 257. The rights of the State also are subservient to the general public rights of navigation and fishery; and the State cannot make any disposition of land under water prejudicial to such rights. But the State may grant such lands in private ownership for the purpose of reclamation and use. Ward v. Mulford, 32 Cal. 365; and see *post*, "Wharves." The State may declare streams to be highways, and may control the use of a public river, as trustee for the public, and prevent the erection of bridges, dams, &c., obstructing their use. Suits may be instituted by the Attorney General for the people. By declaring a stream a highway, the State acquires no title to the river bed, but only declares the easement as existing. The People v. Canal Appraisers, 33 N. Y. 461; Canal Appraisers v. The People, 17 Wend. 571; People v. Gutchess, 48 Barb. 656; see also more fully, *infra*, as to obstructions in harbors and slips.

Jurisdiction of the State over the Inland Bays and Seas.—It is asserted here, as a principle of State jurisdiction, that the cession to the Federal authorities, under the Federal compact of admiralty and maritime jurisdiction over the inland seas and bays of the respective States, was not a cession or alienation of their waters, or of general jurisdiction over them; and in respect of these, the States are held to retain unimpaired their residuary powers of legislation, and their rights of territorial dominion. It is held, also, that the counties and towns which are bounded generally on a bay or sound comprehend within their limits, for the purposes of ordinary civil and criminal jurisdiction, the waters between their respective shores and the exterior water line of the State.

Vide The United States v. Bevan, 3 Wheat. 336; Manley v. The People, 2 Seld. 295; Mahler v. Transportation Co. 35 N. Y. 352; the New Eng. Ins. Co. v. Dunham, U. S. Supreme Ct. 1870; Brookman v. Hamol, 43 N. Y. 554.

Boundaries.—When the sea, bay, or a navigable river is named as the boundary of land in a grant of the title of land, the line of ordinary high-water mark is intended and inferred where the common law prevails. Where

the grant, however, is one of *jurisdiction*, the boundary would extend to low-water mark.

United States v. Pacheco, 2 Wall. 587; Palmer v. Hicks, 6 Johns. 133; Gough v. Bell, 1 Zabriskie N. J. R. 156; The Railroad Co. v. Schurmier, 7 Wallace, 272. Where a Power or State cedes territory on the other side of a river it possesses, making the river the boundary, the Power retains the river to high water on the further bank. Howard v. Ingersoll, 13 How. U. S. 381.

Encroachments in a Harbor or River.—All such encroachments, without a specific grant or authority, are, *per se*, nuisances, and may be abated.

Vide The People v. Vanderbilt, 38 Barb. 282; 26 N. Y. 487; 28 N. Y. 396, and cases above cited.

Remedy.—The remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is by injunction at the suit of the Attorney General. The People v. Vanderbilt, *Ib.* It would be necessary, if the intrusion was by parties in another State, to institute action in the Federal Courts. People v. C. R. R. of N. J. 42 N. Y. 283.

Buildings beyond Low Water.—A building beyond low water is not in itself a nuisance. Whether it be so or not depends upon its effect upon the channel or navigation, and is always a question of fact. Wetmore v. Atlantic White Lead Co. 37 Barb. 71; affirmed, 42 N. Y. 384. This case also holds that the filling up, according to law, of navigable water adjacent to a bank, unless made as an accretion to a public highway, does not create the land so filled in a highway, but is a gain to the adjoining proprietor, and does not bring a public right of passage over the land thus gained, in consequence of the former public right of navigation over the water filled up. Also, that if there is an encroachment on the State line without impeding navigation, none but the State can interfere.

Obstructions as Affecting Private Rights.—In a case in the New York Superior Court, it is held that obstruction to a public stream is a nuisance, and is the subject of indictment, and also of private action at the suit of any individual who sustains an injury personal and peculiar to himself; but that an obstruction to a public navigable stream unaccompanied by any personal injury does not authorize an action by a private person. Hudson R. R. Co. v. Loeb, 7 Robert'n, 418.

Right of Way Along the Borders of Public Rivers.—By the civil law, a littoral right of way for purposes of navigation, anchorage or towing existed on the banks or shores of public streams over private lands. Such right, however, has been held not to exist under the common law as prevailing in England and this country. A special custom, however, may be shown as conferring the right. The whole doctrine is discussed in the case of Ball v. Herbert, 3 Term. Rep. 253.

Wharves and Slips.—Where the State makes an absolute grant of land covered by water of a bay or navigable river, and the grantee builds a wharf thereon, it has been held that he has not a mere franchise to collect wharfage, but the rights that pertain to the ownership of land. It is supposed, however, that the legislature

can only authorize the erection of wharves on the public waters, by individuals for the purposes of common benefit and enjoyment. And to a certain extent they remain subject to legislative control, and cannot be used for mere storage to the exclusion and hindrance of commerce or for private purposes.

Taylor v. Mayor, 4 E. D. Smith, 559; Board of Commissioners v. Clark, 33 N. Y. 251; Radway v. Briggs, 37 N. Y. 256; Mayor v. Hill, 13 How. Pr. 280; Smith v. Levinus, 4 Seld. 472; People v. Kelsey, 38 Barb. 269; Hecker v. N. Y. Balance Dry Dock Co. 13 How. Pr. 549; Penniman v. Same, 13 How. Pr. 40; Lansing v. Smith, 8 Cow. 161; Rodway v. Briggs, 37 N. Y. 256. And parties have a right to make use of public wharves, for purposes of commerce, without special application therefor; but not, it seems, of a private pier. Dutton v. Strong, 1 Blatch. U. S. 23; Heeney v. Heeney, 2 Den. 625. And there is an easement over wharves in the public in New York City, as against lessees of public wharves. Taylor v. Mut. Ins. Co. 37 N. Y. 275. In Post v. Pearsall, 20 Wend. 11; affirmed 22 Wend. 425, it is held, that the public have no right to occupy the soil of an individual as a public landing against his will, although it has been so used for twenty years with his *knowledge*. An act authorizing a filling up of land for a wharf, up to which there was a public highway, by operation of law, extends the highway over the made land to the water. People v. Laimbier, 5 Den. 9. See also as to the use of such made land by the public, Waterbury v. Dry Dock Co. 54 Barb. 389; reversing 30 How. 39. As to ejectment for wharf or right thereto, *vide ante*, p. 697; and Child v. Chappell, 5 Seld. 246. There may be summary proceedings to recover wharf property. People v. Kelsey, 14 Abb. 372.

Regulation of Wharves.—Statutes providing for the occupation and regulation of wharves (*i. e.*, of 1862, ch. 487, and of 1807, ch. 945, as to the city of New York), are mere police regulations and do not deprive wharf owners of any of their rights or privileges, although they may regulate their use or enjoyment. Roseult v. Goddard, 52 Barb. 534. Such acts have been held constitutional, and also the delegation of power over the wharves to officials, and the imposition of port charges. Mayor v. Ryan, 2 E. D. S. 368; Hecker v. N. Y. Bal. D. D. Co. 24 Barb. 215; Roberts v. Same, 52 Barb. 533; Benedict v. Vanderbilt, 1 Robt. 194; Mayor v. Tucker, 1 Daly, 107.

Taxation.—Where there is a mere right to collect wharfage, there is but an incorporeal hereditament, and in default of special statute, it has been held not taxable either as real or personal property. Boreel v. City of N. Y. 2 Sand. 552; The Mayor v. Hill, 13 How. Pr. 280.

Obstruction of Rivers, Harbors and Slips.—Any permanent occupation and exclusive appropriation of a portion of a public river, unless sanctioned by the Legislature, is held to be an obstruction to its free and common use, and as such is a public nuisance. The State or Corporation, or other body whose duty it is to prevent obstructions in a river, will be considered as a party aggrieved, and may by its own act, without indictment,

remove such nuisance, whether any actual damage has been occasioned or not.

Hart v. Mayor, etc., of Albany, 9 Wend. 571. An injunction to prevent and restrain such a nuisance would also be granted at the instance of any private individual who sustains a special injury. Penniman v. The N. Y. Balance Co. 13 How. 41; Hecker v. N. Y. Bal. Dock Co. *Ib.* 549. It has been held that the provisions of the ordinances of a municipal corporation imposing penalties as to the use or obstructions of the *public* wharves, do not extend to wharves, etc., owned by private citizens. Vandewater v. City of N. Y. 2 Sand. 258. It has been judicially decided that erecting cribs or piers, or even stationing vessels permanently in the harbor, or in the basins or docks thereof, is a public nuisance, unless placed there by direction or grant of a competent authority. Nor is it necessary for the removal of the obstruction that actual damages to the public should be shown. The sinking of a pier, therefore, outside of the legally established harbor lines, could not be authorized even by a city corporation, and would be a purpresture and a nuisance; and could be restrained or abated by the State, by action through the courts, whether any actual damage had been occasioned by it or not. The Court might either abate it by its own officers or require the party offending to do so. The People v. Vanderbilt, 26 N. Y. 287; also, same case, 28 N. Y. 396; Hudson R. R. Co. v. Loeb. 7 Rob'n, 418. It has been held that occupation of basins and slips by a balance dock is for a legitimate commercial purpose, and if sanctioned by the proper officers, and assented to by the owner of the pier, no other person can complain or restrain such occupation. Hecker v. N. Y. Bal. Dock Co. 14 Barb. 215; Robert v. Same, Special Term; Roosevelt v. Goddard, 52 Barb. 533. The above decision does not conflict with the case reported in Howard's P. R., Penneman v. N Y. Bal. Co. 13 How. 41, in which such a structure was held a nuisance, inasmuch as the plaintiff therein sustained damage specially, by its interfering with the wharfage. A subsequent act legalized the location of the docks of the said New York Balance Dry Dock Co. in the slips.

Parties Aggrieved.—It is established by legal decision that lessees of land under water, and of bulkheads, piers, etc., have no peculiar claim to relief by injunction, against alleged obstructions, founded upon any rights as riparian owners. Their rights, if any, are in common with other people of the State, when the use of a highway has been obstructed. Any obstruction or disturbance of a highway as such is the subject of action, however, by any individual specially aggrieved or injured. Hudson R. C. Co. v. Loeb, 7 Rob'n, 418: The People v. Vanderbilt, 28 N. Y. 396. As to whose duty it is to raise a sunken vessel in the harbor, *vide* Taylor v. Atlantic Mutual Insurance Co. 37 New York, 275. As to the use of wharves by the public where they are beyond *the legal water line*, *vide* Wetmore v. Brooklyn Gas Light Co. 42 New York, 385, quoted in full *ante*, p. 719. See also as to obstructions of commerce and navigation, *supra*, pp. 712, 720, 721.

TITLE IV. FISHERIES.

The right of fishing in the sea or public waters of a State is held to be a common right; that is, a right inherent in all the people of a State by the common law. It is one of those rights held by the sovereign power in

trust for all the people. This State in the exercise of such trust, has made various regulations as to fishery in its waters both inland and in tide-water. It is held that the legislature has power to pass such laws regulating fisheries and forbidding fisheries at specified times, within the waters of this State. The right is founded in considerations of public policy, and the legislature may delegate such right to minor bodies or officials.

Smith v. Levinus, 4 Seld. 472; People v. Reed, 47 Barb. 235. See also Corfield v. Coryell, as to the power of a State to regulate the fisheries within its territorial courts, as to its own citizens and the citizens of other States. 4 Wash. C. C. 371. An act was passed April 22, 1864, ch. 288, to prevent the taking of fish from any private or artificial pond. An act was also passed April 22, 1868, ch. 285, amended May 2, 1870, appointing Commissioners of Fisheries in the State, with specified powers, and otherwise providing regulations as to fishing in the State; continued March 13, 1873, ch. 74. A general act was passed May 13, 1867, ch. 898; amended 1868, ch. 3; also ch. 785; 1869, ch. 909. A consolidation act was passed Ap. 26, 1871, ch. 721; amended law of 1872, ch. 433, § 5; amended law of May 7, 1873, chs. 435, 436, 439. An act was passed as to the protection of fish in private ponds, June 7, 1873, ch. 665. By law of Ap. 3, 1840, ch. 194, certain powers were given to the supervisors of counties as to taking fish, and repealing all other laws on the subject then in force. This law and the others above specified have probably virtually repealed the provisions of the Rev. Stat., Part I, ch. 20, tit. 2, as to fisheries generally, and giving the Courts of Common Pleas of counties certain powers as to them.

It has been seen above that the law gives to riparian proprietors on certain inland fresh water rivers and streams, above tide-water, ownership *ad filum medium aquæ*. The law also gives such proprietors the exclusive right of fishing over the same, each on his own side. The right, however, is subordinate to the right of way or easement in the public over the waters as a public highway, and there can be no such diversion or obstruction of the stream as to injure or impair the rights of others in the fishery by preventing the free passage of fish, or otherwise. Such private right is also held subordinate to the power of the legislature to regulate fisheries for the general good; and the legislature, as before seen, has power to make general laws for that purpose. The presumption of the ownership of the adjoining owner in the fishery right, may be removed if there be a grant or prescriptive right existing in another, to the exclusion of the former.

Lewis v. Keeling, 1 Jones, 299; Moulton v. Libbey, 37 Maine, 472; Commonwealth v. Bailey, 13 Allen (Mass.), 541. As regards what are or what are not navigable rivers, within the above principles giving exclusive and several right of fishery, it has been held in several of the States, that such right would not be held appurtenant to owners on great inland rivers, although not having tide-water, at least so far up as they have capacity for public use, as commercial highways. But that fishery on such rivers would be common to the public. Hooker v. Cummings, 20 Johns. 90; Carson v. Blazer, 2 Binney, 475; 3 Kent, 418; Stump v. The Presd't, &c. of the Schuylkill Nav. Co. 14 Serg. & Rawle, 71; Cates v. Wadlington, 1 McCord, 580; Collins v. Benbury, 3 Iredell (N. C.), 277; Lewis v. Keeling, 1 Jones, 299; Moulton v. Libbey, 37 Maine, 472; Commonwealth v. Bailey, 13 Allen (Mass.), 541; and see *ante*, p. 708.

