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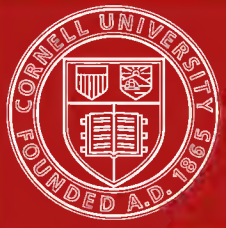

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THE

REAL PROPERTY LAW

OF THE

STATE OF NEW YORK

Being Chapter Forty-six of the General Laws

(PASSED MAY 12, 1896; CHAPTER 547, LAWS OF 1896)

WITH ALL THE AMENDMENTS THERETO

TOGETHER WITH

THE REPORT OF THE COMMISSIONERS OF STATUTORY REVISION THEREON, THE NOTES OF THE ORIGINAL REVISERS OF THE REVISED STATUTES ON THE ORIGINAL ACTS, AND THE FULL TEXT OF ALL THE STATUTES CODIFIED IN THE REAL PROPERTY LAW

ALSO

AN INTRODUCTION, NOTES OF JUDICIAL DECISIONS, AND COMMENTS, EXPOSITORY AND HISTORICAL, ON THE TEXT OF THE STATUTES

BY

ROBERT LUDLOW FOWLER

COUNSELLOR AT LAW

NEW YORK
BAKER, VOORHIS & COMPANY
1899

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1899

JAMES B. LYON
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PREFACE.

This volume contains, among other material, not only all the text of the existing statute of this State, designated "The Real Property Law," but also the entire text of all the other statutes from which that most important act is taken. It was believed by the editor that it would conduce to a more orderly arrangement of the subject-matter, and easier reference, if the various sections of The Real Property Law might be uniformly placed at the head of successive pages, thus subordinating the prior repealed statutes and the mere notes and comments of the editor to the text of the far more important and living law. The paramount importance of The Real Property Law itself seemed to justify such an arrangement, if it were feasible. The place of emphasis is always the place of beginning, and each section of The Real Property Law is in reality treated by the editor as the subject of an independent chapter of this work, and, therefore, should be placed at the head of a page. To be sure, some of such chapters are necessarily most brief, and it would have been improper from their nature to extend them. Consequently, and not infrequently, a succession of short pages, very disturbing to the publishers, is one result of the editor's arrangement. But to the mind of the editor the appearance of a volume of this character is of less consequence than its utility, and so he ventured to persist in his own plan of arrangement, without regard to custom or the æsthetical canons of the printer's art. How far the arrangement actually adopted will be justified by the legal profession, only their use of the book can ultimately determine.

Of one thing at least the writer feels entirely confident — that the reader will, if he fairly examine the subject-matter, admit that the arrangement actually adopted was not designed to enlarge the volume beyond its normal limits. The arduous labor of the editor, which is so readily apparent, ought at once to acquit him of any motive to extend the work beyond the barest limits dictated by professional and technical necessity.

The editor feels also assured that the generous reader will, upon reflection, not complain that many of his notes and comments, contained in this work, dwell upon the early stages of the law of

real property. Without an exact knowledge of the history of a statute, the younger lawyer, at least, is poorly equipped for argument on even the "last case" involving it. Aside from this consideration, the constant reference to the origins of the law of real property in late cases, it is confidently submitted, justified the writer in adopting the historical method of exposition. In this connection, it has been well said by Bryce, in his masterly and probably greatest work, The Holy Roman Empire [p. 3], "to explain a modern act of Parliament, or a modern conveyance of lands, we must go back to the feudal customs of the thirteenth century." No abler justification than this can be adduced.

The reader can readily find in this one volume the text of The Real Property Law, the text of the original statutes displaced by that law or consolidated in it, and also all the existing reports and notes of the framers of all such laws. This collection of original matter, in itself, it is thought, will result in a considerable saving of professional labor and time. The reports and notes of the several revisers to the Legislature, together with the original text of The Law of Real Property, are contained in the appendices at the end of this volume.

As this volume is the result of prolonged labor on the part of the editor, it is perhaps natural for him to express the hope that it may, in some small measure, fill the place it was designed to occupy — that of a ready-reference book. If it do this, the writer will feel abundantly repaid for what cannot but prove to him an otherwise unprofitable, though not wholly unpleasant, task.

NEW YORK, *January*, 1899.

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INTRODUCTION.

As the modern law of real property, among most English speaking peoples, is composed of common as well as statute law, it necessarily subsists on very ancient foundations, for the common law relating to real property is the oldest portion of our jurisprudence. It is, therefore, conceived that a preliminary dissertation, treating of several features of the archaic law of land and inculcating the leading principles of conveyancing at different epochs, may form no irrelevant introduction to even the most modern of all statutes concerning real property. Statutes can never be read aright without reference to the antecedent state of the law. The law of the present is so inextricably blended with past institutions and with a historic terminology that we are forced, whether we will or not, constantly to recur to original sources.

That reader of The Real Property Law[1] who has no need to refresh his recollection upon matters of legal history or upon the principles of conveyancing, can derive but little benefit, it is feared, from a perusal of this Introduction. It is not intended for such persons.

The present law of real property in the State of New York is but a statutory modification of the former English law relating to lands and estates therein. The history of limitations of estates in lands marks successive stages, mounting like steps of a stairway from an ancient foundation to the present modern and statutory structure. Mr. Butler[2] in his day counted five stages from the feudal settlement, and to these we in this country have to add others, denoting the results of a transmigration of a people, the occupation of a new country, the establishment of a subordinate colonial government, a revolution in that government, the reforms consequent upon such a great organic change and, finally, statutory innovation. It is not necessary or even possible to advert to all these stages in detail, but simply to point them out and to suggest briefly the bearing which they have on the law of convey-

[1] Chap. XLVI of the General Laws of New York; chap. 547, Laws of 1896.

[2] Charles Butler, Esq., of Lincoln's Inn, the author of many of the notes contained in the latest edition of Coke on Littleton and one of the leading conveyancing counsel in England.

ancing in our own day. The reader can then readily resort to the appropriate authorities, and where these are lacking to original sources, if he may choose to pursue the inquiry further.

All the English law of real property, at the time it was made the law of New York in the year 1664, was referable to three great causes: (I) The feudal settlement, giving rise to the common law; (II) Equity, founded upon the civil or canon law; (III) The national renaissance, or awakening, in the reign of King Henry VIII, which was attended by statutes of great significance, materially altering the common or archaic law of land. The rise of the original limitations of estates in lands will be found to correspond very closely to the epochs indicated. Subsequently to the period of the Reformation came a fourth epoch, embracing the period of the Civil War in England, the abeyance of the monarchy and the express abolition of the feudal or military tenures. The restoration of the monarchy was followed by great activity in the American colonies; colonial constitutions were then regularly formulated by the officers of the Crown. From these general instruments of colonial government, it is obvious that in legal theory all the land in the colonies became *terra regis* or Crown land held by tenants of the Crown by the reformed socage tenure.[1]

When the American Revolution broke out the monarchy was at first put in abeyance in so far as the socage tenure was concerned, and the newly-organized State was then informally substituted for the Crown in all its prior legal relations to land.[2] When independence of the Crown was at last achieved, the theory that the State, or the people as a political corporation, had been substituted for the Crown in its old legal relations to land was formally acted on by the Legislature. Lands were next made allodial, and finally, by the Revised Statutes of 1830, the remnant of the rules of the common law which had feudalism for their base, were abrogated, and a uniform system of rules was applied to land. But as these new rules were more often mainly statutory extensions of principles having theretofore a limited application, they generally have a legal relation back to the origin of the particular principle. Thus it is impossible to break away from an endless chain of cause and effect in any unfinished system of jurisprudence.

[1] In other words, the law of land in the new country reflected the actual condition of the English law on a like subject.

[2] People v. Trinity Church, 22 N. Y. 44; Seneca Nation v. Christie, 126 id. 122.

Again, "political societies" are in reality governed more by thousands of little institutions and rules of remote origin than by the prominent evidences of governmental authority. So it is with the law of land; it has its origin in the remote past, while only its final form is due to recent legislation. With this general explanation, let us refer more definitely to the causes which have been most potent in shaping the law of New York relative to land.

It is generally conceded by law-writers that the law of land now used in England and the States derived from her Empire is inexplicable without reference to the law of feudal tenures.[1] Although feudalism has long ceased to have any power as a system, it still furnishes us with many legal doctrines and much legal terminology. Unfortunately there is no very comprehensive and modern history, from a purely legal point of view, of feudalism. Mr. Butler's account of the sources of feudal law,[2] used freely by Chancellor Kent, contains references to the best sources accessible in his day. The excellent generalizations of the lay historians who have since written on the subject, Sismondi, Guizot, Hallam, Robertson, Palgrave, Stubbs, Freeman, and the German scholars, Gneist, Waitz, Schmid, Sohm and Roth, are too abstract for the purposes of the practicing lawyer even when such generalizations are not divergent or even irreconcilable. Thus the English-speaking lawyer still finds most that he requires for his investigations in the old Anglo-juridical sources, such as Littleton, Selden, Madox, Coke, Spelman and Wright, for these authors write of the feudal law at the precise point where it touches modern law.

In this connection it is to be observed that the historical theories of mediæval common lawyers cannot be disregarded by modern lawyers, for their theories are those which entered into the actual solution of legal doctrines. It is the fashion of the modern lay historian too often to deride the technical lawyer's history,[3] without taking account of the fact just denoted. The judicial historian seeks only the *consensus* of lawyers, at some given date, on some institution pregnant with juridical results; whereas, the function of the lay historian is purely abstract, sociological or institutional. For example, what lawyer will

[1] 1 Haynes on Conveyancing, 6; Kent, Com. III, 487; Bryce, The Holy Roman Empire, 3; Ency. Britannica, article on Feudalism, 9th ed.; Black. Com. II, 44.

[2] *Horæ Juridicæ*, *Subsecivæ*, 73 *et seq.*

[3] *Cf.*, for example, Freeman, Norman Conquest, V, 246, 248, 309, on Blackstone's history.

pretend that the history, contained in the Institutes of Gaius, can be compared for accuracy with the profound historical deductions of a Niebuhr or a Mommsen. Yet, Gaius is of far greater value to the civilians, for it tells them not the eternal principle, but that concrete rule which men of law acted on at a given and fructifying date. So the history of a Coke or a Blackstone on tenures, while it may not precisely square with the profounder investigations and deductions of a Freeman or a Stubbs, has the advantage to lawyers of being that very theory which actually led to judicial and statutory improvements in the law of tenures. In other words, the history of the lawyers has been accepted by agents of government and acted on, while the history of the layman is yet to be treated as evidence only in the regular fashion and according to the rules of evidence. This suggestion will, perhaps, at least, serve to show the use actually made of the history contained in the commentaries of the older and the mediæval common lawyers, and that it is important in law, even if inaccurate, because it presents the *consensus* of the older judges and lawyers during a given epoch and on purely legal institutions.[1] Such history, therefore, furnishes a guide whereby a statute may be safely construed.

When it happens that the oracles of the common law, such as Coke and Blackstone, disagree upon some historical principle (and that this does happen occasionally is not to be ignored),[2] the lawyer will quickly recognize that here there is a place for original inquiry, in all the light that the documents or the lay historians may shed upon it.

For the purposes of the common lawyer, the laws of England divide themselves into three great periods, the ancient, the middle and the new; thus corresponding to the *jurisprudentia antiqua, media et nova* of the civilians. The ancient jurisprudence, in so far as it affects land, may be said to embrace the period beginning with the feudal settlement under the Conqueror and ending with the enforcement of uses by the chancellor in the reign of Henry V (1413–1422). The period of the middle jurisprudence will extend thence to the formal abolition of the military or feudal tenures (1660); while the modern jurisprudence will embrace all

[1] The notion contained in this paragraph about the value of the writings of legal historians, is discussed from other points of view by Tomlin, in the Preface to his edition of "Lyttleton on Tenures."

[2] Pollock & Maitland, Hist. Eng. Law, I, 310.

the period between the restoration of the monarchy under Charles II and the present day. These periods are, however, always changing, for in a living jurisprudence the modern law rapidly merges into that which is obsolete ; while the obsolete soon blends with the archaic. Who can doubt that, in the endless vista of time, even existing jurisprudence will form part of the *jurisprudentia antiqua* of future generations? Yet how imperceptible are the actual gradations and demarcations between the periods! How impossible it is in practice to ignore the most remote period all schools of English-speaking commentators have admitted in writings which are now, from their excellence, a part of the great body of existing law.

Chancellor Kent began his Commentaries on the American Law of Real Property with an account of feudal tenures, because he deemed it impossible to explain the law of real property without some reference to a system which still furnishes in our own day, not only the definition of estates in land, but the very law regulating the quantity and the quality of dominion which we now enjoy over definite areas of land.[1] It is to be observed in this connection that Mr. Butler has pointed out that in England the law of feuds, or feudal estates, developed on lines of its own. He dwells on its isolation and its comparative independence of the foreign feudists.[2] While this is generally true, there is reason to believe that it is somewhat overstated and that many points in the English law of feuds or fiefs are identical with the rules prevailing in other feudal countries. Thus, as Mr. Butler himself admits, the "Coutumier de Normandie" bears close relations to the feudal jurisprudence of England,[3] while the *libri feudorum*,[4] though relating to Lombardy, are at one, in many particulars, with the early feudal law of England.

It is not often necessary in litigated cases to explore the most remote recesses of English jurisprudence, although not a few cases in our reports actually turn on the primitive common law, while a multitude of others examine with great profundity the origin of particular doctrines of the common law. In a large number of instances, as Mr. Justice Story has pointed out, so-called doctrines of the common law are, however, very modern.[5] But

[1] Comm. III, 487–514.