The above principles relative to the private right of fishery only apply to certain fresh water rivers above tide-water, but the right of fishing in the sea, and in the bays and arms of the sea, and in navigable or tide waters is a right common to the public; and persons using the common right of fishery on such rivers, may do so on the river-bed up to high-water line on either bank.

Lowndes v. Dickerson, 34 Barb. 586; Palmer v. Hicks, 6 Johns. 133; Rogers v. Jones, 1 Wend. 237; Delaware, &c. v. Stump, 8 Gill & J. 479. There is no right in the public to pass over the lands of an individual in order to reach the common fishing waters, unless there be a usage or dedication to the contrary. On navigable rivers, adjoining proprietors have the exclusive right to draw the seine and take fish on their own lands; and if an island or a rock in tide-waters be private property, no person but the owner has the right to use it for purposes of fishing. Lay v. King, 5 Day, 72; The Commonwealth v. Shaw, 14 Serg. & Rawle, 9; 3 Kent, 417.

Common of Piscary.—This is a right existing in one or more persons of taking fish in waters running over land of others. The principles regulating the right are distinguished from a general right in the public to take fish in an open sea. Although there is a common right of piscary open to all in the sea or arms thereof, it has been claimed that there may be a franchise, or a right, by prescription to a several right of fishery in a portion of a public river, or arm of the sea. The weight of authority, however, seems to be adverse to the existence of any power in the State to grant to an individual the right of taking fish in the open sea and in the creeks or arms thereof, in exclusion of the common liberty. See Jacobson v. Fountain, 2 John. 170; Gould v. James, 6 Cow. 369; Rogers v. Jones, 1 Wend. 237; Martin v. Waddell, 16 Pet. 367; Den v. Jersey Co. 15 How. U. S. 426; Lowndes v. Dickerson, 34 Barb. 586.

Shell Fish.—Shell fish, planted even in tide or navigable waters, in a bed where there is no interruption of navigation, are the exclusive property of those who plant them; but the bed must be clearly defined; and the shell fish must not have existed there in their native state.

Lowndes v. Dickerson, 34 Barb. 586; Decker v. Fisher, 4 Barb. 592; Fleet v. Hegeman, 14 Wend. 42; Brinckerhoof v. Starkins, 11 Barb. 248. Various acts have been passed in the State as to this fishery. See an act as to the unlawfully taking oysters planted by others, 1866, ch. 753. As to the planting and protection of oyster beds in the towns of Hempstead and Jamaica, *vide* Law of 1863, ch. 493; Queens Co., Law of 1865, ch. 343, amended Ap. 5, 1866; Richmond Co. and surrounding waters, 1866, ch. 404; Jamaica and Hempstead bays, 1870, ch. 93; 1871, ch. 639; Suffolk Co., 1870, ch. 234; see also laws of 1872, chs. 483, 659, 666, 667.

TITLE V. FERRIES.

Among incorporeal hereditaments is the right or franchise to establish and maintain a public ferry.

The right to establish ferries, and to appoint others to establish and maintain them, is one of the provinces of the sovereign power of the State.

The general principle as regards the right of the grantee of a ferry franchise to maintain a ferry in a particular locality, is, that it is in the nature of a grant, as of an estate and interest in property, subject to be resumed by the sovereign power only in cases where the public good requires, on due compensation made to the owners of the franchise.

Exclusive Privilege.—The grantee of an *exclusive* ferry privilege has a good cause of action against any other person who conveys passengers, even if free of charge, across the stream within the ferry limits.

As has been seen, under the present views of the courts, a grant of a franchise is no longer considered as implying a peculiar and continuous privilege to the grantee, or a contract, on the part of the State, for an exclusion of any conflicting interest, unless there be a specification to that effect. With respect to ferries, it is held that it is competent for the Legislature, after granting a ferry franchise to one, to grant a similar franchise to another person, the use of which might impair the value of the first franchise, although the right so to do may not be reserved in the first grant. It would be otherwise if the right so to do is expressly prohibited in the first grant.

The Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; The People v. The Mayor, 32 Barb. 102; Aikin v. West. R. R. 20 N. Y. 370.

City of New York.—As to rights to ferries in the city of New York, *vide* Benson v. The Mayor, 10 Barb. 223; to the contrary, The People v. The Mayor, 32 Barb. 102; also Costar v. Brush, 25 Wend. 628. In the Revised Statutes provision is made as to the general regulation of ferries; and the Courts of Common Pleas are authorized to grant ferry licenses in their counties respectively, for not over three years. Part 1, ch. 16, tit. 2. See as to ferries on a river where the State has only jurisdiction over one-half thereof, People v. Babcock, 11 Wend. 586.

CHAPTER XLIV.

THE COMMISSIONERS OF THE LAND OFFICE AND THEIR DUTIES.

TITLE I. GENERAL POWERS OF THE COMMISSIONERS.

This Commission was created and had its powers under various early laws of the State, the most important of which are noted for reference.

5 May, 1786, ch. 67; March 24, 1801, ch. 69; April 5, 1803, ch. 88; 1805, ch. 250; April 6, 1813, 1 R. L. p. 193; October 20, 1814, ch. 199; Laws of 1815. By Constitution of 1846 (Art. V, § 5), the Board is to consist of the Lieutenant-Governor, Speaker, Secretary of State, Comptroller, Treasurer, Attorney-General, and State Engineer and Surveyor.

By the Revised Statutes (Part I, ch. ix, tit. 5, Art. I), the Commissioners of the land office are to have the general care and superintendence of all lands belonging to the State, the superintendence whereof is not vested in some other board. They also have power to direct the granting of the unappropriated lands of the State, according to the directions, from time to time, to be prescribed by law. A majority may act, or any three of them, the Surveyor-General to be one. Minutes of their proceedings are to be kept. And letters patent to be issued are to contain a reservation of gold and silver mines. On failure of title they are to refund purchase moneys, with six per cent. interest. They may lease unappropriated lands of the State (if improved) for not over a year, and until disposed of. Provision is made in Art. III as to how the sale of unappropriated lands is to be made, and as to the execution of grants therefor. In Arts. V and VI are provisions concerning the protection of the public lands, and the payment of charges thereon, and the duties of the Commissioners as to lands belonging to the canal fund.

The provisions as to the sales of land were amended by law of May 25, 1836, ch. 457, repealing Act of May 11, 1835. See, also, law of May 9, 1840, ch. 252, as to sales; also 1841, ch. 70; 1830, ch. 322; 1831, ch. 61; 1839, ch. 134, as to attendance of witnesses.

Escheated Lands.—As to the action of the Commissioners of the land office with respect to escheated lands, *vide* law of 1831, ch. 116; 1829, ch. 259; 1833, ch. 300; 1834, ch. 37.

Indians.—As to the powers of the Commissioners, as to Oneida Indians, *vide* law 1839, ch. 58; as to other Indians, law of 1841, ch. 234; 1849, ch. 420; 1850, ch. 37; 1851, ch. 198. As to resale of land for non-payment of dues, *vide* Allen v. The Commissioners, 38 N. Y. 312. By laws of 1843, ch. 57, the Commissioners may take any proof by affidavit administered by them.

Form of Grant and Reservation.—The statutes prescribe that all letters patent to be granted shall be in such form as the Commissioners shall direct, and shall contain a reservation to the people of all gold and silver mines. The want of this reservation would not invalidate the grant of land under water. The People v. Mauran, 5 Den. 389. The grant may be by letters patent, under the seal of the State, or by deed under the hands and seals of the Commissioners. People v. Mauran, 5 Den. 389. It would take effect only from the time when approved by the Commissioners, and passed the Secretary's office, although dated and signed by the Governor before that time. Jackson v. Douglas, 5 Cow. 458.

Summary Inquiry.—By law of 1869, ch. 196, whenever the Commissioners have power to make a grant (except as to land under water), they are to have power summarily to inquire as to the rights of parties thereto.

Salt lands in Syracuse.—*Vide* law of 1870, ch. 279.

Mines.—As to the working of mines reserved to the State, and over mining lands, *vide* law of 1867, ch. 943.

TITLE II. LAND UNDER WATER.

Powers under Early Laws.—By the above laws of 1786 and 1801, and Act of April 6, 1813 (Vol. I, p. 292), they were allowed to grant such lands under water of *navigable rivers* as they should deem necessary for the commerce of the State—*the grants to be made only to proprietors of adjacent lands;* six weeks' notice was to be given by applicants as provided.

By law of April 7, 1807, ch. 176, 5 Web. 233, the powers of the Commissioners were extended to land under water in the Hudson river adjacent to the State of New Jersey, subject to all the above restrictions. (Re-enacted by said law of 1813.) By act of March 24, 1809, 5 Web. 473, their powers were extended to the waters adjacent to and surrounding Great Barn Island, and land between high and low water thereon. No infringement to be made on the rights of the city of New York, or on the navigation of surrounding waters. (Re-enacted by said law of 1813.) By laws of April 4, 1815, ch. 199, p. 201, the powers of the Commissioners were extended to land under water on navigable lakes, and to lands under water adjacent to and surrounding Staten Island. Provided that no grant should interfere with the rights of the corporation of the city of New York, nor extend more than 500 feet into the water beyond low-water

mark. Repealed in 1828, but re-enacted in the Rev. Statutes of 1830, as below.

Revised Statutes and Subsequent Laws.—The above powers of the Commissioners were confirmed by the Revised Statutes of 1830 and by law of May 6, 1835, ch. 232. The latter statute extended their powers, as below seen.

The provisions of the Revised Statutes were as follows:

Vol. I, R. S. 1st edit. Part i, chap. 9, title 5, art. 4.

"§ 67. The Commissioners of the Land Office shall have power to grant so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this State; but no such grant shall be made to any person other than the proprietor of the adjacent lands, and every such grant that shall be made to any other person shall be void.

Vide post, amend't of 1850.

"§ 68. The powers hereby vested in said Commissioners shall extend to lands under the waters of Hudson's river, adjacent to the State of New Jersey, and also to lands under the waters adjacent to and surrounding Great Barn Island, in the City and County of New York, and to the land between high and low-water mark on said island; but no grant shall be so made as to interfere with the rights of the corporation of the City of New York, or to affect the navigation of the waters surrounding the said island.

1 R. L. 293; Laws of 1815, 201.

"§ 69. The powers of the Commissioners shall also extend to the lands under water adjacent to and surrounding Staten Island; but no such grant shall be so made as to interfere with any rights of the corporation of the city of New York, or to extend more than five hundred feet into the water from low-water mark.

1 R. L. 293; Laws of 1815, 201; 1850, ch. 283.

"§ 70. Every applicant for grant of land under water shall, previous to his application, give notice thereof, by advertisement, to be published for six weeks successively in a newspaper printed in the county in which the land

so intended to be applied for shall be situated, and shall cause a copy of such advertisement to be put up on the door of the court-house of such county; and if there be no court-house in the county, then at such place as the commissioners shall direct.

"§ 71. If there be no newspaper published in the county where such land shall lie, the advertisement shall be published in the newspaper that shall be printed nearest to such land."

1 R. L. 23; Laws of 1815, 201; 1850, ch. 283.

By an act to amend the Revised Statutes relative to grants of land under water, passed May 6, 1835, ch. 232:

"§ 1. The powers conferred on the Commissioners of the Land Office by article fourth, title fifth, chapter ninth of part first of the Revised Statutes, are hereby extended to lands under water, and between high and low-water mark, in and adjacent to and surrounding Long Island, and to all that part of the county of Westchester lying on the East river or Long Island Sound; but no grants shall be made within the boundaries of the city of New York, or interfere with the rights of the corporation of said city.

"§ 2. This act or the act referred to in the preceding section shall confer upon the said commissioners no other power than to authorize the erection of such dock or docks as they shall deem necessary to promote the commerce of this State, and the collection of reasonable and accustomed dockage from persons using such dock or docks; and the Legislature may at any time regulate the same in such manner as they shall think proper.

"§ 3. So much of article fourth, of title fifth, of chapter ninth, of part first of the Revised Statutes as is inconsistent with this act is hereby repealed."

By an act to amend the Revised Statutes relative to grants of land under water, passed April 10, 1850, ch. 283, "by a two-third vote."

"*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*—§ 1. Section

sixty-seven of article four, of title five, chapter nine, of part first of the Revised Statutes, is hereby amended so as to read as follows:—The Commissioners of the Land Office shall have power to grant, in perpetuity or otherwise, so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this State, or proper for the purpose of beneficial emjoyment of the same by the adjacent owner; but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void.

"§ 2. The powers conferred on the Commissioners of the Land Office by the first section of this act are hereby extended to lands under water, and between high and low-water mark, in and adjacent to and surrounding Long Island, and to all that part of the county of Westchester lying on the East or Hudson river or Long Island Sound; but no grant made under this act shall extend beyond any permanent exterior water line established by law, and nothing contained in this act shall authorize the Commissioners of the Land Office to grant any lands under water belonging to the mayor, aldermen and commonalty of the city of New York, nor interfere with any property, rights or franchises of said corporation of the city of New York, or interfere with the rights of the Hudson River Railroad Company.

Publication of the Notice.—The publication of the notice is held to be absolutely necessary to confer jurisdiction upon the commissioners, and without it any grant made by them is void. The People v. Schermerhorn, 19 Barb. 540. It is not necessary, however, for one making title by patent to such lands to show affirmatively that notice was given. The presumption is that the patent was regularly issued, and that all preliminaries were complied with. People v. Mauran, 5 Den. 640.

Purposes of the Grant.—A patent for lands under water cannot be invalidated in a collateral action by proof that it was granted for other purposes than to promote the commerce of the State, etc., as that it was granted to a turnpike corporation. It can only be invalidated by a proceeding directly for the purpose. The People v. Mauran, 5 Den. 389.

Constructions of these Grants.—These grants are to be construed strictly, and nothing is to be implied or intended from them except what is specifically given by metes and bounds, and there is no implication in them that the commissioners may not grant out land beyond what is embraced

in a grant, and so interfere with the riparian privileges of the first grantee. If the grants of water lots are to be construed as giving the right to erect a wharf, a reservation to the Legislature to regulate the use of it, and of the waters adjacent, will be implied. Lansing v. Smith, 4 Wendell, 9; and *vide ante*, p. 715. Grants made by these commissioners are presumptive evidence of the title of the people. People v. Mauran, 5 Den. 389.

Adjacent Owners.—Adjacent owners under the above statute are held to be those who are owners of the land bordering upon or adjoining the waters covering the subject of the proposed grant. The lateral limits must be perpendicular to the general course of the shore. The People v. Schermerhorn, 19 Barb. 540. Or at right angles with the thread of the stream without regard to the direction of lines in the land. U. S. v. Ruggles, 5 Blatch. 35; and see *ante*, p. 716. Although the commissioners are restricted to making grants to *adjacent* owners, it is always lawful for the State to make grants to others than such owners. People v. Canal Appraisers, 33 N. Y. 461. It is to be noted that the statute of 1850, amending the Revised Statutes, did not re-enact the provisions of the law of 1835 against grants being made "in the city of New York." It is questionable whether that restriction is now in force. The members of the board are said to be divided on the question. Repeals by implication, as a general rule, are not favored by the courts. There is a principle of law, however, that a subsequent statute making a different provision of the same subject is not to be construed as an explanatory act, but as an implied repeal of the former, especially if it appears that the latter statute was intended to prescribe the only rule which should govern in the case provided for. If the latter act is to be construed as the sole expression of the will of the Legislature on the subject, it should prevail over the law of 1835. The question, however, is yet one of argument, and not of adjudication. *Vide* Harrington v. Trustees of Rochester, 10 Wend. 547; Colombian Man'g Co. v. Vanderpoel, 4 Cow. 556; Davies v. Fairbarn, 3 How. U. S. 636; Dexter P. R. Co. v. Allen, 16 Barb. 15.

Application for Grants.—The mode of application for grants is given in the statutes, and if not complied with the grant is held void. People v. Schermerhorn, 19 Barb. 540. Rules have been adopted by the board to be observed by applicants. On application to the Secretary of State, printed copies of these rules are sent to those desiring them, and copies of the minutes of the board of Sept. 28, 1854, and July 2, 1861, amended Feb. 11, 1870, and March 6, 1872, as to what applicants are to do and furnish, are also supplied.

Void Grants.—A grant of land by the commissioners of a water lot to one, adjacent to land of another, is void. Champlain, &c. R. R. v. Valentine, 19 Barb. 484; and see Beach v. Mayor, 45 How. P. 357.

CHAPTER XLV.

NOTICES OF LIS PENDENS.

An Action per se Notice.—It was a general rule, that, independent of statute provisions, a purchaser of real estate, pending a suit affecting it, was bound by the decree, and that the suit itself was constructive notice. Consequently any rights acquired in land after the commencement of an action affecting the title, were subordinate to those of the plaintiff in such action, and this although the purchaser might never have heard of the suit.

6 Barb. 133; 15 *Id.* 520; Cleveland v. Boerum, 23 Barb. 201; affirmed, 24 N. Y. 613; 27 Barb. 252; 11 Wend. 442.

Provisions of Law of 1823 *and of Revised Statutes.*—To remedy the injustice worked by the above legal principle, by the law of 1823, April 17, p. 213, ch. 182, if a bill was filed affecting real estate, the bill was not to be deemed constructive notice to purchasers, unless a notice of *lis pendens* were filed with the clerk of the county in which the lands were situated—the notice to give the title of the cause and general object thereof, and description of the lands, &c.; and the county clerk was directed to index such notices in books in his office, so that all persons may search for such notices without inconvenience. The same provision substantially was incorporated in the Revised Statutes relative to bills in chancery affecting real estate.

Provisions of the Code.—The following are the provisions of the Code on the subject, and the period when each amendment of the original section went into operation.

By the Code, § 132, "In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, or (whenever a

warrant of *attachment* under ch. 4, tit. 7, Part II of the Code, shall be issued, or at any time afterwards [*amendment of* 1857]), (or a *defendant* when he sets up an affirmative cause of action in his answer, and demands substantive relief at the time of filing his answer, or at any time afterwards [*amendment of* 1866]), if the same be intended to affect *real* estate, may file with the clerk of each county in which the property is situated, a *notice of the pendency of the action*, containing the *names* of the parties, the *object* of the action, and the *description* of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the *date* of the mortgage, the *parties* thereto, and the *time* and *place* of recording the same. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby."

Amendment of 1858.—§ 132. "And every person whose conveyance or incumbrance is subsequently executed or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, to the same extent as if he were made a party to the action."

Amendment of 1862.—§ 132. "For the purposes of this section, an action shall be deemed to be pending from the time of the filing of such notice; provided, however, that such notice shall be of no avail unless it shall be followed by the first publication of the summons on an order therefor, or by the personal service thereof on a defendant within sixty days after such filing."

Cancellation.—By amendment of 1866, provision is made for the cancellation of such notices by the clerk on good cause shown. Laws of 1866, ch. 824.

Real Action.—It is still held that a notice of *lis pendens* is unnecessary in an action to recover possession of real property, even as against a purchaser *pendente lite*. The plaintiff in such an action can only recover upon a legal title; it is only against mere equities that a purchaser without notice is protected. Sheridan v. Andrews, 49 N. Y. 478; and *ante*, p. 701.

Foreclosure and Partition.—The law of May 14, 1840, ch. 342, also provided for the filing of a special *lis pendens* in foreclosure suits substantially as in the Code. The county clerk was to index the notices, so that persons

might find them without inconvenience. By this act the notice was to be filed at least 40 days before any decree could be made; also by law of 1844, ch. 346. As to the filing in a partition suit, and the effect of irregularities in filing, *vide* Waring v. Waring, 7 Abb. 472. A decree in foreclosure made without affidavit of filing is not void (Supreme Court, rule 72); nor will an omission merely to state the place of record of the mortgage vitiate. Potter v. Rowland, 8 N. Y. 448.

Notices to be Recorded and Indexed.—The names of all parties should be inserted in the notice. By law of March 22, 1864, ch. 53, the clerks of the different counties are directed to record, in suitable books, and index all notices thereafter filed. All notices theretofore filed may also be recorded. The party filing is to indicate the names of such of the defendants as are to be inserted in the index. The record, or a certified copy thereof, to be evidence. If a defendant's middle name is omitted, the notice is still sufficient to put a party upon inquiry. Weber v. Fowler, 11 How. 558.

Queens County.—By law of 1867, ch. 538, the clerk of Queens county is to record and index notices of *lis pendens* filed between January 1, 1820, and April 1, 1864.

Effect of.—A purchaser after notice filed is bound by the decree. The notice is as effectual against any disposition of the property as is an injunction. It is a substitute for actual notice. Hall v. Nelson, 14 How. 32; 23 Barb. 88; Stevenson v. Fayreweather, 21 How. 449; Harrington v. Slade, 22 Barb. 162; Zeiter v. Bowman, 6 *Id.* 133; Jeffres v. Cochrane, 48 N. Y. 671; Griswold v. Miller, 15 *Id.* 520; Murray v. Ballou, 1 John. 566; Cleveland v. Boerum, 23 Barb. 201; 27 *Ib.* 252; 24 N. Y. 613; Ostrom v. McCann, 21 How. 431.

Amendment of 1858.—Prior to the amendment of 1858, a grantee of the equity of redemption had to be made party, although *his deed was not recorded* at the time of filing the *complaint* and *lis pendens*. Hall v. Nelson, 23 Barb. 88. Since that amendment, deeds not *recorded* before filing the *lis pendens* are inoperative as against parties taking under the judgment.

Amendment of 1862.—Prior to the amendment of this section (132), in 1862, it was held that the filing a notice under this section did not charge the *grantee* of an equity of redemption unless, prior to the conveyance, the *grantor had been served with the summons in the action.* 12 How. 171; 17 How. 477; 7 Abb. 61; Butler v. Tomlinson, 38 Barb. 641.

When Complaint Amended.—In case of amendment of complaint by changing the description or the parties, a new notice must be filed. Curtis v. Hitchcock, 10 Paige, 399. The filing of the new notice seems necessary only as to the added parties. Waring v. Waring, 7 Abb. 472. A decree made without proof of filing would be irregular, not void. 4 Seld. 448.

Kings County.—In Kings county, by Laws of 1859, ch. 212, the notices are to be recorded by county clerk.

When it takes Effect.—If the *lis pendens* is filed before the complaint, it takes effect from the time of filing the complaint, and not before. 12 How. 171; 7 Abb. 472; 9 Abb. 61; 17 How. 477; Leitch v. Wells, 48 N. Y. 5; Butler v. Tomlinson, 38 Barb. 641; 15 Abb. 88. As the Code existed in 1859, a notice might be filed before the *service* of the summons or complaint; the filing was alone necessary. Stern v. O'Connell, 35 N. Y. 104. It has been held that a *lis pendens* does not operate as notice unless the Court has jurisdiction of the thing. Carrington v. Brentz, 1 McLean, 167. The notice cannot be filed against prior incumbrancers not parties to the action. People v. Connolly, 8 Abb. 128; Chapman v. West, 17 N. Y. 125; affirming, 10 How. 367.

Amendment.—It may be amended by inserting a description omitted. Vanderheyden v. Gary, 38 How. 367; see also 13 Abb. N. S. 265.

Judgment.—A judgment lien is not an encumbrance within the meaning of the above section 132. Rodgers v. Bonner, 45 N. Y. 379.

Assignees, &c.—See as to the effect of a decree on an assignee in bankruptcy, taking after notice of *lis pendens*. Cleveland v. Boerum, 23 Barb. 201; s. c. aff'd, 24 N. Y. 613; also Griswold v. Fowler, 6 Abb. 113. An assignee (in insolvency) for a precedent liability held not a *purchaser* within the statute. Leavitt v. Tyler, 1 Sand. Ch. 207; see also 13 Abb. N. S. 265.

Paramount Title.—A notice of *lis pendens* applies to those who derive the title to the subject matter from a party to the suit after it is commenced. It does not affect one who has a paramount title superior to that of all the parties to the suit. Stuyvesant v. Hone, 1 Sand. Ch. 419.

Attachment Suits.—In such suits the notice only binds the property levied on. Fitzgerald v. Blake, 28 How. 110; 42 Barb. 513. It will have no effect in an attachment suit to recover money. Burkhardt v. Sandford, 7 How. 329. The notice must be filed to make the lien effectual as against *bona fide* purchasers and incumbrancers. Learned v. Vrandenburgh, 7 How. 379; and People v. Connolly, 8 Abb. 128; but see as to the effect generally of a *lis pendens* notice in an attachment suit, Lamont v. Cheshire, 6 Lans. 235; cited fully, *ante*, p. 696; and see Bassett v. Spofford, 45 N. Y. 387, as to effect of an attachment suit with *lis pendens* over a judgment lien. The omission to file the notice in an attachment suit until another creditor has obtained a judgment against the defendant has no effect to postpone the lien of the attachment to that of the judgment. Rodgers v. Bonner, 55 Barb. 9.

Removal of the Notice.—By the amendment of 1862, the court may, after action is settled, discontinued or abated, direct the notice to be canceled from the record, to be noted in the margin thereof.

Expiration of the Notice.—The effect of the notice will be lost if the action is not expedited. So held as to a delay of eight years. Myrick v. Seldon, 36 Barb. 15.

CHAPTER XLVI.

THE LIEN OF TAXES AND ASSESSMENTS, AND THE SALES OF LAND THEREFOR.

TITLE I. GENERAL PRINCIPLES OF TAXATION.

In this chapter only the general principles of taxation, and the tax laws as applicable to the State at large, are considered. A multitude of tax laws have been passed for specified cities, towns, and other localities, which it would require volumes to review, and which cannot here be investigated.

The Power to Tax.—A power to tax individual property for the general benefit is one of the sovereign attributes and powers of a State, in the exercise of its right of eminent domain, and one which it may delegate to inferior bodies. The power to tax implies a power to apportion the tax as the legislature may see fit. The legislature may also grant immunity from taxation and revoke the privilege.

Vide The People v. Mayor of Brooklyn, 4 Com. pp. 419, 420; also People v. Lawrence, 36 Barb. 177; also People v. Roper, 35 N. Y. 629; also People v. Haws, 34 Barb. 69; Gordon v. Carnes, Bunn v. Same, 47 N. Y. 608.

As regards conflict with the authority of the United States, it may be remarked that the taxing power is in the States respectively, except so far as the Constitution of the United States prevents its affecting the means and resources of the General Government, or so far as property is exempt by the Federal Constitution.

Vide Weston v. The City Council of Charleston, 2 Pet. R. 49; People v. Cunningham, 35 N. Y. 629; Ward v. Maryland, 12 Wall. 418, and the

cases *infra*. As to assessment on shares of a "*national* bank," under the act of 1865, ch. 97, *vide* Van Alen v. Assessors, &c. 3 Wall. 573; First National Bank v. Fancher, 48 N. Y. 524; overruling City of Utica v. Churchill, 33 N. Y. 61; National Bank v. Commonwealth, 9 Wall. 353.

Aliens holding real estate under the law of 1845, ch. 115, *ante*, p. 94, are subject to taxation as if citizens. § 12 of the act.

Different Kinds of Taxation.—The two systems of taxation, the one for municipal purposes and the other for county and State purposes, are distinct. The latter species forms the subject of the general provisions of the Revised Statutes, and they apply to municipalities only so far as by the provisions of the laws imposing and regulating municipal taxation, they are either expressly or impliedly adopted. Mayor v. Mutual Bank, 20 N. Y. 387.

Tax Laws.—By the *Bill of Rights* of this State, passed December 1, 1827, taking effect January 1, 1830, no tax, duty, aid, or imposition whatever, except such as may be laid by a law of the United States, can be taken or levied within this State, without the grant and assent of the people of this State by their Representatives in Senate and Assembly; and no citizen of this State can be by any means compelled to contribute to any gift, loan, tax, or other like charge, not laid or imposed by a law of the United States, or by the Legislature of this State.