[2] Introduction to 13th ed. of Coke on Litt. xvii.

[3] Butler, *Horæ Juridicæ Subsecivæ*, 92.

[4] *Vide infra.*

[5] Story, Eq. Juris. I, § 646.

the law of land constitutes an exception to Mr. Justice Story's observation, for its basic principles depend wholly on the local or Anglican law of feudal estates, as finally settled in the reign of King Henry II.[1] Without entering into the disputable and purely antiquarian learning, which few persons (and the present writer is not one) have sufficient opportunity or knowledge to illustrate, let us confine our consideration briefly to those established principles of the English law of feuds which have a practical relation to the present law of real property in New York, and particularly to the department of conveyancing.

Feudalism has been said, in substance, to be a complex word, not well adapted to the use of lawyers, who imply by it only that feature which relates to land tenure.[2] As we well know, land tenure may exist without feudalism, or rather tenure may survive the social and political organization and the personal relations, together known as feudalism. It is unnecessary for the conveyancer to consider the historic forces which led to feudalism, or to determine whether it was of Teutonic or of Roman origin, or whether, as is far more likely, it was not of composite origin.[3] We may discard all this and begin with the period when the feudal establishment was firmly founded in England, and when most "feuds" or tenant-rights over lands had become estates of inheritance, whatever else they may have been in the earliest stages of the feudal law.[4] When such an estate was inheritable by law, or by the form of the gift, the question alluded to by Glanvill[5] must naturally have arisen: "Did it belong to the donee alone, or to the donee and the heir presumptive, conjointly?" An objection founded on this question is said to have been first interposed to the alienation of the feud, or tenement, by the ancestor alone.[6] A consequence of this subsequent legal unity of ancestor and heir is shown by the old maxim, "*filius est pars patris*," quoted by Sugden in his notes to Gilbert on Uses, and taken from a case in the Year Books.[7]

[1] By the "*Leges Henrici II.*"

[2] Pollock & Maitland, Hist. Eng. Law, I, 43, citing Waitz.

[3] See preface to Stubb's Select Charters, 14; Spence, Eq. Juris. I, chaps. VI to X; Freeman, Norman Conquest, I, 62.

[4] It is much doubted whether English feuds, or feudal estates, were not always granted to the donee and "his heirs." Spence, Eq. Juris. I, 44, 46; Pollock & Maitland, Hist. Eng. Law, I, 44, 213; Kent, Comm. III, 494, 495, 496.

[5] Lib. vii, c. 1.

[6] Dalrymple on Feudal Property, 94, 95, 96 (3d ed. Lond. 1758).

[7] Sugden's Gilbert (3d ed.), 150; 4 Hen. VI, 19b, pl. 6.

It has been already suggested that the *jurisprudentia antiqua* of England may be said to extend to the reign of Henry V (1413-1422). This reign is chosen by the present writer as a *terminus ad quem*, or boundary of the old law, because then it was that the lord chancellor first gave a judicial remedy to the *cestui que use*, and through this triumph of uses the nature of the legal, or "feudal," or common-law estate was indirectly subverted. Prior, indeed very long prior, to this reign, an estate in lands had by the laws of England come to possess the following characteristic: it was held, mediately or immediately of the king, by the bond recognized in law as tenure. Either the king, or some chief lord holding of the king, was the lord of every estate in England.

Tenure may be said to fall into three general divisions or classes: (I) Chivalry; (II) Socage, and (III) Frankalmoigne.[1] Each class comprised several sub-kinds or species, which it is quite unnecessary for us to consider. They are very familiar through works of authority.[2] The lord of an estate holden by tenure in chivalry possessed a seigniory, the nature of which is sufficiently denoted by the feudal rights of homage, fealty, escheats, forfeitures, reliefs, primer seisins, aids, wardship and marriage, all described in the classic pages of Blackstone, and by many other writers on the law of real property.[3] The lord of a fee, or estate, holden by tenure in socage, possessed a seigniory of a non-military nature; in other words, a seigniory of a less highly feudalized character.[4] Many incidents of socage tenure are undoubtedly of pre-Norman origin. The essential characteristic of socage tenure is that the tenant holds by certain services for all manner of services, so that the service be not knight service.[5] Tenure by frankalmoigne, or free alms,[6] as it never existed in this coun-

[1] No. I and No. II were lay tenures; No. III a spiritual tenure.

[2] Madox, Baronia Anglicana; Pollock & Maitland, I, 207-389; Challis, 8, 15. The precise time when this classification became wholly comprehensive is uncertain. It was certainly accurate in Littleton's day.

[3] *Cf.*, the legal historians, Reeves, Crabb, Digby, Pollock & Maitland; and also the original sources, Glanvill and Bracton.

[4] The socage tenant was free from liability to render military service, and from the incidents of wardship and marriage.

[5] Litt. § 117.

[6] Although saved by stat. 12 Car. II, chap. 24, I have never met an instance of this tenure in the province of New York. It may have, however, existed in the West Indies, the Maritime Provinces, or in Canada. The Crown could create it undoubtedly

try, need not be here considered.[1] The American lawyer rarely has to deal with the tenure by frankalmoigne, except in connection with his reading of very old English cases, bearing on the law of charities.[2]

The obligations of a tenant by either of the lay tenures indicated, of course corresponded with the rights of the lord. The nature of the estate of the tenants, during the long period mentioned is, on the other hand, sufficiently denoted by their rights to seisin or possession, and to legal protection of such possession in the established courts of the realm. But the principal rights connected with the tenant's estate are related to the power of alienation, and to a succession by his heirs. The nature of these rights are the chief subject of the lawyer's inquiry at the present day. It will suffice to point out here that when both rights were firmly established, estates in lands had already attained a form and substance in the common law very important to modern jurisprudence. Thenceforth the struggle, both political and legal, could only be one to augment the rights of the tenant at the expense of the feudal seigniory. It is a curious fact in this connection that in the march of time, not only did the once inferior tenure (for socage tenure was usually the tenure of persons of the lower rank), supplant the higher forms, but that the rights of tenants of leasehold estates (which, as estates, are long posterior to the feudal settlement), became in this country the *norm* or pattern of all legal rights connected with land.[3]

The primary authorities upon the law of estates in England, during the period embraced in the *jurisprudentia antiqua*, are the Justiciar, Glanvill, and the commentator, Bracton. The ages of these writers have recently received much illumination from the great work of the learned Professors, Maitland and Pollock.[4] Glanvill has the distinction of being the first writer upon the subject of the feudal jurisprudence of England,[5] having written in the reign of Henry II,[6] or only a century after the Conquest.

[1] See a discussion of tenure by frankalmoigne in People v. Van Rensselaer, 9 N. Y. 334, 335; Jackson ex dem., etc., v. Sample, 1 Johns. Cas. 231, 236.

[2] It may, perhaps, be permissible for me, in this connnection only, to refer to my Essay on Charitable Uses, pp. 17–19 (N. Y. 1896).

[3] *Vide infra*, this Introduction.

[4] Bracton's Note Book, Maitland: "History of English Law before the time of Edward I."

[5] *Tractatus de legibus et consuetudinibus Angliæ.*

[6] Hist. Eng. Law, Pollock & Maitland, I, 146; *cf.* 8 Reports, Coke's Preface, and Preface to Beame's Translation of "Glanville," p. xvii.

But as his treatise deals mainly with remedies and practice questions and only obliquely with the law of estates,[1] it is now much less cited in legal controversies than the commentaries of Bracton, who wrote in the reign of Henry III. (1216–1272).[2] Bracton deals much more extensively and in detail with the laws and customs of England. His work has been called "the crown and flower of English mediæval jurisprudence."[3] No one who will take the trouble to consult the text of Glanvill or Bracton with attention, can fail to see the bearing which it has upon the modern jurisprudence of England and of this country. But as Glanvill's treatise owes little to the Roman law, of which Bracton is textually full, he is higher evidence than Bracton as far as his text goes, although the text of neither author is now entitled to be regarded as authority in a court of law, unless supported by decisions.[4] Fortunately decisions are not lacking within a brief space after the epoch of these authors. The Year Books begin seven years after the Statute *De Donis*, or in 1292 (reign of Edward I).[5] Having now briefly indicated the primary authorities concerned with the ancient, or the common-law, jurisprudence of England, we are prepared to pass to the further consideration of those features of estates in lands which proved permanent elements in English and in Anglo-American law.

The supremacy of the Crown, in respect of all landed estates, is the distinguishing mark of English feudalism. It undoubtedly dates from the year 1086 and the meeting on the plains of Salisbury, when it was enacted that all men, whether tenants of the Crown or not, should take the oath of fealty to the king.[6] This supremacy of the Crown of England accounts for the doctrine of the common law "that all the land in England was either in the

[1] Glanvill is much used by Hallam in his Essays on the Feudal System, and with fine results.

[2] The reader will find in the Publications of the Selden Society, Volume 8, an interesting comparison of the texts of Azo and Bracton.

[3] Pollock & Maitland, Hist. Eng. Law, I, 185.

[4] Stowel v. Lord Zouch, 1 Plow. 353; Blundell v. Catterall, 5 B. & A. 268. I have seen Bracton quoted in the New York Reports without reference to this distinction and, therefore, note it.

[5] Chancellor Kent says they begin in the reign of Edward II (*vide* Comm. I, p. 480); but he never saw the earlier books, only lately accessible in this country through the publications of the Rolls Series. There are occasional references to the Year Books in the New York Reports; *e. g.* 9 N. Y. 334; 16 Johns. 384, 393, 405.

[6] Freeman, Norman Conquest, IV, 472; Glanvill, Lib. ix, c. 2.

hand of the king himself or held of him by his tenants *in capite*."[1] By a natural extension, this doctrine was applied to the colonies of England,[2] including the province of New York.[3]

The essential right of a tenant of an estate in lands, during the first period of English jurisprudence, has been already stated to be related to the power of alienation.[4] Let us, then, briefly refer to the growth of the tenants' power of alienation. The precise starting point of this power is said to be in dispute,[5] Coke maintaining that "the liberty and power, originally vast, was gradually circumscribed;"[6] whereas Blackstone postulates the "original inalienability" of the fief or feudal estate.[7] Without entering into the merits of the alleged controversy between the oracles of our law, it may be suggested that the historical theory adopted by Cruise in his work on Fines and Recoveries, is entitled to attention. He states, in substance, that immediately after the conquest, it was the Norman policy to render feudal tenements inalienable, and that the feudal doctrine on non-alienation was very strictly enforced. But when the Norman power and dynasty was firmly established, it was no longer good policy for the Crown to contribute to the feudal power of the great nobility, and that then a Crown policy, favorable to tenant alienation, set in.[8] Notwithstanding the discussion of this historical question in many adjudicated cases in this country, it may be pointed out that subsequent to the Conquest, and prior to the year 1217, there is little exact evidence concerning the precise extent of the tenant-right of alienation. What there is, is largely statutory. *Magna Charta* of 1217 only provided, in substance, that no man should sell more of his land than that the residue might be sufficient to answer the services due to the lord of the fee.[9] This law obviously recognizes the tenants' power of alienation, to some extent, and also that feudal consequence of a partial alienation which is known as sub-infeudation; a system of

[1] Challis, 4; Black. Comm. II, 59.

[2] Mitchel v. United States, 9 Pet. 748; Martin v. Waddell, 16 id. at p. 426.

[3] Jackson ex dem., etc., v. Ingraham, 4 Johns. 163, 182; People v. Livingston, 8 Barb. 276; People v. Clarke, 10 id. 120, 141; People v. Rector, etc., Trinity Church, 22 N. Y. 44, 46.

[4] *Supra*, p. 8.

[5] Pollock & Maitland, I, 310; *sed. cf.* Butler Intd. to 13th ed. Co. Litt. xviii.

[6] Co. Litt. 43a.

[7] Comm. II, 71, 72.

[8] Cruise, Fines & Recoveries, II, 3 (3d ed., Dublin, A. D. 1787).

[9] *Magna Charta* (ed. 1217), ch. 39. This act is given *in extenso* in Coke's 2d Inst. 1–78.

alienation wherein the last grantor stands as mesne lord to his vendee,[1] and also as tenant to his old feudal superior, the bond being theoretically unbroken, although the remedies of the chief lord, *dominus capitalis*, may be purely real or *in rem* — a very important factor in the development of the law of feudal property.

It was stated that the accepted legal history of the tenants' original right to alienate their feudal estates in England is not altogether satisfactory. The evidence is at best extremely meagre, and most legal historians have been content with a reference to a passage in Coke's Second Institute,[2] or with passing generalities derived from the *libri feudorum*[3] which have no precise reference to English feuds. The best evidence attainable is inferential and largely derived from the text of the Statutes *De Donis* and *Quia Emptores*.[4] Even the scientific historians, such as Stubbs and Freeman, shed little light on the early exercise of this right or power, while the legal historians until recently only buttress each other with a system of cross-references to Coke and each other which would be amusing were the subject of less interest to the law of property. It would be highly presumptuous here to attempt to unravel a problem so dependent on profound research and the most exalted scholarship. Yet, with this explanation, certain obvious inferences may be tolerated in view of their reference to the existing and modern authorities, and in view also of the importance sometimes attributed by the courts of New York to the common law of England prior to the Statutes *De Donis* and *Quia emptores terrarum*.[5]

If we start with the provision of the 1217 edition of *Magna Charta* already noticed,[6] and assume a natural tendency on the part of the feudal lords to insist on conditions which must have been implied or expressed at the origin of their tenants' estates — a position quite conceivable in view of the known reciprocal feudal obligations of the lord to defend and warrant the tenants' possession[7] — we are at least prepared in good com-

[1] Called tenant in demesne.