1 R. L. 48, § 12.

Tax Laws, What to State.—By the State Constitution of 1846, art. 7, § 13, every law which imposes, continues, or revives a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

Laws, How Passed.—§ 14. On the final passage, in either house, of all laws imposing, continuing or reviving a tax, the question shall be taken by *ayes* and *noes*, which shall be duly entered on the journal, and a quorum of three-fifths in either house is necessary. The presumption is, the law was properly passed. Pumpelly v. Village of Owego, 45 How. P. 219; and see, *ante*, as to the passage of such laws, p. 17.

Former Laws.—As title is made according to laws in force at time of sale, reference may be made to the following laws. The first regular system of taxation in this State after the peace was adopted in 1788. *Vide* J. & V. vol. 2, p. 340. The laws for the assessment of taxes and sales therefor, up to the first revision of the State statutes are collected in 1 Web. Laws of 1801, April 8, p. 547, and the Revised Laws of 1813, ch. 52, vol. 2, p. 509. The law of 1813 has reference to all the real estate in the State. The act of April 5, 1813, and all other subsequent acts relative to the assessment and collection of taxes, including a revival of the act of April, 1813, passed April 23, 1823, ch. 242, were abolished by act of December 10, 1828, and provisions of the Revised Statutes adopted. The Revised Statutes re-enact most of the provisions of the act of 1823, with additions from acts passed in 1824, pp. 16, 112; 1825, pp. 282, 33, 355, 373; 1826, pp. 45, 94, 135, 327; 1827, p. 4. They, in turn, have been modified by subsequent statutes.

TITLE II. THE ASSESSMENT AND COLLECTION OF TAXES ON LAND.

Lands to be Taxed.—By law all *lands* and all personal estates within this State, whether owned by individuals or by corporations, shall be liable to taxation, subject to certain exemptions as from time to time established by various acts.

1 R. S. 1st ed. p. 387. Among the exemptions are property real or personal exempted from taxation by the Constitution of the State or the Constitution of the United States; and all lands belonging to the State or the United States, and certain scholastic, religious, and eleemosynary properties. Lands sold by the State are to be taxed as if conveyed. Exempting statutes are to be strictly construed. Exemption from public taxes and assessments will not exempt from assessments for local improvement. So held as to rural cemeteries, which are to be assessed as a whole and not in lots. Buff. City Cem. v. City of Buff. 46 N. Y. 506; *Ib.* p. 503; *in re* N. Y. 11 John. 77. These exempting statutes are not contracts, and may be repealed. People v. Commissioners, 47 N. Y. 501; People v. Cunningham, 35 N. Y. 629. Assessment of taxes is valid on a person to pay debts of a locality incurred before he became a resident. Pumpelly v. Village of Owego, 45 How. P. 473.

Railroads and buildings, &c.—The term *lands* would include certain fixtures and buildings, although not accompanied by the *fee, e. g.* railroads. People v. Cassity, 46 N. Y. 46. See further as to assessments of railroad property, where all the statutes are cited and reviewed, People v. Barker, 48 N. Y. 70; Buffalo, &c. R. R. v. Supervisors Erie Co. *Ib.* 93; also, 46.

Wharf Property.—As to taxes on, *vide ante*, p. 720.

Debts Due to Non-Residents.—Debts due by inhabitants of the State to non-residents of the United States for the purchase of real property are to be taxed as personal property. The manner of collection is specified, Law of 1851, ch. 371. This is held applicable only to towns. As to taxation in villages, the general law authorizing assessments to agents (1 R. S. ch. 13, tit. 1) remains in force as amended in 1851. People v. Westbrook, 48 N. Y. 390.

Turnpike and Plank Roads and Bridges.—As to taxes on, *vide* law of 1847, ch. 398; 1848, ch. 259.

The Term "Land."—The terms "*land*" or "real estate" or "real property" are stated to include all buildings and what is erected on or affixed to the same, trees, &c., thereon, and all mines, minerals, quarries, &c., except mines belonging to the State. By law of 1873, ch. 530, the words "land under water" were added.

Where Assessed.—Every person is to be assessed in the town or ward where he resides, when the assessment is made for all the lands then owned by him within such town or ward and occupied by him, or wholly unoccupied. § 1, p. 389, R. S.

To Whom Assessed.—Land occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident lands. § 2 R. Stat. vol. 1, p. 389, 1st ed. as amended by laws of 1851, ch. 176. This leaves to the assessors a discretion. Johnson v. Learn, 30 Barb. 616; disapproving N. Y. Har. R. v. Lyon, 16 Barb. 651; see also, Van Rensselaer v. Cottrell, 7 Barb. 127. Unoccupied lands not owned by a person

residing in the ward or town where the same are situated shall be denominated "lands of non-residents."

Corporations.—The real estate of corporations shall be assessed in the town or ward where the same shall lie. § 6. See also, Laws of 1857, ch. 456; 1858, ch. 654; 20 N. Y. 387; 1863, ch. 240, as to banking and moneyed corporations; 1866, ch. 761; 36 N. Y. 59, holding the last act invalid; and 1865, ch. 27; also, First National Bank v. Sandy Hill Bank.

Mode of Assessment.—The manner in which assessments are made by the assessors, divided into assessment districts, is given in the Revised Statutes. 1st ed. vol. 1, pp. 390 to 397, as amended by Laws of 1851, 1857, and 1858, *infra;* 1858, ch. 357; 1859, ch. 312; 1862, ch. 194; 1865, ch. 453; 1868, ch. 575; 1869, ch. 855.

The Assessment and Notices.—When the assessment is finished, notices that the roll may be inspected, have to be put in three public places of their town or ward, except that in cities the local regulations are to govern. Laws of 1851, ch. 176; 1857, ch. 536; 1858, ch. 110. The assessment roll is to be finished by the 1st of August, in each year; and a fair copy left with one assessor. *Ib.* The contents of the notice are specified, but in the several cities notices are to conform to their respective laws. Laws of 1851, ch. 176; 1857, 536; 1858, ch. 110. The certified roll, as corrected, is to be sent to the Supervisors (except as otherwise specially provided), before 1st September in each year. By Law of 1851, ch. 176, the roll is to be sworn to.* By Law of 1857, ch. 536, the term "*person*" is to include corporations. The Rev. Stat. (Part I, ch. XIII, Tit. 2, Art. 3) make further provision as to equalization of the assessments, and the correction of the assessment rolls by the Supervisors; and a corrected copy is to be given to the clerk of the city or town, and also to the town or ward collector, before December 15 in each year; and a warrant for collection; and in case of failure to pay, he is to levy the same by distress of goods and chattels. The warrant may be changed as to the collection to conform to local laws. Laws of 1845, ch. 180; 1857, ch. 139. After the deposit of the assessment roll on or before the 1st of August, the assessors have no jurisdiction over tax-payers, or the roll, save for review and verification; and if their affidavit is made prior to the 3d Tuesday of August, and the defect appears on the paper, the tax warrant is null, and the collector is a trespasser. Westfall v. Preston, 49 N. Y. 349; Bellinger v. Gray, Commissioners of Appeals, 1873. If affidavit is not made, the assessment is invalid, *Ib.* A certificate of the assessors, if required by any law, is necessary to validity and to protect the collector. Van Rensselaer v. Wilbeck, 3 Seld. 517. The assessment roll must be completed before the warrants can be annexed. Bellinger v. Gray, Commissioners of Appeals, 1873. As to the affidavits and other proof submitted to the assessors, and how far they are conclusive, *vide* Law of 1851, ch. 176, and People v. Barker, 48 N. Y. 70. Their decision is *quasi* judicial and based on their judgments as well as the proofs, and they are personally protected, and their decision cannot be reviewed collaterally, nor at all, unless perhaps there has been a flagrant disregard of facts or in an extraordinary case, Buff., &c. R. R. v. Supervisors Erie, 48 N. Y. 93; Western R. R. v. Nolan, 48 N. Y. 514; Barhyte v. Shepherd, 35 N. Y. 238; People v. Trustees, &c. 48 N. Y. 390; Van Rensselaer v. Wilbeck, 7 Barb. 133. But they are liable if they exceed their powers, and they cannot change

* As to the swearing to the roll, and its validity, *vide* Westfall v. Gere, 3 Lans. 151.

or add to the assessment roll after it is finished. Clark v. Norton, 49 N. Y. 243; Mygatt v. Washburn, 15 N. Y. 306. If the assessors have no jurisdiction, a personal action lies against them. Mygatt v. Supervisors, &c. 11 N. Y. 563; Genessee, &c. Bank v. Supervisors, 53 Barb. 223. By law of 1836, ch. 461, warrants may be issued by County Treasurers to other counties in cases of removal. By law of 1867, ch. 36, a party may be brought up and be examined as to his property. By law of 1853, ch. 69, the time when proceedings are stayed by injunction, &c, are not to affect the collection and collector's return.

Non-resident's lands may be assessed if occupied, to occupant or owner. Van Rensselaer v. Cottrell, 7 Barb. 127; and must be to one or the other, Whitney v. Thomas, 23 N. Y. 281. If regular notice of the completion of the assessment, &c., is not given for the full term as required by law, the tax is invalid, and a sale of land therefor confers no title. Wheeler v. Mills, 40 Barb. 644.

When the Lien Arises.—The confirmation of an assessment for taxes creates a lien on the land. Manice v. Miller, 26 Barb. 41; so held as to the city of New York. In the case of Rundell v. Lakey, 40 N. Y. 513, a tax assessed, but not laid, was held a breach of covenant, on conveyance of farm lands.

On Decease of Owner, Who Liable.—Taxes due at the death of a decedent should be paid from the *personal* estate; and taxes accruing subsequently are chargeable on the *land*. There is no ratable apportionment for the year. 4 Brad. 216.

Correct Assessment Necessary.—Care must be taken in making title under a tax or assessment sale to see that the land has been properly assessed by boundaries, or lot number, township, &c. Vol. 1 Rev. Stat. p. 391. An assessment or advertisement by wrong number would pass no title. 2 Barb. 344; 4 Denio, 237; 2 Com. 66; and see *post*, title III. And it must be assessed to the proper person. 16 Barb. 651; 30 *Ib.* 616. As to the city of New York, *vide* ch. 410, § 5, of Laws of 1867, and Whitney v. Thomas, 23 N. Y. 281. As to the proper assessment of land under law of 1850, *vide* Whitney v. Thomas, 23 N. Y. 281.

Taxation Omitted.—If taxation on any land, or property is omitted, the assessors of any town, city, or ward, on application of three tax payers, are to enter it for taxation, as of the current year. Law of 1865, ch. 453.

Disputed Location.—An act was passed, April 21, 1870, ch. 325, providing for actions to determine in which counties disputed lands were taxable. An act was passed, April 4, 1871, ch. 287, as to assessment where farms or lots were in town or county lines, which was repealed by Law of 1872, ch. 355. By the Rev. Stat. a farm or lot on a county line is to be assessed where the occupant resides; if unoccupied, it shall be assessed where each portion lies.

Redress for Errors in Taxation.—A suit in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal, nor where there is a remedy at law. There must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction. The charge that a municipal body intends to collect the tax and assess, and collect similar taxes, is not sufficient. Dows v. City of Chicago, U. S. Sup. Ct. 1871; Pumpelly v. Village of Owego, 45 How. Pr. 220. Any injunction is not to be against the assessors, who are *quasi* judicial officers; but against the parties acting, *i. e.*, the ministerial officials. As a general rule, however, injunctions will not be granted to restrain the collection of a tax or assessment. Mohawk & Hudson R. R. v. Archer, 6 Pai. 83; Susquehanna Bank v. Supervisors, Broome Co. 25 N. Y. 312; Western R. R. v. Nolan, 48 N. Y. 513. The action of the assessors,

however, may be reviewed by *certiorari*,* *e. g.*, as if property not liable to taxation is put upon the assessment roll. Genessee, &c., Bank v. Supervisors, 53 Barb. 223; People v. Trustees, &c. 48 N. Y. 390; Western R. R. v. Nolan, 48 N. Y. 513. Their action cannot be reviewed collaterally unless under a flagrant disregard of facts; and the tax, after it has reached the treasury, cannot be recovered back. An entirely illegal tax collected, it has been held, could be recovered from the county if taken by wrongful act of its officers. Buff. &c. R. R. v. Supervisors of Erie, 48 N. Y. 93; Newman v. Supervisors, 45 N. Y. 676; Genessee, &c. Bank v. Supervisors, 53 Barb. 223; Hill v. Supervisors, 2 Ker. 52. And their judgments may be reviewed for fraud, mistake, or other cause giving jurisdiction to courts of equity. Western R. R. v. Nolan, 48 N. Y. 513. An action, however, would lie in equity, where the tax is upon land which is liable to be sold; and where the conveyance to be executed would be conclusive evidence of title; and where the tax was not void on its face; or where there might be otherwise a multiplicity of suits. Western R. R. v. Nolan, 48 N. Y. 513.

Recovery on Erroneous Taxation.—Where there has been *jurisdiction* of the person, *i. e.*, the person being a resident, no action will lie to recover back an erroneous tax or assessment. So held as to *personalty*. Genesee, &c. Bank v. Supervisors, &c. 53 Barb. 223; Mygatt v. Supervisors, &c. 11 N. Y. 563. While the assessment of the tax is in force, no action will lie for the recovery of the tax paid, although the property was not subject to taxation. Bank of Commonwealth v. Mayor, 43 N. Y. 184.

Collectors' Return of Unpaid Taxes.—The Rev. Stat. (art. 1, tit. 3 *supra*) further provide that the collector is to return to the county treasurer an account of unpaid taxes.

TITLE III. THE SALE OF LANDS FOR TAXES AND THE CONVEYANCE AND REDEMPTION THEREOF.

To divest the owner of lands by a sale for taxes, or local "assessments," every preliminary step must be shown to be in conformity with the statutory requirements regulating the sale. The power given is a naked one not coupled with any interest, and is in derogation of a common law right; therefore every prerequisite to the exercise of the power must precede it.

Newell v. Wheeler, 48 N. Y. 486; 5 Hill, 286; 4 *Ib.* 92; Leggett v. Rogers, 9 Barb. 411; Stryker v. Kelly, 2 Den. 323; Doughty v. Hope, 3 Den. 594; 1 Com. 79; Varick v. Tallman, 2 Barb. 113; See also 2 Com. 66; 16 Wend. 550; 7 *Ib.* 148; 50 Barb. 639. A power to sell for taxes imposed on lands does not authorize to sell for taxes imposed on their owners or occupants, and not *nominatim* on the lands; nor will a power to sell for taxes authorize a sale for an assessment for local benefit. A *party* claiming under a tax sale has the *onus* of proof as to all the proceedings, except when otherwise provided. Sharp v. Speir, 4 Hill, 76; approved, 10 N. Y. 328.

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* A *certiorari* brings up the merits as well as questions of jurisdiction and regularity. People v. Assessors of W. Albany, 40 N. Y. 154.

Non-Resident and Unoccupied Lands, and where there are no Chattels, &c.—The statute defines lands of *non-residents* as unoccupied lands, the owners not residing in the ward or town where the same are situated. Land where there is not sufficient *personal property* to satisfy the tax, and lands vacated by removal of *occupant, are to be proceeded against in the same way as non-resident lands.*

Laws of 1855, ch. 427, § 5; Newman v. Board of Supervisors, 45 N. Y. 676.

The act of 1855.—The following provisions are taken from act of April 13, 1855, ch. 427, entitled "An act in relation to collection of taxes on lands of *non-residents*, and to provide for the sale of such lands," &c., which repealed the statutes of April 10, 1850, and April 6, 1850.

Lists and Publication, &c.—County treasurers are to compare lists of unpaid taxes received from collectors with the assessment roll, and transmit the same with their certificate and the collector's *affidavit* to the comptroller. Whenever any tax charged on lands returned to the comptroller is unpaid for two years from the first of May following the year in which the same was assessed, the comptroller shall make out lists of the lands charged, taxes, and interest, and transmit them to the different *town clerks* and *county treasurers*. §§ 4, 33, 34.

Publication by Clerks and Treasurers.—They shall each publish the list for ten weeks before the commencement of the sale in the county newspapers that are designated to publish the Sessions Laws in their county, and if none are designated, then in two county newspapers, or in those most generally circulating therein, to be designated by the treasurer. Errors in the advertisement are not to vitiate sales. The town clerk is to give notice at the town election meeting, that the lists are in his office for inspection. The omission of the town clerk to give notice according to the statute will not avoid a sale. § 40. So held in Pierce v. Hall, 41 Barb. 142.

Advertisement by Comptroller.—The comptroller is then to advertise that the lists are deposited as above, and the lands for sale at the Capitol, at Albany, once a week, for twelve weeks, in all the newspapers in the State designated by the County Supervisors for publishing the Session Laws (under the act of May 14, 1845). § 41.

Sale.—On the day prescribed, and from day to day, the comptroller is to sell sufficient of each parcel assessed to pay the taxes, interest, and charges, and the purchasers shall pay the purchase moneys within forty-eight hours after the last day of the sale, and in default thereof, the comptroller may sue, or, in his discretion, resell. §§ 44, 45.

Certificate.—The comptroller shall give to the purchaser a certificate in writing describing the lands purchased, the sum paid, and the time when he will be entitled to a deed. § 46. If the purchase money is not paid in three months from the conclusion of the sale, any sale may be canceled, and a new purchaser or the people substituted (§§ 47, 48), and a certificate issued. The change of purchaser is to be noted in the sales book. §§ 48, 49. See also same provisions, law of 1840, ch. 252.

Redemption.—The owner or occupant, or *any other person*, may redeem

within two years from the last day of sale, by paying the sum mentioned in the certificate, with interest at ten per cent. from date of certificate. § 50. Undivided and specific parts of lots may be so redeemed, and the conveyances made accordingly. §§ 53–56. A person *conjointly* assessed with another may *redeem* the whole, and recover the proportion of redemption money from the other (§ 57); no suit to be brought until after expiration of time to redeem. If the lands are not redeemed, a proportionate value of the lands sold may be recovered (§ 58); and see *post*, tit. 5, as to apportionment and redemption where lands have been sold, and there are joint interests. Every judgment so recovered is to have preference over mortgages and judgments executed since 23 April, 1823, if an entry to that effect is made on the docket. §§ 59, 60. As to the lien of *judgments* obtained under these provisions, *vide ante*, p. 677. The comptroller is bound to give a certificate of the amount due, otherwise, if the party is thereby prevented from redeeming, he will not be prejudiced. Van Benthuysen v. Sawyer, 36 How. 245; same case, 36 N. Y. 150.

Notice to Redeem.—The comptroller is required to give a specific notice for each county, six months before the expiration or the two years allowed for redemption, that unless the lands are redeemed by a certain day, they will be conveyed to purchasers. §§ 61, 62. The notice is to contain full particulars. So also in law of 1823, ch. 242. The notice is to be published once a week, for six weeks, in the county newspaper designated for publishing the Session Laws, or other two selected by the comptroller; the publication to be completed at least *eighteen* weeks before the two years' time for redemption expires. It must be published in the body of the newspaper. The publication must be fully completed as the law requires (3 Den. 594; 1 Com. 79), and a subsequent publication will not rectify. *Ib.* See also, as to notices prior to 1850, Bunner v. Eastman, 50 Barb. 640. If the redemption is prevented by any misconduct of the public officer through whom the redemption is to be effected, the title will not pass by the deed. 36 N. Y. 150, *supra*. Unless the notice is published as required at the time, the title is invalid, and will not be saved by any recitals in the deed. Westbrook v. Willey, 47 N. Y. 457; Bunner v. Eastman, 50 Barb. 639. And the lands must be sufficiently described. Sharp v. Speir, 4 Hill, 76. The time to redeem cannot be extended by law after the sale. Dikeman v. Dikeman, 11 Pai. 484. The deed takes effect back by "relation," for bringing trespass. Pierce v. Hall, 41 Barb. 142.

The Deed.—If no person redeems such lands within such two years, the comptroller shall execute to the purchaser, his heirs, or assigns, in the name of the *People of the State*, a conveyance which shall vest in the grantee, an absolute estate in fee simple, subject to taxes or other liens or incumbrances to the State. § 63.

No Title Passes, When.—If the tax had been paid, the deed passes no title. 3 Barb. Ch. 528; 18 Johns. 441; 15 Barb. 337; or if the lot was described by a wrong number or name. Dike v. Lewis, 4 Den. 237; Tallmann v. White, 2 Com. 66. The recitals in the deed are not proof of facts sufficient to give title unless made so by statute. Hoyt v. Dillon, 19 Barb. 644. The lands must be regularly assessed, and the collector's affidavit made, as to the assessment roll being correct, &c. Curtis v. Van Dyke, 15 Barb. 337; Tallmann v. White, 2 Com. 66. Sales to the comptroller or an employee, are void. Laws of 1855, ch. 427; Laws of 1862, ch. 285.

Form of Deed.—The deed would be good if not made in the name of the people. And see as to form of deed, 3 Barb. Ch. 528, 577; 9 Barb. 406. § 65. The deed is to be signed and sealed by the comptroller, and witnessed by the deputy comptroller, surveyor-general, or treasurer.

Presumptive Evidence.—§ 65. And shall thereafter be presumptive evidence that the sale and all other proceedings prior thereto, from and including the assessment, and all notices previous to expiration of the two years for redemption, were regular. Under the act of 1829, before the law of 1850, ch. 183, § 81, the comptroller's deed was *conclusive* evidence of regularity. *Vide* 2 Barb. 113; 1 Seld. 366; 2 Com. 66; also 50 Barb. 640, as to what it was conclusive of. By the act of 1850, § 20, the deed was made presumptive evidence of authority and of all proceedings prior to the sale. By Laws of 1860, ch. 209, where the party claiming is in possession, it is presumptive evidence, whatever the date of the deed. This would include a constructive possession, where there is actual possession of a part. Finlay v. Cook, 54 Barb. 9. By law of 1866, ch. 820, deeds executed under law of 1850, ch. 298, were to be presumptive evidence that the sale and proceedings prior thereto and notices within the two years were correct. Under the above law of 1850, the deed was not even presumptive evidence of the facts giving the comptroller authority to sell, but merely as to his acts. Beekman v. Bigham, 1 Seld. 366. It is held, in a sister State, that the legislature has no authority to make a tax deed *conclusive* evidence that the tax warrant was sufficient. Corbin v. Hill, 21 Iowa, 70.

Notice to Occupant.—The grantee, or his heirs or assigns, shall serve a written notice on any person occupying such land, within two years from the expiration of the time to redeem. The notice may be served personally, or at the dwelling of occupant, with one of the family of suitable age and discretion, and is to state in substance the sale and conveyance, the person to whom made, the consideration money and thirty-seven and one-half per cent. and the sum paid for the deed; and that unless paid within six months after the time of filing in the comptroller's office of the evidence of the service of the said notice, the said conveyance will become absolute. And no conveyance shall be recorded until the expiration of the said notice, and the evidence of the service of such notice shall be recorded with such conveyance. §§ 68, 69. This clause was substantially in Laws of 1813, 1819, 1823, 1830, 1836, 1837 and 1844, ch. 266. If no notice is given, the sale is void as to every part of the land sold. 5 Hill, 287; 3 Barb. 528; *vide* 4 N. Y. 577. An error in the notice would not vitiate. 9 Barb. 406. It cannot be waived by an occupant. 7 Wend. 148; 15 *Id.* 348; 16 *Id.* 550; 15 Barb. 337.

Notices to Occupants in City of New York.—As to notices to occupants and persons last assessed on sales for taxes and assessments in the city of New York, *vide* law of May 25, 1841, ch. 230; April 18, 1843, ch. 230; 1843, ch. 235; as modified or repealed by act of April 8, 1871, ch. 381, and 4 Sand. 50.

Redemption by Occupant or Deed to be Absolute.—The *occupant* may within the six months redeem as above, and the comptroller shall give a certificate thereof, which may be recorded in the book of deeds; otherwise, the *grantee* files an affidavit of the service of the notice within one month after service, the comptroller gives a certificate of the facts, and the conveyance to the comptroller's grantee becomes *absolute*. *Vide* 3 Barb. Ch. 530. §§ 70 to 73. The occupant or any other person may at any time before the service of such notice, redeem by filing in the office of the comptroller evidence of occupancy, and paying the above sums; and the receipt of the treasurer and comptroller's certificate shall be presumptive evidence that the redemption was correct. §§ 74, 75. A mere encroachment will not make an occupant. It must be substantial. 4 N. Y. 577, reversing 3 Barb. 360. The title does not vest under the comptroller's deed, until the notice has been served, and the six mouths expired. 3 Barb. Ch. 528; Hand v. Ballou, 2 Ker. 541. If land was

occupied at the time of sale, the occupant was entitled to notice. So held under the provisions of the Rev. Stat. and law of 1830.

Invalid Sales.—Provision is also made as to the canceling of invalid sales, and refunding of the money paid, in the above law of 1855.

Lost Certificates.—On proof of lost or unduly withheld certificate, the comptroller may issue the deed to the person entitled. Law of 1835, ch. 11; 1855, ch. 427, § 64.

Notice by Purchaser to Mortgagee.—By law of May 14, 1840, ch. 387; law of 1844, ch. 266; 1850, ch. 298, and of 1855, ch. 427, § 77, relating to lands sold for taxes throughout the State, no sale for a tax or assessment shall affect the lien of any recorded mortgage, unless written notice be given by the purchaser to the mortgagee, his representatives, &c., to redeem within six months after notice, or be barred, &c. By Laws of 1844, ch. 266, a memorandum had to be filed with the comptroller within two years from the sale, to entitle him to notice; otherwise his right to redemption was barred. The above provisions under law of May 14, 1840, were general in their application, and were repealed by § 114 of ch. 298, of 1850; but by § 112 of that act, it was provided that the provisions of the act of 1850 should not in any manner affect or apply to the city and county of New York, or the cities of Albany and Troy, Brooklyn and Williamsburgh. The act of 1850, ch. 298, and the law of 1855, ch. 427, had similar general provisions as to notices to mortgagees *in the State.* By law of May 14, 1840, ch. 387, and law of 1855, ch. 427, the term "mortgagee" was to include assignees and personal representatives, and "purchaser," assignees or personal or real representatives, § 80. Section 81 provides how the notice was to be served. A notarial certificate was to be presumptive evidence which might be recorded. By § 82, the notice was only to be served upon such persons as within two years from the sale, should file a memorandum of their mortgage with the comptroller. This § 82 was repealed by law of 1862, ch. 285, § 1. By law of April 18, 1870, ch. 280, the above § 77 of the law of 1855 was amended by adding that the notice might be given at any time after expiration of two years from the last day of sale. This same law also amended § 81 of the act of 1855, by providing that proof of service of the notice should be filed with the comptroller within one month after service. This same law of 1870 provides that a mortgagee or assignee whose mortgage or assignment is recorded, or their representatives, who shall have filed with the comptroller the notice required by law, may redeem after sale and within six months after notice given under law of 1855, ch. 427, *supra.* Provision is made as to the manner of redemption; and section 1 of ch. 285, of law of 1862, *supra*, amending ch. 427 of law of 1855, *is repealed.* As to the rights of mortgagees to redeem in the city of New York, *vide* laws of May 6, 1819, ch. 170; May 25, 1841, ch. 230; 1843, ch. 230, as amended. *Ib.* ch. 235; also law of 1871, ch. 381.

Act of 1855 *not to Apply to Certain Cities.*—§ 91 of the act of 1855 provides that the above provisions of the act, viz, of 1855, ch. 427, shall not apply to the city and county of *New York*, the city of *Albany*, the cities of *Brooklyn* or *Williamsburgh*, Kings county. The words "County Treasurer" were to apply to the city chamberlain of New York.

Repeal of Former Acts.—§ 92 of the above act of 1855, ch. 427, repeals the law of April 10, 1850, relative to taxes on lands of *non-residents*, and providing for the sale of land in the counties where they were assessed, and also repeals the act of April 6, 1850, as regards the publication of notices. But the repeal shall not affect taxes or sales for 1849, 1850, and 1851, 1852, or 1853, except §§ 30, 89 and 90 of the act of 1855, as to taxes of 1852 and 1853, nor proceedings on sales thereon, nor accrued rights

nor powers of county treasurers as taxes of 1852 and 1853, except as provided.