[2] 2d Inst. 65–67.

[3] Printed at the end of vol. III. *Corpus Juris Civilis*, ed. *Fratrum Kriegeliorum*.

[4] The great work of the professors, Pollock and Maitland, does not extend to the passage of the Statute *Quia Emptores*, 1290. They speak with much reserve on the subject of alienation before 1290. What they do say is a great advance of their predecessors.

[5] *Vide*, *e. g.*, Anderson v. Jackson, 16 Johns. 382, 404, 425; People v. Van Rensselaer, 9 N. Y. 291, 334; Van Rensselaer v. Hays, 19 id. 68, 72.

[6] *Supra*.

[7] Glanvill, L. ix, c. iv.

pany to conjecture the nature of some struggle which must have led to the Statutes *De Donis* and *Quia Emptores*. That there were before these statutes conditions connected with the creation of the tenants' rights over land cannot be doubted. The earliest charters extant in England are full of conditions[1] which are known to be the remote parents of uses, trusts and covenants running with the land as well as of those rights at a later day known as "common-law conditions." It was the diverse nature of the original donations of land *sub conditione* which no doubt ultimately led to a classification of fees or estates. But in the days of Glanvill and Bracton fees had not been subjected to classification.[2] All tenements were simply free or non-free, and this classification was wholly connected with the *status* of the tenant, rather than with the nature of his estate. No precise deductions concerning the extent of the earliest tenant-right of alienation can, however, be drawn without a resort to some hypothetical definition of the earliest normal type of feud or fee. It is common, though far from authorized, to assume that Littleton's definition of an English fee simple, *feudum simplex*, although made four centuries later, embraced the most extensive tenant-right known before the Statute *De Donis*, and then to explain that statute by a desire on the part of tenants to acquire a fee of the most liberal character. Such are the shifts of even an exact science, in the absence of the desired evidence. The definition of Littleton, unquestionably true in his day, thus enables the legal historian to assume with Coke that a fee simple originally conferred certain power of alienation and the right of succession *ab intestato*, and that out of this fee simple came all other estates known to the later common law. This method of writing a history of tenant-right is, of course, satisfactory only in so far as it is sustained by contemporary evidence. It is apt to be most misleading history where it is wholly inferential.

If the lords insisted upon the fulfillment of conditions contained in feudal donations of land, and particularly on that one providing that where land was granted to a man and the heirs of his body, or heirs by such an one his wife, it should revert to the feudal donor, in case the heirs of the donee failed, it would be also natural to assume that the tenants resisted the claim. It is always

[1] *Vide* Thorpe, *Diplomatarium Anglicum Aevi Saxonici*, *passim et* Sharon Turner, Hist. Anglo-Saxons, II, appendix IV, "Anglo-Saxon Landed Property;" Statute *De Donis*, cap. 1.

[2] Glanvill, L. ix, c.ii; Bracton, f. 207.

assumed by law writers, despite the later maxim, *nemo est haeres viventis*, that a feudal donation to A. and the heirs of his body was originally treated as one on condition, and that birth of issue fulfilled the condition, and thenceforth that the tenants' fee was free of all conditions, or, in other words, *feudum simplex*.[1] The best evidence of the existence of this state of things prior to 1285 is the first chapter of the Statute *De Donis*, which Lord Coke treated as conclusive. The professors, Pollock and Maitland, marshal other documentary evidence, although precisely at the most interesting point of the inquiry — the action of the judges in interpreting such conditions favorably to the tenant — there appears to be no definite reference to the authorities.[2] Thus, the lawyer of to-day must still adhere for his authority to the recital of the Statute *De Donis*, and in so doing he will possess the undoubted advantage of being in the company of Coke and Blackstone.

The statute of Westminster 2d, cap. I, commonly called the "Statute *De Donis*,"[3] was passed in 1285, and obviously for the purpose of enforcing conditions contained in allotments or grants of territory, and thus enabling the lords of the land to profit by the reversion or escheats on the failure of the right heirs of the tenant. Its ultimate effect was to raise a class of estates intermediate between a fee simple and an estate for life, called an "estate tail," which as Littleton says was wholly by force of this statute.[4] The effect of this statute upon alienation was for a time, or until the year 1472,[5] to circumscribe the power of tenants in tail to alienate their tenements. It had no relation to those estates which were without conditions, now called fees simple.

The next statute affecting the tenant's power of alienation was passed five years later, or in 1290, and was directed to the practice of alienating lands by the process called sub-infeudation. This statute of Westminster 3d,[6] called, "*Quia emptores terrarum*," from the three first words of the statute, was passed in the interest of the feudal superiors, as by sub-infeudation they in some instances were deprived of the fruits of feudal tenure.[7] The statute provides that it shall be lawful to every freeman to sell at his own pleasure

[1] And see Anderson v. Jackson, 16 Johns. 382, 425.

[2] Hist. Eng. Law, II, 17, 18.

[3] 2d Inst.

[4] § 13.

[5] The year of Taltarum's case, enabling alienation by tenants in tail.

[6] 18 Edw. I.

[7] See the text of the statute itself and Van Rensselaer v. Hayes, 19 N. Y. 68, 72.

lands or part of them so that the feofee shall hold the same lands or tenements of the chief lord of the fee.[1] This enactment gave the *coup de grâce* in England to alienations by the process called sub-infeudation. Henceforth the right of free tenants (not being tenants *in capite* of the Crown) to alienate their tenements is clear. This statute has been thought to have had no reference to the King's tenants (tenants *in capite*), who were, however, specially enabled by the statute *de praerogativa regis*,[2] now called apocryphal.[3] The Statute *Quia emptores* certainly had no reference to those who held by unfree tenure, or who did not possses the *status* of free men at the time of its passage or adoption.

From the year 1290, when the Statute *Quia emptores* was enacted, until the reign of King Henry VIII, there was no great statutory change in the legal relation of the lord of the fee and the tenant, for during that whole period every occupier's possession of land was only a tenancy; the King being the sole allodial proprietor. In view of this fact, the nature of estates in land by the law of England may be said to have assumed definite form and shape in the first period, or that one prior to the judicial enforcement of uses in the days of Henry V. But in so long a period of time as the four centuries prior to King Henry V, the growth of legal conceptions was certainly not stationary. A strictly feudal estate under the Norman dynasty (1066–1154) developed into an estate less highly feudalized under the Plantagenets (1154–1399). Yet in looking back on the entire period from so great a distance of time, it is not inaccurate to group the widely different days of both Glanvill and Bracton, and to include even the time of which Littleton wrote, for the system of tenures treated by him extended back to the feudal settlement, although in Littleton's own day feudalism was, no doubt, in a declining stage. In legal theory it remained dominant, but in practice it was being subverted without being formally abrogated.

The time when Littleton was writing his great work on Tenures has long been regarded as the proper point to describe as a whole the development which estates in lands had then attained to in the law of England. We are by this course enabled to add to the treatises of Glanvill and Bracton the authority of the Year Books,[4]

[1] Coke's 2d Inst, 500.

[2] 17 Edw. II, cap. 6; Black. Comm. II, 289; Lewis, Perpetuity, 14; People v. Van Rensselaer, 9 N. Y. 291.

[3] Pollock & Maitland, Hist. of Eng. Law, I, 316.

[4] The official reports of cases from the reign of Henry III to the reign

and to profit by the commentaries of Littleton, which may be said to crown the completed edifice of Anglican feudalism just as Glanvill and Bracton serve to mark the earlier stages of the same system.

Although Littleton's work was probably not published until later, it was undoubtedly written in the reign of Edward IV,[1] and is, therefore, entitled to be regarded as indicating the state of the common law in the reigns immediately preceding, including that of King Henry V, when uses were first regularly recognized by an established court of the realm. Until a very recent day Littleton's was the first treatise given to a student of the common law, concerning real estates.[2] Littleton is still a work of the highest authority in the courts of New York.[3] Treated as a merely historical document, it is entitled to precedence in an orderly perusal of authorities bearing on the law of real property.

While considering briefly the nature of a tenant's estate of freehold, according to the more ancient jurisprudence of England, it is unnecessary to note in detail slight changes and distinctions embraced in so long a period. We may best confine our attention to a summary of a freeholder's rights about the year 1400, over lands held by the socage tenure — the only common-law tenure ever known in practice in New York. It will be unnecessary, for the same reason, to pay any attention to the peculiar or different rules of law relating to tenure by chivalry and particularly by that species of it known as knight's service; for the military tenures had been all abolished in England prior to the English dominion over New York,[4] and, therefore, never became connected with our law of estates in lands.

Although, as before indicated, the legal conception of a *feodum*

of Henry VIII. At a later day the various Abridgements of the Year Books by Statham, Fitz Herbert and Brooke answered most practical purposes. The writer has consulted the Abridgements used by Supreme-Court Justice William Smith, in the last century, and afterwards by Mr. Justice Morgan Lewis, the predecessor of Kent in the Supreme Court of New York.

[1] A. D., 1461 1483. See Mr. Tomlin's learned note on this subject in his edition of "Lyttleton."

[2] The common edition of Littleton is, of course, Coke's translation, with his notes and those of the distinguished scholiasts, Mr. Hargrave and Mr. Butler. But one equally acceptable to most persons is the edition by Mr. Tomlin, which is very condensed and precise in the notes, while preserving the law French of Littleton himself. Both editions are very commonly in lawyers' libraries, and need only be mentioned.

[3] *E. g.*, 6 N. Y. 493; 19 id. 76; 26 id. 576.

[4] 12 Car. II, chap. 24, *et vide infra.*

simplex, or fee simple estate in lands, does not in all points coincide with the conceptions of the lay historian, such a fee may be said to denote, by the ancient or feudal jurisprudence of England, the largest collection of rights possessed by any feudal tenant of lands. By law a fee simple then passed to the heir at law free from any qualification arising out of the terms of the gift. Tenants in fee simple after the year 1290 (*Statute Quia Emptores*) had power to alienate the estate. Thus, in legal theory, a feud or fee of this character came ultimately to furnish to lawyers the normal type of estates in lands, notwithstanding the fact that long before the Statute *De Donis* conditions were frequently coupled with gifts of feuds of inheritance.[1] After that statute enforcing the conditions of the gift, arose the class of fees, known as "fees tail," which Littleton says were wholly by force of that statute. In early feudal times the subordinate landholder, even of a pure feud (*feodum simplex*, or fee simple) lost the more ancient power of testamentation. The feudal burdens of tenure and the loss of a testamentary power are the main characteristics of a purely feudal estate in lands. This loss of the power of willing lands was a feudal innovation, for by the pre-Norman law devises, introduced by the clergy, were in common use.[2] It was not, however, consistent with the principles of Norman feudality that the subordinate landholder's testamentary power should continue to exist. It was certainly calculated to embarrass the claims of feudal superiors; thus it happened that the so-called common law of England did not permit devises of lands.[3] Dower, or posthumous provision for the wife of tenant in fee simple, is recognized as early as *Magna Charta*.[4] So when tenant in fee simple came to die the estate devolved on the heir after the reign of Henry III (1216–1272),[5] very much according to the principles of descent, prevailing down to the present century.[6] Primogeniture, said to be of Norman origin[7] (but probably peculiar to military tenures),[8] finally triumphed as the common-law rule,[9] although the

[1] Litt. § 13; *et cf.* Bracton *passim* on Conditional Gifts.

[2] This well-established fact is shown by the great number of Saxon wills extant. See Thorpe, *Diplomatarium Anglicum Aevi Saxonici*, *passim;* Freeman, Norman Conquest, I, 20.

[3] Powell, Devises, I, 4.

[4] Ed. 1215, cap. vii.

[5] *Vide* a most interesting discourse on the Law of Descent. Pollock & Maitland, Hist. Eng. Law, II, 257.

[6] Changed in New York in 1782. Art. IX, The Real Prop. Law, *infra*.

[7] Sandys, Hist. of Gavelkind, 238.

[8] Pollock & Maitland, Hist. Eng. Law, II, 265, *seq.*

[9] Reeves, Hist. Eng. Law, I, 254, 255.

more ancient rule of partible inheritances survived by particular custom in many places.[1] Thus we perceive that prior to the reign of Henry V (A. D. 1413–1422) an estate in lands had come to mean property of the tenant, out of which provision could be made for the wife, and that, subject to the wife's provision, such estate descended to the heir of the tenant. But the inheritable estate was subject to the many feudal burdens already mentioned.[2] These feudal burdens are the distinguishing characteristics of the estate of the period, as contrasted with the estate of a later day.

Scientific classification is not a characteristic of the early law writers of England. Even Littleton takes no note of any division of fees other than that into "fees simple" and "fees tail,"[3] which last he states are wholly by force of the statute of Westminster 2d (*De Donis*), and that before that statute even fees tail were but "fees simple conditional."[4] Littleton ignores even the ancient fees known as "fees farm," "*feoda firma*," treating of them only indirectly or from the point of view of the landlord, under "rents,"[5] notwithstanding the fact that fees farm were very ancient, being mentioned in *Magna Charta*.[6] It is, however, to be remembered that in Littleton's day the "feudal system" of England had been greatly relaxed, although in legal theory it still remained the basis of the land law of England. Littleton seems to have been impressed with this fact, for in his treatise he practically ignores any classification based upon the characteristics of feuds or fees, and attempts to classify the rights of certain tenants over lands, under "estates upon condition;" thus abandoning fees as a basis of classification and resorting to the more modern "estates."[7] It is not curious that in this attempt he nearly loses sight of that very ancient class of fees known as "fees farm," although such fees possessed the inheritable characteristic of fees simple, in passing to the farmers', or grantees', heirs at law.[8]

The custom in England of reserving rent on certain grants of lands long antedates the Norman Conquest. When this custom was perpetuated by the Normans certain feuds in perpetuity were known as "*feoda firma*" or "fees farm," probably because the tenant was a "farmer" or one who paid rent. Thus in addition to Lit-

[1] Sandys, *ibid sup. passim.*
[2] *Supra*, p. 7.
[3] §§ 1, 13.
[3] Litt. § 13.
[5] § 217.
[6] Ed. of 1215.
[7] Liber III, c. 5, §§ 325, 384.
[8] Mr. Cruise, in his book on Fines, notices that leases to farmers resemble sub-infeudations, II, 17.

tleton's "fees simple" and "fees tail," we may add a third class of feuds or estates originally known as "fees farm."