Deeds under Repealed Law of 1850.—By Laws of 1866, ch. 820, all deeds executed pursuant to law by the treasurer and county judge of any county, upon any sale under Laws of 1850, ch. 298, shall vest an absolute fee simple, subject to claims by the people of the State for taxes or other liens, and shall be presumptive evidence of the regularity of the assessments and other proceedings.

Taxes in Cities.—As to taxes and sales in the different cities, *vide* the various local acts applicable to each. Taxes and sales for draining swamp and marsh lands. As to these *vide* title 16, ch. 8, part 3, R. S. and laws of 1869, ch. 888.

TITLE IV. OF THE LIEN OF LOCAL ASSESSMENTS AND THE SALE THEREFOR.

Power of a State to Assess for Local Improvements.—The raising of money for local improvements by assessing a particular class of persons is held an exercise of the taxing power inherent in the legislature; and this power to tax implies the power to apportion the tax as the legislature sees fit. The legality of acts for this purpose has been well settled (*vide ante, p.* 33). It is in the discretion of the legislature also to provide that the whole or any part of the lands sold for charges imposed by law, be sold in fee or otherwise, and that the proceedings be conducted by judicial forms or through judicial tribunals.

The power so to take lands for public uses, results from the right of eminent domain, which is only restricted by the constitutional provision that just compensation in some form shall be made to the owner. The State may also delegate the power to take land, or to assess the owners of land benefited by improvement, in proportion to the amount of such benefit; and the justice of the assessment or the propriety of the improvement, is not a matter of judicial inquiry. On these heads, *vide* People v. Cravel, 36 Barb. 177; People v. Mayor of Brooklyn, 4 Com. 419; overruling 6 Barb. 209, and 9 Barb. 535. *In re* Church St. 49 Barb. 455; People v. Flagg, 46 N. Y. 401; and see fully *ante*, p. 33: *ante*, Title I; and Doughty v. Hope, 3 Den. 594; 1 Com. 79; Trustees N. Y. Epis. School, 31 N. Y. 574; Striker v. Kelly, 2 Den. 323.

Various provisions have been enacted by the legislature relative to assessments for improvements applicable to the different cities of the State. They are local in their nature and cannot be here reviewed. Only a review of the general principles of the intricate law on the subject, which is applicable, more or less, to different localities is here attempted.

An assessment for a local improvement is not a "*tax*" within the

meaning of a law providing for selling lands for *taxes*, and the provisions Art. 7, § 13 of the Constitution, as to the passage of the law. Sharp v. Speir, 7 Hill, 76; *in re* Ford, 6 Lans. 92; Sharp v. Johnson, 7 Hill, 99. On being confirmed it becomes a lien. Gilbert v. Havemeyer, 2 Sand 506. This is modified in many instances by local statutes. As to city of New York, *vide infra.* It would take preference over prior mortgages. Dale v. McEvers, 2 Cow. 118.

Assessments when Void—An assessment made by a body having no power to make it is a nullity, and not even an apparent lien. Haywood v. City of Buffalo, 14 N. Y. 534. If the assessment is not made according to the charter or authority of the corporation making it, it is void. 4 Hill, 76. But where assessors have jurisdiction of the person and subject matter, and parties make no objection, although the assessment is erroneous, it is not void, and it can only be reviewed by writ of error or *certiorari.* Swift v. City of Poughkeepsie, 37 N. Y. 511; Sanford v. Mayor, 33 Barb. 147. An assessment for a local improvement, or any award made without legal notice to the owner of the land, is void. Ireland v. City of Rochester, 51 Barb. 414; Jordan v. Hyatt, 3 Barb. 275. Any law imposing an assessment and taking lands in violation of the Constitution of 1846, art. 1, § 7, is void; that section providing, that "when private property is taken for public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than *three commissioners appointed by a court of record*, as shall be prescribed by law." House v. City of Rochester, 15 Barb. 517; Rochester Water Works v. Wood, 60 Barb. 137. But see *in re* Central Park, 51 Barb. 277. An assessment is void also if not assessed against the *owner* or occupant, when required by the law. Chapman v. City of Brooklyn, 40 N. Y. 372; Newall v. Wheeler, 48 N. Y. 486; Platt v. Stewart, 8 Barb. 493. Or if application not signed by a *majority* of persons designated by any law, or if assessment not made distinctly and severally against each owner and his land; or the lands are not sufficiently described; or the specified notice is not given; or the collector's affidavit made, ff the law so require. Sharp v. Johnson, 4 Hill, 92. Or if not certified by the assessors if so required. Platt v. Stewart, 8 Barb. 493. Or if illegal expenses are added in. People v. Yonkers, 39 Barb. 266. Or where notice is not published in certain newspapers to be designated as provided. *In re* Douglass, 12 Ab. N. S. 161. *Ib.* 46 N. Y. 42. See as to when such direction is maudatory only in certain cases, *in re* N. Y. P. Epis. School, 47 N. Y. 556. Or where notice of presentation of a report of commissioners is not made if required by the law. *In re* Ford, 6 Lans. 92; McLaren v. Pennington, 1 Pai. 102. Or where there has been no demand of the assessment if so provided by law. Striker v. Kelly, 2 Den. 323; Bennet v. Mayor, 1 Sand. 485. Or if publication of notice of redemption is not duly published. *Ib.* Or the affidavit of collector (if required) is not made. *Ib.* Sanders v. Leavey, 38 Barb. 70; Doughty v. Hope, 3 Den. 594; aff'd, 1 Com. 79. And all the assessors must act or it is void. Doughty v. Hope, *Ib.* But see *in re* Church St. 49 Barb. 455, as to this, and *ante*, p. 342; also *in re* Palmer, 1 Abb. N. S. 30. A ratification of a void assessment by a common council does not make it valid. Doughty v. Hope, 3 Den. 594; aff'd, 1 Com. 79. Where there is authority to sell a lot, an undivided half may not be sold. Jordan v. Hyatt, 3 Barb. 275. The legislature cannot by subsequent law legalize an invalid sale for assessments. Hopkins v. Mason, 61 Barb. 469; Sharp v. Speir, 4 Hill, 76; aff'd, 10 N. Y. 328. See also, 4 Hill, 92. The commissioners are confined to the land which the notice describes as required for the improvement. *In re* Central Park, 51 Barb. 277, and the whole extent of the land, required must be therein

stated. *Ib.* Any provision by which more land is taken for a street than is necessary therefor would be unconstitutional and void, unless by assent of the owner, direct or implied, *e. g.*, as by his accepting the award made. *In re* Albany St. 11 Wend. 149; Embury v. Conner, 3 Com. 511. After a report on a street opening is confirmed, the commissioners are *functi officiis*, and it cannot be altered or sent back for correction. *In re* Central Park, 60 Barb. 132. The objection that more than one lot of a person is included in one assessment is not a valid ground for vacating, nor that expenses are charged on all lots assessed, but the assessment of each lot per foot. *In re* Anderson, 60 Barb. 375; nor that the assessors have not fairly distributed the expenses, unless there is palpable evidence of fraud or misconduct. Lyon v. City of Brooklyn, 28 Barb. 609.

Paving and Regulating Streets.—Assessments may be made before the work is done or afterwards. 25 Wend. 696; Doughty v. Hope, 3 Den. 249; affirmed, 3 Com. 511; 5 Barb. 49; 4 Sand. 109; 8 Barb. 95; 4 Seld. 120; 2 Sand. 341; 8 N. Y. 120; 1 Abb. N. S. 449; 31 How. Pr. 16; *in re* Lewis, 51 Barb. 83; Howell v. City of Buffalo, 37 N. Y. 267.

City of New York.—As to recent acts for collection of taxes and assessments and water rates, and as to the review thereof, and the opening of streets, *vide* Laws 1853, ch. 579; 1857, ch. 677; 1859, ch. 302; 1861, ch. 308; 1862, ch. 483; 1869, ch. 920; 1870, ch. 366; 1870, ch. 383; 1871, ch. 381; 1871, ch. 573; and also *infra*, this title. By law of April 8, 1871, ch. 381, taxes and assessments therein, and Croton water rents, and the interest and charges laid or heretofore laid, shall be a lien on the real estate assessed superior to all other charges. No assessment is to be deemed confirmed so as to be a lien until the title thereof and date of confirmation shall be entered, with the date of entry, in a record to be kept in the office of the clerk of arrears. Provision is also made as to notice and collection of taxes, and the sale of lands; and other laws on the subject are recalled.

Review and Remedies of Parties Unlawfully Assessed.—Erroneous or illegal assessments may be reviewed on *certiorari* by the Supreme Court. Suits in equity will only be allowed in certain cases (for which see *ante*, p. 740). Such actions would lie only to prevent a multiplicity of suits, or where the assessment is an apparent valid lien, and cloud on the title, and the invalidity does not appear upon the face of the proceedings, so that extrinsic evidence is necessary to show its invalidity. And an injunction will be allowed, where such an assessment is void, to prevent its collection. But, as a general rule, courts of equity will not interfere where there has been an error of judgment, but they may where there has been unfairness or impartiality.*

* In Mann v. City of Utica (44 How. 334), it is held that an action will lie to restrain a sale under an illegal assessment, but that a subsequent act is valid making the assessment a legal one; and in People v. Brooklyn, that proceedings will not be vacated on *certiorari* for an irregularity which does not go to the entire assessment. 14 Abb. N. S. 115.

Hayward v. City of Buffalo, 14 N. Y. 544; Woodruff v. Fisher, 17 Barb. 224; Wiggin v. Mayor, 9 Pai. 16; Whitney v. Mayor, 1 Pai. 848; Scott v. Onderdonk, 14 N. Y. 9; *vide* Heywood v. City of Buffalo, 14 N. Y. 534; Ireland v. City of Rochester, 51 Barb. 414; Allen v. City of Buffalo, 39 N. Y. 386; Hatch v. City of Buffalo, 38 N. Y. 276; Tilden v. Mayor, 56 Barb. 340; and see *ante*, p. 740. A suit in equity and injunction will lie where only a nominal sum has been awarded. Baldwin v. City of Buffalo, 29 Barb. 396. Money wrongfully paid may be recovered back. Chapman v. City of Brooklyn, 40 N. Y. 372; Bennet v. Mayor, 1 Sand. 485. An action to cancel and annul a certificate of sale upon a void assessment is maintainable, when the defect does not appear upon the face of the proceedings. Newell v. Wheeler, 48 N. Y. 486. As to when property owners would be estopped, even if the assessment were invalid, by adopting the improvements, *vide* People v. Curtis, 45 How. Pr. 289. Proceedings of assessors cannot be reviewed as to the merits of the proceedings. Patterson v. Mayor, 1 Pai. 114; and see *supra*, tit. 1, p. 739. The validity of certificates under assessment sales may be determined under proceedings to determine claims to real property. *Ante*, p. 706. Burnham v. Onderdonk, 41 N. Y. 425. By law of April 11, 1842, ch. 154, feigned issues might be awarded to test the validity of assessments ordered to be paid by order of Court of Chancery out of lands directed to be sold. Amended by law of 1855, ch. 327, as *supra*, p. 246.

City of New York.—By law of 1858, April 17, ch. 338, assessments for local improvements may be vacated for fraud or legal irregularity on application to a judge of the Supreme Court, who may vacate the assessment, and it shall be canceled. The land may be re-assessed at the expense of the city. By law of 1868, ch. 193, the judge might enforce the cancellation by attachment. The order is to be entered in office of the clerk of the Supreme Court, and a certified copy filed with the officer having charge of the assessment lists. As to the construction of this section, *vide* 19 How. 317, 518; 17 Abb. 321; 19 How. 518. It must be actual fraud. 12 Abb. 118; 23 How. Pr. 118. See act to prevent fraud, &c., law of 1862, ch. 483, as to street openings in said city. The act of 1858 held to apply to local improvements, and not street openings. *In re* Brown, § 7, 1864, 1st dist. Inquiry as to whether the work was well or ill done cannot be made under these acts. *In re* Lewis, 51 Barb. 82. As to what is an "irregularity" within the meaning of the above statute of 1858, ch. 388, *vide in re* McCormack, 60 Barb. 128; *in re* Dunning, *Ib.* 377; *in re* Lewis, 51 Barb. 82. By law of 1870, ch. 383, § 27, on assessments for local improvements in New York city, if there was fraud or irregularity, the assessment might be vacated or modified, but not vacated for proceedings to collect the same by sale, but the sale might be set aside. The law of April 14, 1859, ch. 302, repealing act of April 16, 1857, authorized the review and collection of assessments by *certiorari* in said city. As to objections to an assessment, and their presentation to the board of revision in the city of New York, *vide in re* Dunning, 60 Barb. 377.

TITLE IV. MISCELLANEOUS.

Taxes paid by Tenants or Occupants.—By Revised Statutes, part 1, ch. 13, title 5, § 4, where the tax on any real estate shall have been collected of any occupant or tenant, and any other person by agreement or otherwise ought to pay such tax or any part thereof, such occupant, &c., may recover the same by action, or retain it out of rent due or accruing on the land taxed.

Certificate, &c., may be Recorded.—Every conveyance *or certificate* exe-

cuted by the comptroller on sales of land for taxes, may be recorded in like manner as a deed. *Ib.* § 10.

Sales for Taxes for Opening Roads.—All sales and redemption of *land for taxes on opening and improving roads*, shall be conducted in the manner before prescribed (under non-resident sales). § 11.

Insolvent Discharges.—*Insolvent discharges* do not affect taxes to the State. 2 Rev. Stat. p. 39, 1st ed.

Apportionment of Taxes where Several Persons have Joint Interests in Lands.—See fully as to this, *ante*, p. 246, and Norsworthy v. Bergh, 16 How. 315; Powers v. Barr, 24 Barb. 142.