Classifications of fees,[1] as it will be remembered, then are not ancient. Littleton confines his treatise to descriptions of the nature of tenancies, and his work is the final one on tenures as they stood after the Wars of the Roses, when they had been already much modified by the rise of the equitable estates called "uses." But there is no attempt at a classification of fees by Littleton. Coke's commentary on Littleton does map out a classification of fees as follows: (1) *Fee simple absolute*, (2) *fee simple conditional*, and (3) *fee simple qualified*.[2] Mr. Preston, in his work on Estates, proceeded to evolve a much more elaborate classification of fees, which Chancellor Kent criticises, preferring to adopt Coke's simpler one.[3] Few law writers are always consistent in their classification of fees or in their use of epithets descriptive of their limitations.[4] So, the terminology of the common law is not constant. The English legal terminology arose subsequently to the reign of King Henry VII, and much of it is far more modern. It is true that pleadings were by statute directed to be in English as early as the reign of Edward III;[5] but Latin and Norman-French remained the language of technical treatises, and furnished the terminology of the law until after Lord Coke's day, which, it will be remembered, was but shortly prior to the English occupation of New York.

One of the most important contributions which Blackstone made to jurisprudence was the settlement of most questions concerning legal terminology. His commentaries furnished both a final classification of laws and a precise and elegant legal terminology in the English tongue. It was from the pages of Blackstone that the revisers of the New York Statutes, in 1827–30, derived both their classification[6] and their terminology.

Having adverted to the history and nature of estates in land, according to the theory of the common law of England, and also to the different classifications of fees, let us next very briefly point

[1] Fees develop from inheritable feuds, and when feudalism is abolished become simple estates of inheritance.

[2] Co. Litt. 1b; and see Edward Seymour's Case, 10 Rep. 95b.

[3] Comm. IV, 9.

[4] See Sharswood & Budd's criticism of Washburn, Lead. Cas. Real Prop. II, 19.

[5] 36 Edw. III, St. 1, c. 15; *cf.* Black. Comm. III, 317, *et seq.*; Wilson, Hist. of Modern English Law, 7.

[6] See Revisers' report to the Legislature, with Part II of the Revised Statutes; Appendix II, *infra*.

out that the common conveyances of the kingdom were at first of two general kinds: (1) By matter of record, such as fines; (2) by matter of deed, such as feoffment, grant, lease and release and exchange. After the reign of Henry VIII, we find certain old equitable principles fastened on the legal construction of certain deeds of bargain and sale and covenant to stand seized. But these latter assurances may be regarded as substantially posterior to the Statute of Uses (27 Hen. VIII).

The most ancient mode of conveyance in the common law is, no doubt, the feoffment with livery of seisin. A feoffment or "*donatio feodi*" (gift of a feud), as its name implies, was originally, in all probability, confined to a gift of a feudal estate.[1] As delivery was essential to a perfect gift in the Roman law, so livery of seisin or possession came in feudal law to be the essential characteristic of this mode of transfer. So enduring was this ancient conveyance that a feoffment with livery of seisin was abolished in this State only by our Revised Statutes in 1830.[2] Although prior to the Statute of Frauds (29 Car. II, c. 3) a writing or charter was not essential to the validity of this mode of conveyance, the accompaniment of a deed or charter was very common long before that statute.[3] In the early common law the feoffment indicates, not the deed, but the act of infeudating only. It was a grant *per verba non scripta.* The charter or deed, being no part of a feoffment, was usually in the past tense, reciting what had occurred. At a later day the evidence of the livery of seisin, with the names of the witnesses, was also usually indorsed on the charter. A relic of this ancient custom may be still detected in the language of the deeds of the present day, for they are usually phrased in both the present and the past tense. In a feoffment the primary and fundamental element was the livery of seisin, or, in other words, the delivery up of actual possession.[4] It is, however, apparent that, even before the Statute of Frauds, a writing was essential to a conveyance operating under the Statute of Uses as a bargain and sale; for the Statute of Inrolments required such a conveyance to be enrolled.[5] But even under the Statute of Frauds signature was not essential to a deed.[6] Chancellor Kent thought

[1] Co. Litt. 9a. *Cf.* the change after the Statute of Frauds in the legal theory of a feoffment. Hargrave, *Collect. Jurid.* II, 432.

[2] The Real Prop. Law (Chap. 547, Laws of 1896), art. VII, § 206.

[3] Preston, Shep. Touch. 203.

[4] Bisset, Estates for Life, 13; Sparrow v. Kingman, 1 N. Y. 242, 250.

[5] 27 Hen. VIII, c. 16.

[6] Preston, Abstracts of Title, I, 236.

that feoffments with livery of seisin were never used in this State as a mode of conveyance,[1] but he is contradicted by very early records in the public offices. This assurance was certainly lawful in New York until the Revised Statutes,[2] and in some cases it must have been most appropriate, as where the entry was lawful it cleared all disseisins and defeasible estates which neither a fine nor a bargain or sale could do.[3]

It is not, however, to be understood that a feoffment with livery of seisin was the only mode of passing a title to real property by the ancient law of England. The practice of using the forms of a litigation for the purpose of effecting a conveyance of land is also of great antiquity in English law, and the evidence seems to point to the year 1178 as the beginning of this mode of conveyance,[4] a period eight years earlier than that mentioned by Dugdale.[5] Fines, which simply denote agreements made in court in a judicial proceeding,[6] are much more ancient than recoveries,[7] which, in practice, do not antedate the reign of Queen Elizabeth.[8] Fines or agreements in court respecting title to land are said to be of Roman origin.[9] Subsequently to the beginning of the reign of Edward I, fines as a mode of conveyance were regulated by statute,[10] and ultimately when levied by tenant in tail they were declared by statute to be a bar to him and his issue.[11] These statutes were in force in the province of New York, and were adopted by the first State Constitution and became a part of the statute law of New York,[12] being repealed only by the Revised Statutes.[13]

Besides the conveyances indicated, there were long before the Statute of Uses two others recognized: "A lease and release," and "a grant with attornment."[14] A "lease and release" was

[1] Comm. IV, 489.

[2] 1 R. S. 738, § 136; The Real Prop. Law, § 206.

[3] Co. Litt. 9a; Sanders, Uses, II, 12. *Cf.* Challis, 321; note 310 to Co. Litt. 48a; McGregor v. Comstock, 17 N. Y. at p. 172, and note to Perkins' "Profitable Book," 49, ed. of 1827.

[4] Publications of the Selden Society, I, p. xxvii.

[5] 28 Hen. II; Cruise, Fines and Recoveries, I, 2.

[6] Cruise, Fines, I, 1.

[7] Note to edition of 1827, Perkins' "Profitable Book," 49a.

[8] Perkins' "Profitable Book," 49a.

[9] Cruise, Fines, I, 4, 5, 6, 76.

[10] 18 Edw. I, c. 4; 34 Edw. III, c. 16; 4 Hen. VII, c. 24.

[11] 32 Hen. VIII, c. 36.

[12] 2 J. & V. 84; 1 R. L. 358; Van Ness v. Gardiner, 1 Cai. 59; Jackson v. Smith, 13 Johns. 426; Lion v. Burtiss, 20 id. 483; Roseboom v. Van Vechten, 5 Den. 414.

[13] 2 R. S. 134, § 136; McGregor v. Comstock, 17 N. Y. 162.

[14] Sugden's Introduction to Gilbert on Uses, xliv; The Theory, etc., of Conveyancing, Hargrave, *Collect. Jurid.* II, 415.

invented to avoid the necessity of livery of seisin.[1] A grant passed a reversion to a stranger where no livery was possible. Both these modes of conveyance were less ancient than feoffment with livery of seisin. Having now noticed the primitive modes of conveyance, let us pass to a further consideration of the nature of the interests tenants might take under the law regulating tenure, or, as commonly said, under the common law.

It has been stated in substance that the early law of England was concerned only with the law regulating feuds. At a later stage, when feuds developed into settled estates of inheritance, easily transmissible *inter vivos*, the more common subordinate interests in real property were designated "life estates," "vested remainders" and "reversions," sometimes called "escheats." The more subtle, contingent and executory estates are not spoken of in the Year Books, and it is extremely doubtful whether even contingent remainders, or those limitations of an inheritable estate which were to vest on contingencies, were much tolerated by the law before Lord Coke's time;[2] and it will be remembered that he flourished but a very short space before the English occupation of New York in 1664. The variety of contingencies upon which remainders might lawfully be ultimately limited became so manifold in the law as to be almost innumerable. Mr. Fearne, the leading authority on this branch of the law, has, however, reduced contingent remainders to four general classes, subsequently very much glossed by Mr. Preston, Mr. Josiah Williams Smith, Mr. Wilson and other commentators on the text of Mr. Fearne's great work. Several of those classes now have no longer any meaning in New York, since the Revised Statutes abolished the necessity of particular estates to support remainders and made other alterations in the law touching legal limitations.[3]

It is perhaps desirable to point out at this place that where the "common law" of real property is spoken of it ordinarily does not now signify customary law, or the law of custom, but the rules formulated at any time in the fundamental common-law courts; but such rule must have been formulated without the aid of modern

[1] By a lease the possession was given, whereupon privity of estate existed between the lessee and the lessor, who might, therefore, pass the freehold by a release without livery of seisin.

[2] See the remarks of Mr. Joshua Williams in his elementary treatise on Real Property, 264, 265; Digby, Hist. Real Prop. 230, 231.

[3] Part. II, R. S. chap. I; now "The Real Prop. Law," chap. XLVI of the General Laws.

statutes.[1] In this sense of the term, the well-known controversy between Blackstone's text and Bentham's over the very existence of common or customary law[2] is wholly avoided and the term attains an exact meaning. But, in practice, the term common law is sometimes used more loosely to denote the entire jurisprudence of England, including equity,[3] and at other times it is so used as to include even the statute law of England.[4]

Let us next briefly notice those rules of the common law which regulated the creation of estates prior to the Statute of Uses. It is commonly stated that, at common law, the usual method of conveying an estate of freehold to a stranger, was, by feoffment, with livery of seisin. The fee simple thus conveyed might be conveyed absolutely, or with a defeasance or conditionally.[5] But a fee could not be thus limited after a fee at common law, as strictly nothing remained to be limited over, after a fee simple estate was once disposed of. Nor could a new estate be limited to take effect upon the happenning of the condition.[6] No one but feoffor and his heirs could take advantage of a breach of the condition.[7] The usual limitations were then very simple, creating an estate tail, or an estate for life with remainders over. The estates vested in possession or interest at the instant the seisin was delivered.

At common law the freehold never could be in abeyance by act of the parties.[8] This was a survival of the strictly feudal principle which required that there must always be a tenant of the fief to do the lord's bidding, and to respond to judicial process.

[1] Van Rensselaer v. Smith, 27 Barb. 149; Crabb, Hist. Eng. Law, chap. I.

[2] Austin, in his Philosophy of Positive Law, emphasizes the controversy.

[3] Manning v. Manning, 1 Johns. Ch. 527, 531.

[4] Bogardus v. Trinity Church, 4 Paige, 178, 198; Lansing v. Stone, 37 Barb. 15; Reeves, Hist. Eng. Law, I, 160, Finlason's note.

[5] Burton, Real Prop. 7, *et seq.*; Sugden, Powers, I, 2. A surrender, release, exchange and partition were good without livery under certain circumstances. Challis, 321.

[6] Sanders, Uses & Trusts, I, 149; Lewis, Law of Perpetuity, 49. But several fees may be limited in the alternative at common law, by way of remainder, upon such contingencies, that only one may, by possibility, happen. Loddington v. Kime, 1 Salk. 224; Fearne, Conting. Rem. 373.

[7] Sugden, Powers, I, 2; Sanders, Uses & Trusts, I, 150; Butler's note a, Fearne, Conting. Rem. 382; Challis, 62, 119.

[8] Challis, 77, 78; *cf.* Black. Comm. II, 107; Van Nostrand v. Marvin, 16 App. Div. 28, 32; Wood v. Tayloe, 9 Misc. 640. See *infra* under §§ 32, 40, The Real Prop. Law.

For the same reason an estate could not, by the common law, be so limited as to exist at intervals and not continuously.[1] A vested remainder might be limited on a term of years, but a contingent remainder required an estate of freehold to support it,[2] for otherwise there could be no livery of seisin at the time of the limitation of the remainder. For the reason indicated, no estate of freehold could be so limited as to take effect *in futuro* without an intervening estate.[3] Such are the chief rules of the common law regulating the creation of estates in lands. It will be found, upon investigation, that these rules take their rise in the period here indicated as the *jurisprudentia antiqua*, and are mainly of feudal origin, having direct relations to the law of tenure which forbade an abeyance of the feudal seisin; for, by the feudal law, there must always have been a tenant standing ready to do the lord's bidding. At a little later day a known tenant of the freehold was also essential to the maintenance of real actions. Out of these legal necessities sprang several of the so-called common-law rules of estates in land.

A remainder, by the rules of the common law, before the Statutes of Uses and Wills, was created usually by feoffment and livery of seisin. It was a remnant of an estate in lands or tenements, expectant upon a particular estate, created at the same time.[4] It was the only estate of freehold which at common law could be created to take effect *in futuro*. In order to prevent the abeyance of the seisin, or to prevent a perpetuity, remainders became subject to very strict rules of law. They must await the regular determination of the precedent estate and be limited to take effect in possession immediately upon that determination.[5] They could not be limited to take effect upon the determination of the precedent estate by forfeiture for breach of a condition, nor to take effect upon the expiration of an interval of time after the regular determination of the precedent estate.[6]

At common law every contingent remainder must vest, or become an actual estate, during the continuance of the particular estate which supports it or on the very instant that such particu-

[1] Challis, 79, 81.

[2] Preston, Shep. Touch. 127.

[3] Black. Comm. II, 165; Sanders, Uses & Trusts, I, 141; Revisers' note to art. I, tit. II, chap. I, part II, R. S.; Cruise Dig. tit. 1, § 36.

[4] Co. Litt. 143a.

[5] Watkins, Conveyancing, 100; Fearne, Conting. Rem. 261; Sanders, Uses & Trusts, I, 155.

[6] Challis, 62; note of Revisers to 1 R. S. 725, § 27.

lar estate determines, otherwise it fails.[1] This rule in itself tended to restrain remote limitations by way of remainder. But the other rule of the common law, *that the limitation of a remainder to the right heirs, as purchasers, of a person not in esse, is void*[2]— restricted legal limitations to the unborn children of living persons. Neither a remainder nor any other estate of freehold could be limited on a fee simple absolute at common law,[3] but it could be limited on a fee tail,[4] subject, however, to the rule mentioned above. These rules were at common law to some extent restrictions on perpetuities; for even a fee tail could always be converted into a fee simple and the contingent remainders would thereby be barred.

A contingent remainder might also be invalid because it was limited on a contingency depending on an illegal event, or on a too remote possibility, or because the condition on which it was limited was repugnant to some rule of law, or contrariant in itself, or inconsistent with the quality or nature of the preceding estate.[5] Until the Revised Statutes took away the necessity of a particular estate of freehold to support a contingent remainder and permitted a contingent remainder to be limited on a term of years,[6] there could have been little question here that at common law the rule against perpetuities had no application to legal limitations by way of remainder,[7] notwithstanding Mr. Lewis was clearly of the opposite opinion.[8] The nature of the controversy on this point is considered in connection with the section now regulating perpetuities.[9]

Having thus briefly pointed out the nature of the law concerning limitations of estates in lands by the *jurisprudentia antiqua* of England, let us next consider a phenomenon destined ultimately to subvert the ancient law, even while preserving its outward form. It is needless to say that we refer to *Uses*. Precisely as the ancient law of Rome—*jus civile*—was modified by equity "*naturalis æquitas*" acting through the more modern *jus honorarium* and *jus gentium*, so the common or feudal land law of England was ultimately subverted when the chancellors recognized a separate equitable estate existing alongside of the legal seisin. The new estates called "uses" or "confidences" were thus gradually super-

[1] Williams, R. P. 270; Sanders, Uses & Trusts, I, 155.

[2] Challis, 91; Black. Comm. II, 179.

[3] Co. Litt. 18a.

[4] Challis, 241; Tudor, Lead. Cas. R. P. 719.

[5] Fearne, Conting. Rem. chap. II.

[6] 1 R. S. 724, § 24.

[7] Challis, 159; *cf.* Tudor, Lead. Cas. Real Prop. 471 *seq.*

[8] Sup. to Perpetuities, 97 *et seq.*

[9] § 32, The Real Property Law.

imposed without at first actually disturbing the ancient law of tenures.

The precise origin of the English "use" or trust is a point of historical controversy. While such origin and the nature of the jurisdiction of the clerical chancellors over uses are most interesting subjects, they need not now be dwelt on; at least prior to the time when the chancellor actually granted a subpœna to enforce such a trust at the instance of *cestui que use*.[1] This was in the reign of Henry V. Long prior to this time the ecclesiastics must have enforced trusts and confidences *in foro conscientiæ*,[2] but it is when a use came to be enforced in an established court of the realm by actual process issued at the suit of the beneficiary, that lawyers take notice of the innovation on the established law.[3] The statute 1 Richard III, chapter 1, next materially increased the power of the *cestui que use*.[4] From this point of time the history of uses is apparent, and the English law of land had obviously entered on its second stage, or *jurisprudentia media*. The reason why uses or trusts came into such indirect prominence was that people had outgrown the law of tenure and desired to do more with their property than the strict rules of that law permitted; yet the time was not ripe for the actual repeal or abrogation of so venerable a system as that called the common law of land.

The precise nature of uses prior to 27 Henry VIII, when the Statute of Uses was passed, is always the basis of any thorough legal discussion on uses after the statute,[5] for the characteristics of the

[1] The recent history of English Law by the learned Professors, Pollock and Maitland, contains many valuable suggestions bearing on the origin of uses. *Sed cf.* Mr. Justice Holmes, Lond. Law Quar. I, 162; Digby, chap. vi.

[2] Gilbert, Uses, 3; Kerly, Hist. Eq. 78.

[3] Mr. Justice Holmes, Lond. Law Quar. I, 162; Sanders, Uses & Trusts, I, 5; Digby, Hist. Real Prop. 288.

[4] Sanders, Uses and Trusts, I, 21, 22.

[5] See the excellent writings of Bacon, Gilbert, Sanders and Cornish on Uses, and the general commentaries on the Common Law for full exposition of this subject. The following treatises may be found useful in any profound investigation of this subject. List of books on Uses and Trusts published prior to New York Revised Statutes, 1827–1829: 1660, Herne (John), Law of Charitable Uses; 12mo. London, 1660 (no copy in this country that I know of); 1692, Carthew (Serj. F.), Reading on the Law of Uses (published in the *Collectanea Juridica*, vol. 1, p. 369); copy in N. Y. L. Inst. See this work for a very concise history of uses and commentaries on the prevalent modes of conveyancing. 1734, Gilbert (Lord

former uses determined the nature of the legal estate even after the Statute of Uses. The body of law referable to uses prior to the Statute of Uses is only to be found in the older books; but it is sufficiently referred to in Sugden's Introduction to Gilbert on Uses, and in Mr. Sanders' chapter on Uses and Trusts before the Statute 27 Henry VIII. It will suffice to point out that the simplicity of the common law relating to estates was much broken in upon by the recognition of uses, which were treated as susceptible of much more complicated limitations than the common law knew or tolerated. Thus, uses or confidences were treated objectively, and as things existing apart from the land. Uses were, therefore, devisable at a time when the common law, in deference to its origin in the earlier law governing feuds, did not tolerate a will of lands.[1] The incorporeal nature of uses admitted secret and informal conveyances without livery, and it was not even necessary that the grantee of a use should be a party to the conveyance: so, a use might be limited after a use, and as the use was descendible in the same way as the legal estate, uses came to be a

Ch. B.), Law of Uses and Trusts; 8vo. London, 1734 (has passed through several editions), and Sugden's notes in edition of 1811. 1741, Bacon (Lord F.), The Case of Revocation of Uses; 8vo. London, 1741 (Bacon's Law Tracts, p. 233). Bacon (Lord F.), Reading on the Stat. of Uses (Bacon's L. Tr. p. 299). 1791, Case on the Operation of the Statute of Uses, with the opinions of Mr. Booth and other learned counsel thereon (*Coll. Juridica*, vol. 2, p. 421). 1791, Sanders (F. W.), Uses, Trusts; 2 vols, 8vo. London (has passsed through several editions). 1795, Cruise (Wm.), An Essay upon Uses; 8vo. London, 1795 (nearly all of the above is incorporated in Cruise's Digest of Law of Real Property). 1805, Duke (Geo.), Law of Charitable Uses; 8vo. London (1st ed. 1676), "a standard authority upon this branch of the law." 1787 (1st ed.), 1809 (2d ed.), Highmore (A.), Succinct View of the History of Mortmain and the Statutes Relative to Charitable Uses; 8vo. 1 vol., London. 1822, Randall (Henry), Essay on the Law of Perpetuity and on Trusts of Accumulation; 8vo. London, 1822. 1824, Wilson (J.), Treatise on Springing Uses and other Limitations by Deed; 8vo. London, 1824 (reprinted in Law Library, Phil., vol. 11). 1825, Cornish (W. F.), Essay on Uses; 8vo. London, 1825 (reprinted in Law Library, Phil., vol. 3). 1827, Willis Trustees; 8vo. London, 1827 (reprinted in Law Library). Fletcher, Est. Trustees, London. Magazine articles: Law of Charitable Uses, 16 Mo. Law Rep. 201; Doctrine of Uses in American Conveyancing, 5 Amer. L. Reg. 641; Doctrine of Uses, 6 id. 65; Trusts for Separate Use, 1 N. Y. Leg. Obs. 114; Resulting Trusts of Land, 3 Law Mag. 131; Religious Trusts, 12 L. Mag. Rev. 23.

[1] Excepting in a few places by customs of those places.

mode of limiting an inheritable estate after an inheritable estate, in a manner not tolerated by the common law.[1] Thus, a use might commence a possession *in futuro*, and it might change from one to another owner by matters arising after the estate was created, or *ex post facto*. So, uses originally declared might be wholly revoked and new uses declared, provided such a power was reserved in the instrument creating the uses. But as equity was moulded on the civil law, the courts refused to enforce a *donum gratuitum*, and, indeed, in order to raise a use at all a consideration was required. Such were some of the principles recognized before the Statute of Uses (27 Hen. VIII, chap. 10).[2]

While uses permitted much more subtile modifications of property than the common law, they were not an unmixed blessing, and in course of time they were undoubtedly employed as a means of defrauding creditors of their just dues, of thwarting the law against mortmain and of avoiding the feudal obligations due to the lord of the fee by the law of tenure.[3] When this state of things came about Parliament attempted to check the evils discerned in uses Creditors were aided.[4] The statute, 1 Richard III, chapter 1,[5] intended to aid purchasers against covin of *cestui que use*, was, however, perverted so as to augment the power of *cestui que use*. Finally came the statutes, 23 Hen. VIII, chapter 10,[6] and the Statute of Uses, 27 Hen. VIII, chapter 10,[7] which last act is still, even at this day, influential throughout the law of real property in both England and the States derived from her empire. So potent has been the influence of this statute that it probably received its most perfect application in 1830 in the Revised Statutes of this State.[8]

The Statute of Uses (27 Hen. VIII, chap. 10) recites the evils incident to uses and then proceeds to provide a remedy whereby the equitable interest or estate of *cestui que use* was intended to be converted into a legal estate of like nature. If the intention of this statute was, as some persons have thought, to annihilate the practice of creating novel interests or estates in lands and to restore the feudal rules of tenure, it signally miscarried. The

[1] *Supra*, p. 22.

[2] See these principles tersely stated by Cornish, pp. 18, 19, and by Sanders in his first chapter.

[3] See the recitals in the statutes next mentioned.

[4] 50 Edw. III, chap. 6.

[5] A. D. 1483.

[6] This act was directed against superstitious uses.

[7] A. D. 1536.

[8] Now §§ 71, 72 and 73, The Real Prop. Law, *infra*.

very statute itself, when compared with the strictly feudal law of land, shows that a great advance over the feudal system had already taken place. This purpose of the statute to restore the fruits of tenure would, if fulfilled, have carried society backward, not forward. It is doubtful if history affords an example of the successful enforcement of a law which is intended to restore an archaic system opposed to the more modern habits of a nation. In any event the Statute of Uses failed utterly to take away any of the innovations which indirectly had already subverted the strict law of tenure in England.

Some persons, including Coke, have thought that the Statute of Uses was designed to restore the early common-law conveyance by feoffment with livery of seisin, and to take away all the antecedent modes by which in equity interests in lands could be shifted about, on various contingencies, through the contrivances of uses.[1] But the more philosophical jurist, Bacon, did not agree to this interpretation and his exposition of the statute triumphed.[2] The result of this interpretation was, that the Statute of Uses was held to have fastened all the properties of the former use upon the seisin, or legal estate in lands. Thus, the effect of this statute was to transfer bodily the rational principles of equity to the purely legal Code of the nation. The statute not only led to many new principles touching actual conveyances of land, but it compelled the courts of law to take notice of interests in land before known only in the courts of equity.

In the process of transferring a great body of principles from the courts of equity to the courts of law it is only reasonable to imagine that new doctrines would be enunciated. No doubt such was the fact in the case of uses, although we find the common-law judges disposed, after the Statute of Uses, to give force to the older, or common, law whenever the statute did not expressly displace it; thus they held, that an estate could not take effect as a use, if it might take effect as a "remainder."[3] So the estates raised by the statute became liable to all those rules to which estates raised by the common law are subject, with this distinction, that the former might be overreached by a power, or a conditional limitation, or by clauses of cesser which formerly had accompanied uses in their fiduciary state.[4]

[1] 1 Co. 125 a, b.

[2] 1 Co. 130.

[3] *Cf.* Wolfe v. Van Nostrand, 2 N. Y. 436, 442.

[4] 1 Preston, Estates, 158.