Apportionment between a Dowress and other Owners.—*Vide ante*, p. 247, and Linden v. Graham, 34 Barb. 316. Any portion of the property may be sold to satisfy a tax on another portion. 24 Barb. 142. As to sales made of lands held by tenants for life and remaindermen, *vide* 16 How. Pr. 315. The statutes on this subject held not to apply to cases where the tax has been paid. *Ib.*

Indian Lands.—As to sales of same for taxes, *vide* 23 N. Y. 420, referring to the various statutes.

Taxes against Owners of Rents Reserved in Leases for Life or over Twenty-one Years. By Laws of 1846, ch. 327, and 1851, ch. 371, such rents are taxable, and a warrant issued by a county treasurer to a sheriff to collect a tax against such owners of rents on lands in his county, shall be a lien on and bind therein real and personal estate from the time of *actual levy*, and the sheriff shall proceed as under an execution under a justice's judgment. In case of the warrant being unsatisfied, the property may be sequestered by the Court of Chancery. The same provisions are made applicable against *non-residents of the United States* to whom are owing debts by resident of a county for the purchase of any real estate, and these warrants are a lien on their real estate, and it may be sold as under execution. *Ib.* See law of 1858, ch. 357, as to mode of assessment. By law of June 18, 1873, ch. 809, this law of 1846, ch. 327, was amended. See as to such taxes, Cruger v. Dougherty, 1 Lans. 464.

Certificate of Taxes Due.—These are to be given by the comptroller when required, and the taxes may be paid to the State treasurer. Laws of 1850, ch. 427.

Undivided Interests, &c.—Parties may pay tax on undivided interests when the tax is levied in gross, and it shall be a lien on the residue only. *Ib.* And taxes may be paid for one year and not for others, *Ib.*, and overcharge deducted.

Roads, &c.—Application for county taxation on opening or improving a road, or for any local purpose, must be preceded by six weeks' notice before the session, published in a paper in each county. 1 R. S., 1st ed. p. 155; 7 Barb. 421.

Comptroller's Books Evidence.—Extracts from the comptroller's books certified, are made evidence. Law of 1849, ch. 180.

Surplus Moneys after Tax Sales.—As to actions to recover them, *vide* 2 R. S. 1st ed. p. 555.

Special and Local Provisions.—Special provision has been made by various statutes and charters, applicable to various cities and towns in the State respectively, for which the laws applicable to each locality will have to be consulted.

Covenants in Leases to Pay Taxes, &c.—Under such covenants the lessor may recover amounts of unpaid taxes from the lessee, without first paying the tax. Miller v. Knox, 48 N. Y. 232.

Taxes and Assessments as between Dowress and Heirs.—*Vide ante*, p. 169.

CHAPTER XLVII.

MECHANICS' LIENS AND OTHER LIENS ON REAL ESTATE.

TITLE I. MECHANICS' LIENS.

These liens given by statute on lands and buildings, for the better security of mechanics and others erecting buildings or supplying materials, are of comparatively recent creation.

Different acts have been passed applicable to the different counties and cities of the State; for the details reference will have to be made to the acts themselves, a memorandum of which is appended, as also references to decisions mostly applicable to the county of New York, but which in most cases also apply elsewhere.

Railway Bridges, &c.—By law of 1870, ch. 529, mechanics' liens were extended in all cases so as to cover railroad bridges, and tressel work and structures connected therewith. By law of May 13, 1872, ch. 669, all the acts were to extend to wharves, piers, bulkheads, and bridges and materials therefor.

City of New York.—The first act was passed April 20, 1830. Another act was passed April 29, 1844, both of which were superseded by the provisions of the act of July 11, 1851, ch. 513, which repeals them, § 13. That act was in its turn repealed by the act of May 5, 1863, ch. 500, to take effect on July 1, 1863; amended 1868, ch. 79; restricted in certain particulars by law of 1866, ch. 572. As to what the lien attached to under the law of 1851, *vide* Hauptman v. Catlin, 20 N. Y. 247; Ernst v. Reid, 49 Barb. 367. As to when the lien operated under law of 1851, Carman v. McIncrow, 3 Ker. 70; under law of 1844, Loonie v. Hogan, 5 Seld. 435. As to the word "owner" under the law of 1844, McDermott v. Palmer, 11 Barb. 9; overruled, 9 N. Y. 435; reversed, 8 N. Y. 483. No lien lies on a public building under a contract with a public officer. Povllon v. Mayor, 47 N. Y. 666; Brinckerhoof v. Board of Education, 37 How. 499; 6 Abb. N. S. 428. No lien can be placed if the owner has parted with his interest before filing. Ernst v. Reid, 49 Barb. 367. Unless the conveyance were made in fraud of the lien, Meehan v. Williams, 36 How. 73. In an action to foreclose the lien under the law of 1863, ch. 500, the lien must be continued as required, or the action will be dismissed, and the lien cease. Grant v. Vandercook, 57 Barb. 165; O'Donnel

v. Rosenberg, 14 Abb. N. S. 59; Huxford v. Bogardus, 40 How. 94. See also as to the action to foreclose, Hallahan v. Herbert, 11 Abb. N. S. 326; and as to the effect of the lien and foreclosure on those having equitable interests, and as to the effect of the lien upon lands under contract, and as to the effect of the law of 1863 on liens theretofore created. As to cessation of the lien, *vide* also 19 Abb. P. 132; 6 Abb. N. S. 172. As to continuance of the lien under an order, showing that the continuance must be docketed, Barton v. Herman, 8 Abb. N. S. 399. The person for whom the building was erected, and who contracted to pay, held the owner, 12 Abb. 129. A lien cannot be created as against a person not having the fee. A purchaser is not bound to notice any lien filed against a former owner after his grantor's deed was recorded. Noyes v. Burton, 17 How. 449; same case, 29 Barb. 631.

Effect of the Lien.—A conditional interest is not the subject of a lien. 10 Abb. 179.*

Sale Without Notice.—A sale of land in good faith before the notice of lien is filed prevents the acquisition of any lien. 4 E. D. Smith, 721; 3 *Ib.* 677; 1 Daly, 338. Also where a general assignment has been made. 2 E. D. Smith, 594, 616.

Apportionment of Lien.—Where a lien is apportioned on different houses, *vide* 1 Daly, 396; 16 Abb. 371.

Sub-Contractor and Purchaser.—Adverse rights of sub-contractor and purchaser. 1 Daly, 338.

Contractor and Sub-Contractor.—The owner may show that nothing is due the contractor, and defeat a sub-contractor's lien. 1 Daly, 18; 28 How. Pr. 142. But not after the notice of lien is filed. Schneider v. Hobein, 41 How. P. 232.

Subsequent Liens.—A judgment and sale of owner's interest cuts off subsequent liens. 16 Abb. 371.

Rights of Purchasers.—Where the contractor has transferred his interest, a sub-contractor has no lien against the purchaser, if transfer made before the sub-contract. 1 Daly, 338. A purchaser not having actual knowledge of the lien, is not bound by a lien filed against the grantor of his grantor after the deed giving title to the latter was recorded. 29 Barb. 631.

Mechanics' Liens in Kings and Queens Counties.—An act relative to the security of mechanics in Kings county was passed June 8, 1853, ch. 335; and also an act, April 14, 1858, ch. 204, applicable to the counties of Kings and Queens. By an act of April 24, 1862, ch. 478, p. 947, the first act was repealed, and also the latter act so far as the same applied to the counties of Kings and Queens, and a new act passed in their place, providing for the security by lien of mechanics and material men in those counties. As to the discharge under act of 1862, *vide* Mushlitt v. Silvermann, 50 N. Y. 360.

Counties of Westchester, Putnan, Dutchess, Rensselaer, Rockland, Chemung, and the Town of Newburgh.—As to mechanics' liens in these counties, *vide* law of April 16, 1852, chs. 108 and 384, repealing an act of April 14, 1851, so far as it related to the counties of *Westchester, Rensselaer,* and *Putnam. Vide* next act of 1854, ch. 402, *infra.* As to law of 1852, ch. 384, *vide* Blauvelt v. Woodworth, 31 N. Y. 285; also Ombory v. Jones, 19 N. Y. 324.

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* See a recent case in N. Y. Common Pleas as to the continuance of the lien where the court has acquired jurisdiction in special proceedings founded on it, and where the lien ie but for a portion of the debt, and as to the liability of a married woman's interest. McGraw v. Godfrey, 1873.

Westchester, Putnam, Oneida, Rockland, Courtland, Orleans, Broome, Niagara, Livingston, Otsego, Lewis, Orange, and Dutchess.—An act was passed relative to these counties by laws of April 17, 1854, ch. 402, repealing other acts affecting those counties. This act of 1854 was amended by law of 1871, ch. 188, as to the duration of liens and the judgment. See as to effect of the amendment on prior liens, Trim v. Willoughby, 44 How. 189. By law of 1872, ch. 691, this act of 1854 was extended to the county of Erie, except city of Buffalo.

Law of 1854.—As to the effect of the amendment of the law of 1854, by law of 1869, *supra*, as to prior claims, Moore v. Mausert, 5 Lans. 173. As to what interest may be attached under said law of 1854, Copley v. O'Neil, 1 Lans. 214. As to continuing liability of owner when he has paid his contractor in full, Thompson v. Yates, 28 How. 142. The commencement of an action does not extend the lien beyond a year. People v. Hall, 3 Lans. 136.

Richmond County.—Laws of 1846, ch. 184, and laws of 1850, ch. 160. *Vide* act of 1858, ch. 204, *infra*.

Onondaga.—Laws of 1864, ch. 366, p. 856; amended 1866, ch. 788. See Lumbard v. The Syracuse, &c., R. R. 64 Barb. 609.

Town of Kingston.—Laws of 1845, ch. 205. *Vide* act of 1858, ch. 204, *infra*.

City of Buffalo.—Laws of 1851, ch. 517. *Vide* act of 1858, ch. 204, *infra*.

Ulster County.—Laws of 1851, ch. 169, and of 1852, ch. 384. § 14, *vide* act of 1858, ch. 204, *infra*.

Saratoga Springs.—Laws of 1857, ch. 663. *Vide* act of 1858, ch. 204, *infra*.

Cities in the State, and Certain Villages.—For all cities (except New York), and the villages of Syracuse, Williamsburgh, Geneva, Oswego, Auburn, Canandaigua, laws of 1844, ch. 305. *Vide* also act of 1858, ch. 204, *infra*. This act of 1844 was amended as to the details of procedure by act of April 29, 1871, ch. 872, which latter act repealed act of July 11, 1851, ch. 517. By act of April 14, 1858, ch. 204, § 1, it is enacted as follows: "*All the provisions of the act entitled, An act for the better security of mechanics and others erecting buildings in the counties of Westchester, Oneida, Cortland, Broome, Putnam, Rockland, Orleans, Niagara, Livingston, Otsego, Lewis, Orange, and Dutchess*, passed April 17, 1854, are hereby extended and declared to be applicable to all the counties of this State, *except the city and county of New York and the county of Erie.*" § 2. All acts and parts of acts *inconsistent* with this act are hereby repealed. By the law of 1869, ch. 558, the law of 1854 is made no longer applicable to the counties of Kings, Queens, New York, Erie, and Onondaga, and the act of 1869 is made applicable to them. By law of 1873, ch. 489, this latter act is amended in many particulars. By law of 1870, ch. 194, the county of Rensselaer is excepted from the operation of the above act of 1869, ch. 558. It will therefore be observed that many of the provisions relative to mechanics' liens in counties of this State, other than New York and Erie, are changed by this law of April 14, 1858; and see a further change, law of 1873, *infra*.

Dockets subject to the County Courts.—By laws of 1845, ch. 235, the docket of all liens and judgments under the mechanics' lien acts of ch. 220 and 305 of laws of 1844 are made subject to the control and jurisdiction of the county courts of each county, the same as judgments therein.

Repeal of all Prior Laws with certain Exceptions.—By law of May 12, 1873, ch. 489, all prior acts as to all *counties* in the State, except Kings, Queens, New York, Erie, Onondaga, and Rensselaer, are repealed, saving rights and proceedings under existing laws.

TITLE II. OTHER LIENS ON REAL ESTATE.

The following, among the minor liens on real estate, are to be noted:

Forfeited Recognizances.—By law of May 7, 1844, ch. 315, art. 4, forfeited recognizances (in the city of New York), filed by the district attorney, with a certified order of the court forfeiting the same, in the office of the county clerk, shall be of the same effect as a judgment record. Such judgment shall, in good faith, be a lien on *the real estate* of the persons entering into such recognizance, from the time of filing and docketing the same. Executions may be issued thereon. By laws of 1845, ch. 229, these judgments are made subject to the control of the New York Common Pleas. By laws of 1855, ch. 202, the provisions of the Code are made applicable to forfeited recognizances. By § 30, subd. 12, of Code, county courts may remit forfeited recognizances, as may courts of Common Pleas. As to when the district attorney should prosecute them in New York county, law 1839, ch. 343. The provisions of the Rev. Stat. as to recognizances are in part 3, ch. 8, tit. 6, art. 2. §§ 43, 44, and 45 are repealed by the act of 1839. This act of 1839 makes the provisions of the Rev. Stat. applicable to New York county. Those statutes allowed judgments and execution to be entered on breach of the recognizance. 2 R. S. 1st ed. 485. By law of 1861, ch. 333, they are to be filed with the clerk of any court within ten days after the same are taken. See law of 1865, ch. 563, as to extension of powers to special sessions in New York city. See also as to certain recognizances therein, law of 1860, ch. 508.

Notices under Unsafe Building Act as a Lien in the City of New York.—Under an act of April 19, 1862, ch. 356, amended by law of 1863, ch. 273, *relative to the construction of buildings*, it is provided that notice of certain penalties for violating the act are to be served, and filed in the county clerk's office in the city of New York, in the same manner and with like effect as a "*lis pendens;*" and any judgment recovered upon the suit named in the notice so filed shall be a lien upon the property described therein *from the time of such filing*, and may be enforced against said property in every respect, notwithstanding the same may be transferred subsequent to the filing of said notice. See also law of April 20, 1871, ch. 625, providing that judgments for penalties shall be a lien on the premises from the time of filing notice of *lis pendens;* repealing laws of 1866, ch. 873; 1867, ch. 939; 1868, ch. 634.