The old law of land was never regarded as expressly abrogated by the Statute of Uses, and tenure continued, after the statute as before it, to pervade the law concerning land. Thus, before the statute might be operative at all, some one must be seised to the use. So the necessity of actual seisin was postulated by both the old law and the new.[1] The old feudal law of tenure always required that there should be a tenant of the freehold. The *post*-statutory law of uses also required seisin in order that the transubstantiation of the use might be effected by the statute. The Statute of Uses did not change the nature of estates in fee or of estates in tail. It simply permitted interests in a fee simple to be created upon the principles formerly regulating uses, and it also brought about new forms of conveyance. The intricacies of the English law of real property after the Statute of Uses are mainly due to the continued attempt to supersede the ancient feudal law by indirection; for, as stated above, the feudal or common law was never expressly abrogated, either by the Statute of Uses or by the statute taking away the burdens of the feudal tenure.[2]

In the course of the judicial exposition of the Statute of Uses certain leading principles were from time to time determined, and may be briefly summarized as follows :[3] (1) That, before the statute operated to join the fiduciary interest to the legal title, there must be a person competent to raise a use (*i. e.*, to declare a trust); a person competent to take the legal title to land; a competent beneficiary or *cestui que use;* an intelligible use or trust, and a form of conveyance recognized by the courts. (2) That the statute did not operate on all trusts or confidences, but only on those passive trusts where the former trustee had the naked legal title and the former *cestui que use* took the profits and at will directed the trustee to convey or make estates. The trusts or confidences which the statute operated on are, from this time on, known as *uses*,[4] and those which the statute did not affect are known as *trusts*.[5] The

[1] As a survival of this see, under section 170 of the Real Property Law, that a widow is not endowed of a remainder or reversion of which the husband is not seised in possession before his death.

[2] 12 Car. II, chap. 24.

[3] These principles are really the basis of all future commentaries on uses and trusts. Sanders and Cornish furnish the most methodical treatment at great length, and in more precise legal language. Tudor's note to Tyrrell's case will refer the reader to the judicial authorities on the different principles.

[4] Charitable uses excepted.

[5] Charitable trusts excepted. These trusts continue to be called "charitable uses."

common-law courts took cognizance of uses executed by the statute, and the lord chancellor took cognizance of trusts.[1]

While "uses" were being thus construed, the old conflict between the common-law courts and the courts of equity is again discernible. The former held, in Tyrrell's case,[2] about the year 1557,[3] that there could not be a use on a use; that is, that the Statute of Uses executed the first use and ignored a second. Then the lord chancellor decided that this second use might be enforced in equity as a trust. This decision again restored or augmented the narrowing jurisdiction of the chancellor, and has been the subject of undeserved criticism. Thus, Lord Hardwicke said, in substance, "that a statute made upon great consideration * * * has had no other effect than to add, at most, three words to a conveyance."[4] This statement, however, is true of one class of limitations only. The Statute of Uses accomplished much more than Lord Hardwicke stated. It compelled courts of law to take notice of conveyances made on conditions and under circumstances not formerly tolerated by the old common-law or in the fundamental courts of law. The statute did not make a real innovation, but it became the basis of modern conveyancing, because it was held to sanction certain customs, dealings and contracts well-approved of by the people of England, although they were not consistent with the rules of the common or feudal law of land. Thus Lord Hardwicke's epigrammatic statement concerning the effect of the Statute of Uses is only partially accurate and very far from complete.

The full result of the Statute of Uses on the law of land was not seen immediately. In this connection we should remember that England, in the reign of King Henry VIII, is not to be regarded as the England of King Charles II. In Henry's time London contained not 90,000 persons, and there were no other large cities then established in England. The outward form of the law of land was still feudal; the social structure purely so: but the general employment of "uses," or beneficiary estates, during and after the Wars of the Roses, had impaired the substance of the common or feudal law long before the Statute of Uses. The Statute of Uses only made that the law in England which had thitherto been the practice. It will be found, on examination, that several later

[1] Including those trusts still called "charitable uses."

[2] Dyer, 155a.

[3] *Anno* 4 & 5 Ph. & M.

[4] 1 Atk. 591.

intricacies in the law of conveyancing, under the Statute of Uses, are attributable to the troublesome times under the Stuart dynasty. Thus both custom and civil war have been very influential on the form of the law of real property as it stood in England until recently, and in New York until the year 1830, when the Revised Statutes took effect.

After the Statute of Uses the forms of conveyance recognized in courts of equity — bargain and sale and covenant to stand seised — became perfect conveyances both in law and in equity. Conveyances of real property *inter vivos* thenceforth divide themselves into two great classes; those operative by force of the common-law and those operative by force of the Statute of Uses. In technical language the former correspond very nearly to the class of conveyances later on said in the books to operate "only by transmutation of possession," while the latter correspond with those said to be operative "without transmutation of possession."

We have now arrived at a point where the principles, forms and modes of conveyance of real property remain fixed for nearly three hundred years. Land might be conveyed *inter vivos* by the common-law conveyances, feoffment with livery, by fine or recovery, by lease and release, and by conveyances operative in law by force of the Statute of Uses, and known as "bargain and sale," and "covenants to stand seised." The conveyances operative by the common law have already been noticed; it remains to consider the theory of lawyers concerning the other modes indicated. A bargain and sale was known before the Statute of Uses, and courts of equity then enforced such agreements respecting lands. The Statute of Uses saved the necessity of troubling the chancellors, and held that the bargainee was seised by virtue of the Statute of Uses. So, "a covenant to stand seised" which, before the Statute of Uses was enforceable only in equity, was on the same principles as before regarded by the courts of law as operative by force of the statute. Such is a brief summary of the history and of the practical operation of the different conveyances after the Statute of Uses.[1] The niceties of application and fine distinctions are to be found only in the older books on the law of real property.

The Statute of Uses having converted passive or naked uses into legal estates possessing the same quality as the former use,

[1] Many writers treat of this subject at great length; none more perspicuously than Sanders (Uses & Trusts, vol. II), and Sugden (Introduction to Gilbert on Uses, ed. of 1811).

took away the custom of limiting a use in lands by a last will. While at common law lands in most places were not devisable before the Statute of Wills (32 & 34 Hen. VIII), yet an owner of lands might before those statutes enfeoff another to the uses declared by the grantor's last will and such uses were enforced in equity. Thus by indirection lands were devisable before the Statute of Wills, which was enacted soon after the Statute of Uses had made devises of the lands themselves necessary to preserve testamentary dispositions. The Statute of Wills made it possible for an owner of lands held by the tenure of free and common socage to devise the same at his pleasure to any person except a body politic. As the Statute of Wills was passed after the Statute of Uses, it became an interesting question how far the Statute of Uses operated on a title or seisin conferred by a will; as for example where the will gave the lands to one to hold for the use of another than the devisee. It was held that the Statute of Uses did operate in such a case and that such a *cestui que use* might take the legal estate in a proper case by force of the Statute of Uses.[1]

This much of the history of the forms of conveying property, enables us to turn next to the history of the limitations contained in the conveyances themselves. In England, whence we derived our early law, the law of real property after the Statute of Uses, and to some extent before that statute, bears the impress of a persistent attempt to settle land in families in such a way that it could not be alienated. During the civil wars the great conveyancing lawyers of England elaborated the forms of family settlements to the end indicated.[2] In and subsequent to the reign of King Charles II, new subtleties of various kinds were resorted to in order to regulate alienations. Thenceforth the learning and ingenuity of the great conveyancing counsel were directed to family settlements containing very complicated limitations. Both the learning and the ingenuity of counsel were stimulated by the importance of such settlements, sometimes involving a whole county and the rights of numerous tenants as well as the honors of noblemen and the rights of gentlemen of ancient family. Thus as a family settlement sometimes created an *imperium in*

[1] Sanders, Uses & Trusts, I, 195; Sudgen, Powers, I, 238; Jarman's Powell, Devises, 214, note 2; 217, note 3; Ram, Wills, 254.

[2] See, for example, Foss, *Biographica Juridica*, *sub nom.* Orlando Bridgeman.

imperio, or a little State within a greater State, the learning on the subject of settlements of landed estates became very precise and apparently most involved to laymen, although in reality it was founded on premises partly historical and partly logical. With this account of the general principles, or *rationale*, animating the English law of land, we are prepared to consider particular limitations of estates contained in settlements and conveyances.

Chronologically, the history of limitations of estates in lands marks, as Mr. Butler thinks, five distinct stages in the law of England after the feudal settlement:[1] (1) The creation of a fee simple conditional. This suspended the power of alienation only till the happening of the condition. (2) Then came the Statute *De Donis Conditionalibus*, which took away the tenant-in-tail's power of alienation and multiplied intails, always leaving a reversion in the donor. (3) Entails were finally broken by judicial fines and recoveries.[2] To thwart this result, women seised of estates tail of the gift of their husbands were prohibited from alienating these estates by statute (11 Hen. VII, chap. 20).[3] In this way the concurrence of both spouses to alienate settled lands was required, and this was some protection in family settlements. (4) A fourth mode of settlement was effected by limiting life estates to parents with remainders to their unborn children by purchase. Here the difficulty was that the life tenant and the reversioner could cut off the remainders. Then the device of trustees for preserving contingent remainders was invented by Sir Orlando Bridgeman.[4] (5) The fifth stage of settlements appears to have been the introduction of powers under the Statute of Uses. When the English law was introduced in New York the possibilities of the fifth stage of settlements had been reached in England,[5] and were, of course, available in practice in New York. Yet it would be inaccurate to say that prior to the reign of King James II settlements had

[1] Note Co. Litt. 290b; *cf.* Atherly Family Settlements, chap. I; Sugden, Powers, I, chap. I; Cruise Dig. tit. 32, chap. 24; Lewis, Perpetuity, chaps. I to X; Burton, Real Prop. chap. I; note of Mr. Butler to Fearne, Remainders, 382, and note, id. 562.

[2] Taltarum's case, A. D. 1472.

[3] Husbands seised in right of their wives were prohibited by Stat. 32 Hen. VIII, chap. 28.

[4] He was born in 1608 and was called to the bar in 1632; he became a bencher a few weeks before the restoration of Charles II. During the *interregnum* he became the oracle of the conveyancers. Foss, Biog. Jurid.; *cf.* Vanderheyden v. Crandall, 2 Den. 9, 16, *et seq.*

[5] *Vide* Crabb, History of English Law, 537, 538.

reached their final complexity, even in England. The English lawyers seem to have attained their greatest power of invention only in the eighteenth century.[1] Then it was that settlements became most complex by reason of the introduction of powers and the more frequent limitations of shifting and springing uses.[2]

The Statute of Uses having fastened the quality of the old use to the legal estate, the English law of real property became the subject of increasing scientific consideration, and at a later day of much professional discussion. The precise nature of valid executory limitations of property under the Statute of Uses forms an intricate, and perhaps an arbitrary, learning, yet one not wholly devoid of principle. The legal estates called uses were classified variously, and by none more skillfully than Sir Edward Sugden, who divides them into (1) "shifting or secondary;" (2) "springing," and (3) "future or contingent" uses. The shifting uses took effect in derogation of some other estates. Springing uses were those estates limited to arise on a future event, where no preceding use was limited. Future or contingent uses were estates which took effect as remainders,[3] although limited as uses. In course of time future estates, taking effect as uses, were often called by the more scientifically disposed lawyers of the latter part of the eighteenth century,[4] "executory interests" — a term gradually including also those future interests in lands which were created by a will.

Uses were again classified either as vested or contingent. Such a division of estates, interests and property in land, is entirely natural and primary. After the Statute of Uses, estates, or interests, in lands might be made to take effect in possession, either by the happening of an act of God, such as on a death, or on a birth, or on an act of man, such as the designation of new uses by a person named. When the use arose on an event specified in a deed or settlement, it was either a *shifting* or a *springing* use. When it

[1] *Cf.* Lord Mansfield in his judgment in case of Buckworth and Thirkell in the K. B.; 1 Hargraves, *Collectanea Juridica*, 335. In 1722 Wood, in the preface to his Institutes, notices the increasing complexity of settlements and conveyances "beyond former times."

[2] See usual form of settlement, Appendix to 2 Black. Comm.

[3] Sugden's notes on Gilbert, Uses, *passim*. See, also, the introduction to same. In no other book is the law of Uses more concisely and admirably treated. See, also, Cornish, Uses, for an excellent summary of the law.

[4] Mr. Booth, Mr. Butler, Mr. Hargrave and many others.

arose by the act of a person nominated to appoint the estate it was a use arising from the execution of a *power*. Uses might be preceded by a fee or they might follow a particular estate.[1]

Many rules and distinctions concerning uses were, from year to year, laid down by the judges of England. It is quite unnecessary to attempt to state many of them; but a few may well be borne in mind: Before a springing use vested, the use was said to result to the owner of the fee. A future use could never take effect as a use if it might inure as a remainder.[2] This rule was only a tacit deference to the older law, for "remainders" were long antecedent to "uses."

The old rules of the common law of land were also much modified by the Statute of Wills, and as the Statute of Uses was held to be applicable to those uses, limited by way of a will, a new set of rules touching estates created by will sprang up. This law is generally systemized under the head of "executory devises." But there might be a springing, a shifting, or a future use created by a will and also a "remainder."[3] The fact that a common-law remainder could thus be created was a new fact in English law. When a use was created by a will it took effect on the same principles that governed uses created by deed. But a gift of an estate to take effect in future when limited in a will need not be operative as a use or as a remainder, and it need not comply with the common-law rules touching estates. Before the Statute of Uses could act on an equitable estate there must be a person seised. By a will a gift could take effect *in futuro* contrary to the rules of the common law, and it could be made direct to the donee without the interposition of a third person to stand seised.[4] This class of limitations is known as "executory devises."

An "executory devise" is properly defined "as a limitation by will of a future estate, or interest in land, which cannot consistently with the rules of law, take effect as a remainder."[5] But a remainder may also be created by a will. Before the Statute of Uses, we have seen that a remainder could be created only by a common-law conveyance. Now, after the Statute of Wills, it might be created by an irregular instrument called a will. This instrument

[1] Cornish, Uses, 92.

[2] *Supra*, p. 28; Cornish, Uses, 81; Wilson, Springing Uses, 2; Wolfe v. Van Nostrand, 2 N. Y. 436, 442.

[3] A remainder created by a will was given the same effect as a remainder created by a common-law conveyance, Fearne, Conting. Rem. 387; Watkins, Conveyancing, 114.

[4] *Cf.* Burton, Real Prop. 100.

[5] Powell, Devises, II, 237, and cases cited *ibidem*.

always took effect on the death of the testator.[1] It was a deference to the more ancient law to call such a devise a remainder. So doing necessarily involved this consequence, that where the devise was a remainder, there must be a particular estate of freehold to support it, provided it was a contingent remainder; and, also, that it must vest during, or at the moment the particular estate terminated, or not at all.[2] It may be doubted whether such a result accorded with the spirit of the Statute of Wills. If the limitation contained in the will was contrary to the legal conception of a remainder, in that it could take effect only contrary to the rules of the common law relating to remainders, the devise might still take effect as a use,[3] or as an executory devise.[4] The interest itself thus devised was, as stated above, called an "executory interest;" but the instrument effecting it was an "executory devise."[5] The latter term is often misemployed[6] to denote also the interest taken under such a devise.[7]

Mr. Powell (in imitation of Mr. Fearne's classification of contingent remainders) has reduced executory devises to several classes,[8] and his definitions are both simple and perspicuous. Other classifications more elaborate have been attempted,[9] but they all substantially involve only two leading classes of devises: (I) A substitution of one fee for another upon some determinable event. (II) A fee to commence in possession at some future day without the intervention of a particular estate.[10]

Sometimes a limitation was so framed as to take effect as an executory limitation in one event, or as a remainder in another.[11] In the latter event the strict common-law rules relating to remainders applied, and the remainder might be defeated, unless it vested in or at the moment the particular estate terminated. But if the event occurred in which the executory limitation was to take effect,

[1] *Ibid.* II, 9; but until recently a will did not operate on real property acquired after its date or execution.

[2] Williams, Real Prop. 315; Preston, Abstracts, II, 153, 154; Challis, 96.

[3] Cornish, Uses, 96.

[4] Challis, 57, 58; Inglis v. The Trustees of Sailors' Snug Harbor, 3 Pet. (U. S.) 99, 115; Sanders, Uses & Trusts, I, 250–254. If the limitation might take effect as a remainder, it could not take effect as a use or devise. Wolfe v. Van Nostrand, 2 N. Y. 436, 442; Challis, 96, 97.

[5] Challis, 57.

[6] Challis, 56.

[7] *E. g.* 30 Am. Law Rev. 69.

[8] Powell, Devises, II, 237.

[9] See note to 2 Sharswood & Budd's Lead. Cas. Real Prop. 467.

[10] Inglis v. The Trustees of Sailors' Snug Harbor, 3 Pet. (U. S.) 99, 115; Tilden v. Green, 130 N. Y. at p. 47; Fearne, Conting. Rem. 504.

[11] Powell, Devises, I, 245.

then all the liberal rules relating to executory devises were applicable. This was certainly an anomaly, and came from attempting to graft a new shoot on the old trunk of the common law. Fortunately, all these inconsistencies are now remedied in the State of New York by the Revised Statutes and The Real Property Law.[1] It has been said in a recent case that there is no longer any such thing in New York as an executory devise,[2] and in another place that in New York State executory devises may in principle now be introduced into deeds,[3] meaning thereby that all executory limitations are with us now reduced to precisely the same rules, whether such limitations are contained in wills or in deeds. In this sense both the foregoing statements are accurate.[4]

When these new rules touching future uses and executory devises began to be applied to the creation of estates in lands, it became manifest that some rule must be laid down governing the period in which executory interests must vest, for every executory devise was, as far as it went, a perpetuity, that is, an inalienable interest,[5] and so a shifting or a springing use was inalienable. Neither executory devises nor future uses could be barred by a fine or a recovery.[6] The courts were, however, a long time in formulating the rule against perpetuities, beginning with the case of Pells v. Brown in 1621,[7] and finally ending with Cadell v. Palmer[8] in 1833. The history of the struggle has been admirably written by Mr. Lewis in his work on Perpetuities,[9] and by Mr. Hargrave in his argument in the case of Mr. Thelluson's Will.[10] The rule finally established in England is that vesting may be suspended during a life or lives in being, and twenty-one years afterward, as a term in gross, without reference to the infancy of any person whatever, and that a person *en ventre sa mere* is, for the purposes of this rule, considered as in existence.[11] Persons not bearing in mind that an infant *en ventre sa mere* is to be considered a life in being fell into the error of adding the period of gestation to the term in gross of twenty-one years,[12] but this is not accurate, as is pointed out in the commentary on The Real Property Law.[13]

[1] The entire text of this new act follows this Introduction.

[2] Tilden v. Green, 130 N. Y. at p. 47.

[3] Sharswood & Budd's Lead. Cas. R. P. II, 467.

[4] *Infra.*

[5] Moffat's Executors v. Strong, 10 Johns. 12, 17.

[6] Lewis, Perpetuity, chap. 10; Jackson v. Bull, 10 Johns. 19, 21.

[7] Cro. Jac. 590; 1 Eq. Abr. 187, c. 4.

[8] 1 Clark & Finnelly, 372.

[9] Chap. 11.

[10] 4 Ves. 247; 2 Jur. Arg. 7.

[11] Armitage v. Coates, 35 Beav. 1.

[12] Tudor, Lead. Cas. R. P. 464; and see the writer's "Law of Char. Uses, Donations and Trusts in New York," note to pp. 147, 148.

[13] Under § 32, *infra.*

The rule against a perpetuity had originally no reference to remainders. Remainders had a set of principles of their own precluding a perpetuity;[1] a contingent remainder, for example, required an estate of freehold to support it,[2] and it could not be limited after a fee simple.[3] So the limitation of a remainder to the right heirs as purchasers of a person not *in esse* was void.[4] These rules, together with the power to bar or defeat contingent remainders, and the consequent chance of the destruction of the remainders by the determination of the precedent estate before the vesting of the contingent remainder, were quite sufficient to prevent a perpetuity by means of a contingent limitation, effected by means of a common-law assurance. Vested remainders, of course, never tended to a perpetuity before the Revised Statutes entirely altered the meaning of the term "remainder," so as to include in it shifting uses and executory devises. Then the statutory rule against perpetuity was necessarily made to apply to these statutory remainders.[5]

Nor had the rule against perpetuities any reference to limitations subsequent to an estate tail, for estates tail could be barred by a recovery which destroyed all subsequent executory limitations.[6]

The confirmation of the abolition of the burdens of feudal tenures by the statute 12 Charles II, chapter 24,[7] which turned all lay tenures into tenures by free and common socage, marks the formal ending of the feudal system in England. Thereafter the feudal law remains of importance only because it had been the basis of the earlier law of land, and in legal theory had never been abrogated.[8] In the reign of James I, the project of relieving tenants from the feudal burdens had been very much discussed, and was finally consummated under the Commonwealth,[9] being only confirmed by the act 12 Charles II, chapter 24.

At the time when the territory now embraced in the State of New York was granted by King Charles II to the Duke of York

[1] Challis, 158, 159, 160.

[2] Wharton, Principles of Conveyancing, 101.

[3] Challis, 63, 64.

[4] Challis, 91.

[5] In the same way, as Mr. Lewis points out, the old rule against a perpetuity arose because executory interests and uses, after the Statute of Uses and Wills, were held not to be destructible, in the same way that contingent remainders were destroyed. (Lewis, Perpetuity, 128, 132, 134.)

[6] Challis, 146.

[7] A. D. 1660.

[8] See "Feudalism" in 9th ed. Ency. Britannica.

[9] A. D. 1645. In the reign of King James I, propositions to commute the

(afterward James II), the law of England touching lands had entered on the modern stage of its existence. But it was still affected by many archaic incidents which have only comparatively recently been swept away.[1] By the patent granted by King Charles II to the Duke of York the territory was holden of the crown by the free and common socage tenure. This grant necessarily introduced in the province the contemporary English law relating to this tenure with all its incidents. When the Duke of York became James II and his proprietary rights merged in his Crown, the Crown was bound by the statutes (12 Car. II, chap.24) and henceforth could make no grants to be holden by any other lay tenure besides free and common socage. Owing to this fact it became common in New York to omit the tenure in deeds. Thus the importance of tenure ceased to be emphasized. But tenure was not swept away in New York until nearly two centuries after its explicit introduction.

In the year 1664, when the English took possession of New York, the law of the reformed socage tenure was far from attaining the stage it reached by the time of the war of American Independence. The Statute of Frauds (29 Car. II, chap. 3) had not yet been passed in England, and lands might still be conveyed there by feoffment and livery of seisin without deed. But the "Duke's Laws" from the very first (A. D. 1665) required a writing in New York in order to transfer title to lands. Thus, before the English Statute of Frauds was enacted, New York had a like statute of its own.[2] But, as we have seen, the Statutes of Uses and Wills had long before the reign of Charles II given the law of real property its modern direction while the statute 12 Charles II, chapter 24, had lifted the feudal burdens from the socage tenure.[3] Thus all the forms of conveyance already indicated as adopted in England after the Statutes of Uses and Wills were of equal

feudal rights of the Crown for a sum in gross were considered.

[1] See, for confirmation of this, the preface to the New York edition of Booth on Real Actions, printed A. D. 1808.

[2] The statute (27 Hen. VIII, chap. 16) requiring all bargains and sales to be enrolled within six months after the date thereof, had in point of fact introduced the necessity of a writing in conveyancing, although in law feoffments with livery were still valid without a deed or charter. But the latter was customary even when the conveyance was feoffment with livery.

[3] The feudal law was never in force in New York. Van Rensselaer v. Smith, 27 Barb. at p. 149; People v. Van Rensselaer, 9 N. Y. at p. 338.

relevancy in the province of New York after the English occupation in 1664.[1] The English statutes prior to the end of the reign of King Charles II were generally acted on in New York, while the common law of England, in so far as it was not unsuited to local conditions, was the law of the province.

In the province of New York the more complex English settlements of estates in lands were very unusual and unnecessary. The ordinary mode of conveying freehold lands at first was by a common-law feoffment with livery of seisin, the livery being indorsed on the deed.[2] Subsequently conveyances of record, fines and recoveries, and deeds operating under the Statute of Uses, bargains and sale, lease and release, and covenants to stand seised, became common in New York until the Revised Statutes, in 1830, substituted the simple grant and abolished feoffments and fines and recoveries.[3] The complex forms of English settlements had even then been little resorted to here, although as the Statutes of Uses and Wills[4] were in full force after 1664, the more subtle forms of conveyance were quite among the possibilities in 1829.[5] But in practice, prior to the Revised Statutes, there seems to have been a preference in New York for the simpler forms of conveyance.[6] The deeds met with generally passed a fee simple, and, after the abolition of estates tail, very few derivative estates, except leaseholds, were met with in common practice. Occasionally life interests were limited by a will, with vested remainders over, and so, sometimes, contingent remainders were limited. The common-law rules relating to perpetuities were in full force until 1830, yet very few cases had arisen here involving these. Remainders did not then contravene the rules against perpetuity.[7] There were a few instances of executory limitations and devises, as the Statute of

[1] See a devise in tail in Steadfast ex dem., etc., v. Nicoll, 3 Johns. Cas. 18.

[2] In New York, by the "Duke's Laws," a writing was always necessary before the English Statute of Frauds was passed. Hence, the feoffment consisted of two parts, the charter and livery. (See Burton, Real Prop. 7.) But at common law feoffment and livery were the same act. Challis, chap. 28; McGregor v. Comstock, 17 N. Y. at p. 173.

[3] 1 R. S. 738; 2 id. 343; McGregor v. Comstock, 17 N. Y. 162.

[4] Contained in Jones & Varick's revision of 1788, 1789.

[5] See Revisers' notes to article of Revised Statutes on Powers; Kent Comm. IV, 87-94.

[7] These forms are described sufficiently in Watkins on the Principles of Conveyancing, vol. II. See, also, *Collectanea Juridica*, II, 415; Abridgements of Touchstone of Common Assurances; and see vol. II, Sanders, Uses & Trusts, 1–150.

[7] It was the abolition by the Revised Statutes of particular estates

Uses had been in full force since the year 1664. But settlements creating trust terms and powers deriving their effect from the Statute of Uses were uncommon up to 1830.[1] Entails were not unknown in the case of the larger estates, but they could be so easily broken and barred that they were not regarded as even tending to a perpetuity.[2]

The War of Independence made but slight changes in the law of real property in New York. By a series of acts emanating from the newly sovereign State the seigniory and quit-rents annexed to the Crown were formally transferred to the political corporation, abstractly called the State.[3] Thus in legal theory the socage tenure was not abrogated, but continued over all lands previously in tenure. Lands patented under the great seal of the State were, however, made allodial.[4] This dual condition existed down to the Revised Statutes, when all lands were made allodial.[5] In legal theory the State was substituted for the Crown in all the latter's relations to land.[6]

The legal consequence of the modified continuation of tenure, after the birth of the State, coupled with the constitutional adoption of the former common and statute law of the province,[7] was to leave the former common law of real estates in force down to the Revised Statutes of 1830. Prior to 1830 the legislative reforms in the common law had not been very radical, if we except the statutes abolishing primogeniture and regulating descents.[8] The acts turning estates tail into estates in fee simple[9] had, it is true, abolished entails, but this was not regarded as a great reform, for entails might always be readily broken before those acts,[10] and they were not much used in New York, even while the province was

to support remainders that made contingent remainders obnoxious to the new rule against perpetuities. *Vide*, *infra*, The Real Prop. Law.