Bonds of Collectors and Receivers of Taxes.—Various laws affecting various localities, and often obscurely created in the tax laws or charters of cities and villages, establish such bonds when filed as liens on real estate in the respective counties. Some of these are below indicated. By the Rev. Stat. also (part 1, ch. 11, tit. 3) bonds of collectors of towns and their sureties on being filed are made liens in the counties where filed. Laws of 1823, p. 400; 1 R. S. p. 826.

City of Rochester.—Law of April 12, 1860, ch. 295.

City of Buffalo.—Law of April 7, 1859, ch. 162.

City of Brooklyn.—Law of April 17, 1854, ch. 384.

City of Oswego.—Law of February 27, 1855, ch. 38; amended, April 16, 1860, ch. 463.

City of Poughkeepsie.—Law of March 28, 1854, ch. 90.

New York City.—By laws of 1843, p. 314, ch. 230; 1849, ch. 187; 1851, ch. 148, such receivers and their deputies are to execute bonds with two sureties. They are liens on the real estates of them and their sureties

when filed in the office of the comptroller of the city. Prior to said act of 1843, by law of 1838, April 14, p. 184, bonds of *collectors* of taxes in said city were made liens from the time of filing with the county clerk. The office of collector was abolished by the above law of 1843, taking effect April 1, 1844. By law of 1873, p. 1171, ch. 767, the act of 1843 is amended, so that bonds of the receiver and his sureties shall be a lien on all the real estate held jointly or severally by the receiver or his sureties within the county at the time of filing, unless real estate of the value of the bond is specified in it, owned by the sureties or one of them, in which case the lien shall be on the real estate so described, and on all the real estate of the receiver, and on no other, and shall continue until satisfied, but not to exceed ten years from the expiration of the term of office of the receiver, unless an action on the bond be pending. The deputy receiver is also to give bonds with sureties. Former bonds are to be deemed no longer a lien unless suit has been brought within ten years as above, or is brought within six months after passage of the act. If accounts are settled, certificates may be filed to that effect, and the bonds canceled.

City of Auburn.—March 21, 1848; amended, April 18, 1859.

Albany.—March 23, 1850, ch. 86.

City of Syracuse.—March 3, 1857, ch. 63.

Westchester County.—Such bonds are also liens upon lands of tax receivers for the towns of *Morrisania and West Farms, Westchester County*, when filed with the clerk of said county. Law of 1862, April 21, ch. 393; also, those of the receiver of the town of *East Chester*, law of March 27, 1865, ch. 217; also, for the town of *Yonkers*, law of April 21, 1865, ch. 506; amended, law of 1866, ch. 335; also, for town of *Westchester*, by law of March 28, 1868, ch. 73; amended, law of 1871, ch. 738; also, for town of *Greenburgh*, law of March 25, 1868, ch. 59.

Morrisania.—1870, ch. 465.

Rensselaer County.—Law of 1870, ch. 651, as to town of Lansingburgh.

Jury Fines.— See *ante*, p. 671.

Tribunals of Conciliation.—*Vide ante*, p. 671.

Bonds of United States Officials.—These in many cases are made liens on real estate.

Liens for Draining Swamp Lands.—Rev. Stat. tit. 16, ch. 8, part 3; 1869, ch. 888; 1871, ch. 43, exempting the county of Westchester from the provisions of the act of 1869; also, 1873, ch. 243.

Department of Health in the City of New York.—By law of May 25, 1867, ch. 956, judgments in favor of this department, if so stated on their face, are to be liens against property abated as a nuisance. The lien may be removed by order of a judge of the court on eight days' notice. By law of 1873, ch. 383, the sanitary department was substituted for the department of health.

CHAPTER XLVIII.

MEMORANDA FOR SEARCHING FOR CONVEYANCES, INCUMBRANCES, &c., IN THE VARIOUS OFFICES.

As has been before seen, the various conveyances through which title to land is made are matters of record in the offices of the respective clerks of counties (or registers, if any), where the land is situated. Every purchaser should require a complete title of *record;* and where conveyances are not recorded, or otherwise made matter of notice, a *bona fide* purchaser or incumbrancer for value, is protected against them. The chain of title having been ascertained by inspection of the records, for a period satisfactory to the examiner, written requisitions for searching the records for any prior or other conveyances, or for incumbrances, or liens of record that may affect the property, are usually issued to the clerks of the various offices, on the responsibility

of whose certified returns the conveyancer is supposed to rely. By this means much of the labor of the examination of titles is saved to the professional man, and delegated to experts. The liability of the clerks or experts of the various offices, who may undertake to make searches for liens, in their respective departments, for negligence, that may cause damage to parties employing them, is well established. They are also liable for the acts or omissions of others whom they may delegate to do the work.

Vide Morange v. Dix, 44 N. Y. 315.

A brief digest drawn from the subject-matter of the antecedent pages showing the periods for which search should be made for the respective instruments or liens, is here given.

Deeds, Mortgages, and other Instruments.—These are usually searched for a period of at least forty years back, against parties holding or having held any estate or interest in the land, from the *date* of the conveyance *to* them to the *time of record* of the conveyance *from* them respectively.

Deeds with a Defeasance or Given as Security, should be searched against under mortgages. *Ante*, p. 539, 586.

Married Women.—As under the law of this State, even prior to the Laws of 1848–9, married women could pass title without the husband, *ante*, p. 75, searching in the husband's name alone might not be sufficient.

Powers.—Donees of powers, from the time of the instrument creating them. *Ante*, p. 335. Where a power is given to executors, the heirs, as well as the deceased, or his executors, should in some cases, be searched against, as the heirs may take subject to the exercise of the power. *Ante*, pp. 270, 273.

Powers of Attorney.—The *principal*, and not the attorney, is searched against.

Deceased Person.—Searching to the *time of the decease* of a person would not be sufficient, as the deed might be recorded subsequent to his decease. The search should be continued against such person and his heirs or devisees as the case may be, down to the *record* of the deed from the heirs, or devisees, or executors, if these last have a power to sell. A search against the deceased by name will include a search against his executors, although it would not always include the *testamentary trustee*, who may act without qualifying as executor. *Ante*, p. 446. It is safer to search against the executors *nominatim*, as they might have conveyed as executors, without naming their testator. It will be necessary also to see whether there was a change of the testamentary trustee.

Trusts.—Those having the *legal* estate are alone searched against. It will be necessary to see if there was a substituted trustee, so as to continue a search against him. Conveyances by trustees are usually indexed also under the name of the beneficiary, as well as in the name of the trustees.

Assignments of Mortgages.—These are usually noted in the margin of the record of the mortgage by the register or county clerk; but it is not safe to rely on such notation, as the mortgage may be assigned under a general assignment, or other general instrument, which may have been recorded with conveyances, or the notation may have been delayed or omitted. *Vide ante*, p. 587.

Leases.—Those for three years and upward are to be recorded. *Ante*, p. 581.

Wills.—Where a title is passed through a supposed intestacy, wills of real estate should be searched for in the surrogate's office of the county, from the decease of the party having the estate until at least four years thereafter; and a longer period is desirable to avoid contingencies of infancy, marriage, insanity, &c. *Vide ante*, p. 425.

Mortgages to United States Loan Commissioners.—From January 10, 1837, the date of the passage of the law creating the commissioners, *ante*, p. 610. They are also to take the mortgages given under acts of 1792, and 1808, to the Loan Commissioners. *Vide ante*, p. 613. The mortgages under the old acts are probably all paid off or otherwise settled. By law of 1851, ch. 286, their office in the city of New York is to be in the register's office, and in other counties in the court houses, the books to be kept at the county clerk's office. Law of 1837, ch. 641; *ante*, p. 610. It is usual to search by name only, or with a brief memorandum of the property, as well as the name of the party. The searches are made by the commissioners or their delegates. Although their books are deposited by law with the registers or clerks of counties, these functionaries are not allowed access to them, as the books are kept under lock and key, at least in the county of New York.

Assignments under United States Bankrupt Act.—From June 1, 1867, the date of the taking effect of the Bankrupt Act. The search should be from that time, for the commencement of bankrupt proceedings against the party, as the assignment relates back to that period. *Ante*, p. 631. The search is generally made for "petitions, orders, and decrees in Bankruptcy," with the clerk of the United States District Courts; and the search should be in the district where the bankrupt resides, and also where he carries on his business. The assignment itself is to be recorded with the registry of deeds where the land is situated, within six months after its execution. *Ib.*

Notices of Lis Pendens and Foreclosure by Advertisement.—From April 17, 1823, in the county clerk's office where the land is situated, during the time the party has held the property. If before the amendment of 1858, the search should be down to the record of the *deed resulting from the suit.* And even since that amendment, and the amendment of 1862, it is more desirable to search until that period.

Notices of Foreclosure by Advertisement.—By law of April 9, 1857, ch. 308, such notices, which are in the nature of a *lis pendens* notice, have to be filed with the county clerk.

Insolvent Assignments.—These were first filed in about 1754, in the county clerk's office of the place where they were executed. Pp. 626, 627.

Appointment of Trustees of Absent, &c., Debtors.—These are to filed with the *county clerk.* The appointment vests the trustees with the estates of the debtor from the first publication of notice of their appointment. *Ante*, p. 628. These provisions were embraced in the law of March 21, 1801, re-enacted in 1813. *Vide* 1 Rev. Stat. p. 157. There appears to be no orders appointing trustees filed in the county clerk's office in New York county before November 15, 1831.

General Assignments.—From April 13, 1860, in the office of the clerk

of the county of the residence of the debtor at the date of the assignment. It has been held, however, that these assignments do not operate as notice to purchasers unless recorded among *conveyances*, in the register's or county clerk's office. *Vide ante*, p. 630.

Mutual Insurance Notes.—From March 23, 1836. This is an obscure and generally unknown lien on the building insured, created for the benefit of the Madison Mutual Insurance Company, in favor of deposit notes when filed with a county clerk, and appears to be still in force. *Ante*, p. 550.

Judgments (*County Clerk*).—Judgments, being a lien as against third parties for only ten years, the search is to be in the different *county clerks'* offices where the lands are located, against all or any of *those who have held the land within that past period*, down to the time of the record of the conveyance *from* them respectively. *Ante*, pp. 668, 671.

Extension of Lien.—If the judgment is suspended by *injunction* or *appeal*, the time of the lien is extended for the period it is suspended, if a notice to that effect is filed and noted. *Ante*, p. 672.

Deceased Party.—It is not necessary to search against a party for judgments entered after his decease; for although, under the Rev. Stat., a judgment may be entered within a year of a party's death, if he died after verdict, such a judgment would not bind real estate. *Ante*, p. 677.

Trustees.—A personal judgment would not be a lien on the technical legal estate of a trustee, therefore they are not searched against.

Judgments (*United States*).—These are to be searched for in both the offices of the clerk of the circuit and district courts of the district, against all parties having held the property situated in the *district within ten* years back from the time of the search. *Vide ante*, p. 675, as to the time of searching in these courts. These judgments may also be liens for other counties than those of the district, if docketed with the county clerks therein in any part of the State. *Ante*, p. 676. Before 1840, they were considered liens in any part of the State, without filing the transcript. *Ib.* Many examiners search beyond ten years, as the land may have been sold under a judgment prior thereto; and *vide ante*, p. 676.

Orders for Receivers under Proceedings Supplementary to Execution (*County Clerk*).—From April 23, 1862. Against all parties, from the time of acquiring down to the conveyance of the land by them. Before May 4, 1863, the search is to be made with the county clerk where the judgment roll (or a transcript from a justice's judgment) is filed; after that period, with the clerk of the county where the real estate is situated, or where the judgment debtor resided. *Ante*, p. 693.

Sheriffs' or Marshals' Certificates (*County Clerk*).—Sheriffs' certificates were first filed under the law of 1820 (*ante*, p. 317) with the county clerk where the land is situated. They are to be searched for against all parties holding since that period, from the time they respectively *acquired the property until at least the time when they parted with it respectively*. It seems desirable that the search should be continued for at least a year beyond a conveyance *from* the party, as the land might have been sold under a *judgment* obtained *before* the party acquired the property, and the sale made under that judgment *subsequent* to its conveyance by him. In that case neither the judgment search nor the return to the search for sheriffs' certificates might show the lien or sale under it, if the usual judgment search only were made, and the search for certificates were made *only* to the time of the transfer by deed. Many examiners continue their search for these certificates down to a period *ten years* from the time of the conveyance by the party searched against. *Marshals' Certificates* of sales in the United States' courts were also filed with county clerks from about the same period.

Mechanics' Liens.—These liens are regulated by the laws for the respective counties. In the city of New York and other localities the lien ceases *ipso facto* in a year from filing, unless continued by order. In the city of New York the clerk is to search against the *property* if so required, without reference to individuals. The notices of lien are filed in the *county clerk's* office where the land is situated. The earliest lien law was passed April 20, 1830 (relative to New York city), and laws were subsequently made for different counties at the times given. In practice it is usual to search back for these liens for at least *two* or *three* years from time of search.

Forfeited Recognizances (*City of New York*).—These were filed with the county clerk of New York, by *law of May* 7, 1844, as judgment liens. In other counties judgments may be obtained on them.

Unsafe Building Notices (*City of New York*).—By act of April 19, 1862, these became liens on being filed with the county clerk under certain circumstances, as stated.

Bonds of Collectors and Receivers of Taxes.—These are to be searched either in the offices of the county clerk, or comptroller, or county treasurer, as indicated in the acts applicable to various localities.

Taxes and Assessments, and Water Rates.—These are made liens from the time of their confirmation, unless otherwise provided. Searches are to be made for them with the various local officers or others who have charge of the proper *bureaus*, and who also search for *sales* made by reason of the said liens. Further, as to said liens. Taxes on lands of residents of towns are held to be payable from the time the assessor's rolls are made up. Rundell v. Lakey, 40 N. Y. 513.

Taxes to the United States have preference as a lien on the estate of a deceased person to all other liens; and *other* taxes have a preference over all other liens or claims. 3 Rev. Stat. p. 174.

Liens in favor of Department of Health.—*Ante*, p. 755.

Jury Fines as Liens.—*Ante*, p. 671.

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