[1] Revisers' notes to article on Powers; Kent, Comm. IV, 87–94.

[2] Steadfast ex dem., etc., v. Nicoll, 3 Johns. Cas. 18.

[3] Journ. Prov. Conv. I, 554; 1 J. & V. 44, § 14.

[4] 2 J. & V. 67.

[5] 1 R. S. 718, § 3; *cf.* art. I, Const. of N. Y. now in operation; art. I, § 12; *infra*, p. 45.

[6] Wendell v. The People, 8 Wend. 182, 188; De Peyster v. Michael, 6 N. Y. at p. 504; People v. Trinity Church, 22 id. 44; Seneca Nation v. Christie, 126 id. 122; *cf.* as to later patents, Jackson ex dem., etc., v. Ingraham, 4 Johns. 163; Jackson ex dem. v. Hart, 12 id. 77, 80.

[7] Const. 1777, § 35.

[8] *Cf.* Laws of 1782; 1 J. & V. 245; and see below, under art. IX, The Real Prop. Law.

[9] Id. *supra*.

[10] See Wyche, Fines & Recoveries, the first law book published in New York.

under the Crown, except in the case of a few large grants of land, producing rent or return.[1]

Neither the statutes abolishing entails and primogeniture, nor the political independence of the State, made material changes in the law of real property in New York. Even the quantity and quality of estates in the new allodial lands were governed wholly by the former common law which the first Constitution of the State had adopted as its own.[2] As all the great English statutes, including those concerning uses and wills, were also expressly readopted[3] and confirmed,[4] conveyancers were at liberty, until the adoption of the Revised Statutes, to continue to employ any conveyance previously valid in colonial times.[5] As the distinction between courts of equity and courts of law was continued, trust estates were on the same footing as in England until the Revised Statutes altered the law. The Revised Statutes effected great changes in the old law of real property. They created a new learning and mark an epoch, but one never wholly disconnected from the past. To know what a statute accomplishes the lawyers must take into consideration the pre-existing law.

The act which is the subject of this volume is in the main only a re-revision of Part II of the Revised Statutes of 1830. It makes few changes except in matters of form. Such changes in substance as are made are commented on at considerable length in the text of the following commentary on the various sections of the act, and need not be noticed at this point. It will suffice to point out that the Revised Statutes extirpated that remnant of the feudal law which, in the English system of real property, had survived the statute abolishing the military or feudal tenures.[6] Under the provisions of the Revised Statutes there may now be a total abeyance of seisin within the revised rule directed against a perpetuity.[7] A contingent remainder need no longer depend for its validity on the regular expiration of a particular estate of freehold.[8] A freehold estate may be limited by deed to commence *in futuro*;[9] a fee may be mounted on a fee, provided only that the limitation takes effect within the statutory rule directed against a perpetuity.[9]

[1] See a devise in tail, Steadfast ex dem., etc., v. Nicoll, 3 Johns. Cas. 18.

[2] Const. of 1777, § 35.

[3] Id. *supra*.

[4] In Jones & Varick's Revision of 1787–9.

[5] *Supra*, pp. 39, 40.

[6] 12 Car. II, chap. 24.

[7] 1 R. S. 724, § 24; "The Real Property Law," § 40.

[8] 1 R. S. 725, § 34; The Real Property Law, § 48.

[9] 1 R. S. 724, § 24; The Real Property Law, § 40.

Innovations so radical were destructive of nearly all the principles which formerly determined the validity of legal limitations, and thus all limitations were consequently subjected to a uniform rule against a perpetuity.

The Revised Statutes did not, however, alter the essential nature of property in land. The quantity and the quality of estates in possession remained as before;[1] so the old rules relating to conditions and defeasance of estates were in the main unaffected by the provisions of the statutes. The form of the law was often changed without, however, affecting the substance. The Revised Statutes swept away the remnant of the socage tenure, and declared all lands to be allodial.[2]

The great object of the Revised Statutes, in the article "on the Creation and Division of Estates," was to subject, in future, all limitations of legal estates then possible to one system of rules and principles. The separate systems of law and equity were then in full force in New York, and in the natural order of things the revisers dealt first with the universal proprietorship, or that cognizable in the courts of law. Prior to the Revised Statutes there were in force, in New York, three classes of rules relating to limitations of legal estates in allodial lands: (I) Those relative to common-law conveyances; (II) those relating to uses; (III) those relating to devises. These rules, by reason of their different origin, were not always consistent, and, therefore, the validity of a particular limitation might depend on the character of the instrument in which it was contained.[3] The revisers intended to bring the rules relative to limitations of estates into harmony. They abolished the mode of conveying lands by feoffment with livery of seisin, and erected the former conveyance by bargain and sale and lease and release, into "grants" which took effect only from delivery.[4] They, however, revised the old Statute of Wills, thus preserving *venia testandi*, whereby estates in lands might continue to pass by devise.[5] But they made the new rules about future estates apply to both wills and grants alike. These were immense and comprehensive changes, and fertile of great results in modern law.

The present writer has elsewhere ventured to make some observations on the nature of the statutory declaration by the

[1] The Real Prop. Law, §§ 20, 55, *infra*.

[2] 1 R. S. 718, § 3, now Constitution, art. I, § 12, *infra*.

[3] Revisers' note to § 7, 1 R. S. 722.

[4] 1 R. S. 738, article on Alienation by Deed.

[5] 2 R. S. 56, 57, being chap. VI, Part II, R. S., relating to Wills, etc.

State of its own sovereign relations to lands, at the time when all the lands of the State were declared allodial.[1] These statutory provisions, as stated above, were transferred to the Constitution.[2] They preserved escheats to the State *propter defectum sanguinis*, and declare that "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."[3] Feudal tenures only were abolished.[4] In view of these provisions it is sometimes asked in what way estates in the allodial lands now differ from estates in lands held by tenure of free and common socage.[5] The answer is not easily made, but if we may venture on conjecture, one great difference effected by the change relates to the interpretation of the Revised Statutes, for it was thus made the key of its own interpretation, and the cases relating to tenure ceased to be relevant to a great extent.

[1] 1 R. S. 718, tit. 1, art. 1; 1 R. S. 718, § 1.

[2] Const. of 1846, art. 1, §§ 10, 13, and of 1894–5, art. 1, §§ 11, 14.

[3] Id. *supra*.

[4] 1 R. S. 718, § 3; Consts. of 1846 and 1894–5, art. 1; Saunders v. Haines, 44 N. Y. 353, 361.

[5] See commentary below on the provisions of the Constitution touching allodial lands.

CONSTITUTIONAL PROVISIONS

RELATING TO THE

LAW OF REAL PROPERTY IN NEW YORK.[1]

Constitution adopted September 28, 1894.

ARTICLE I.

§ 10. 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.

§ 11. 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.

§ 12. 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.

§ 13. 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.

§ 14. All fines, quarter sales, or other like restraints upon alienation, reserved in any grant of land hereafter to be made, shall be void.

§ 15. No purchase or contract for the sale of lands in this State, made since the fourteenth day of October, one thousand seven hundred and seventy-five; or which may hereafter be made, of, or with the Indians, shall be valid, unless made under the authority and with the consent of the Legislature.

§ 16. Such parts of the common law, and of the acts of the Legislature of the Colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred and

[1] As the following constitutional provisions are closely allied to the Real Property Law, they are inserted for the reader's convenience.

seventy-seven, which have not since expired, or been repealed or altered; and such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated.

§ 17. All grants of land within this State, made by the King of Great Britain, or persons acting under his authority, after the fourteenth day of October, one thousand seven hundred and seventy-five, 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 and 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; or shall impair the obligation of any debts contracted by the State, or individuals, or bodies corporate, or any other rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice.

Comments on the Constitution. Sections 10, 11 and 12 of article I of the Constitution were, prior to 1846, contained in the Revised Statutes,[1] and were transferred to the Constitution of 1846,[2] not without objection from lawyers in the convention, who deemed that the re-enactment of section 11, at least, was wholly unnecessary;[3] feudal tenures never having existed in New York since the English occupation in 1664.[4] They had been abolished in England by the act 12 Charles II, chapter 24, before the conquest of New York by the English.[5]

In legal theory, all titles to estates in New York emanate from the Crown of England,[6] or from an earlier Dutch grant.[7] But as

[1] 1 R. S. 718, §§ 1, 3.

[2] Art. I, §§ 11, 12, 13.

[3] Debates of proceedings of Convention of 1846.

[4] People v. Van Rensselaer, 9 N. Y. p. 338; Van Rensselaer v. Smith, 27 Barb. 149; Overbagh v. Patrie, 8 id. 28, 40; affd., 6 N. Y. 510. Note of Revisers to 1 R. S. 718, §§ 3, 4.

[5] *Vide supra*, Introduction, pp. 38, 39.

[6] Wendell v. People, 8 Wend. 183, 188; People v. Livingston, 8 Barb. 253, 276; People v. Trinity Church, 22 N. Y. 44, 46; Mitchel v. The United States, 9 Pet. p. 748; Jackson ex dem., etc., v. Ingraham, 4 Johns. 163, 182; Seneca Nation v. Christie, 126 N. Y. 122.

[7] People v. Clarke, 10 Barb. 120, 141; Dunham v. Williams, 37 N. Y. 251; Smith v. City of Rochester, 92 id. 463, 482.

the Crown ordered all Dutch grants in New York to be surrendered or confirmed, the presumption now is that this law was obeyed, and that all Dutch grants were converted into the tenure by free and common socage.[1]

In the province of New York the Crown was the sole allodial owner of all the lands not patented prior to August, 1664. The heritable estates in lands patented before that time were afterwards converted into heritable estates in free and common socage, held of the crown.[2] The earlier Dutch estates have possessed, by the terms of their confirmation, some qualities of their own, which it is unnecessary now to consider.[3] The Dutch estates in question, however, depend on the terms of their confirmation by the English, and the subsequent course of events in the province and State.

Crown-grants, Tenure. The Crown granted most of the original estates in the lands lying in New York to its subjects,[4] and in these royal patents an estate of a particular tenant was defined and was generally a "fee simple." The lands themselves were to be held by the tenant and his heirs in free and common socage tenure of the Crown, a quit rent being ordinarily reserved. The War of Independence first severed the relation of the Crown to the socage tenants, substituting at first the revolutionary government and afterwards the organized corporate State as chief lord of the fee.[5] The "*terra regis*" or the ungranted Crown lands also then vested in the State of New York, which subsequently granted them under the great seal. These new grants expressly created what were fee simple estates in the common law. But the new fee simple estate differed from the old Crown grants in one respect only, they were free of all those services (except rents reserved) which attached to the old tenure by free and common socage.[6] In other words, the lands were allodial and free of the legal service called fealty.[7]

[1] See note of original Revisers to 1 R. S. 718, §§ 3, 4.

[2] See the method of conversion in Hoffman's Treatise on Estates, City of N. Y., II, 44, 46; Bogardus v. Trinity Church, 4 Sandf. Ch. 699; Jackson ex dem., etc., v. Murray, 7 Johns. 5.

[3] Dunham v. Williams, 37 N. Y. 251; Smith v. City of Rochester, 92 id. 463, 482.

[4] I pass over the estate to the Duke of York which subsequently merged in his Crown and devolved with it. The history of this devolution is very familiar to students of our legal history.

[5] De Peyster v. Michael, 6 N. Y. at p. 504. This case was subsequently questioned on other points, however. The incidents of this change are narrated in the Introduction, *supra*.

[6] See Revisers' notes to 1 R. S. 718, §§ 3, 4.

[7] Jackson v. Schutz, 18 Johns. 174; Cornell v. Lamb, 2 Cow. 652.

Fealty was a purely nominal service, never exacted here in practice, and its chief legal use was that it supported the right of distraint for rents without the necessity of a rent charge. In all other respects the quantity and the quality of estates in socage lands and those of estates in allodial lands were alike, both being determined by the fundamental or common law adopted by the new State in the first Constitution.[1] Chancellor Kent believed that lands holden by the tenure of free and common socage, after the War of Independence did not differ from allodial land in any essential respect.[2] The revisers state that the real reason in making all lands allodial lands was to make the tenures in New York uniform.[3] They desired probably also to destroy all feudal presumptions in the common law and to make the Revised Statutes the key of their own interpretation. A fee simple in allodial lands means now only the largest estate of inheritance or one to heirs generally *ad infinitum*.[4] The dominion of the owner or tenant in fee simple of lands is not, therefore, absolute, but is still subject to the political supremacy of the People of the State. The restriction and qualifications of this supremacy are determined by the constitutions of government, State and Federal.[5]

Effect of Constitution. While the Constitution declares that the People possess the original and ultimate property in all lands, it does not establish a rule of evidence, but a principle of sovereignty. There is no presumption of title in favor of the People against the actual occupant of land, until it is shown that the possession has been vacant within forty years.[6]

Continuation of Tenure. In view of the fact that the 1st article of "The Real Property Law" perpetuates the title "Tenure of Real Property," it is apparent that the Legislature still recognize that lands which are subject to escheats, are essentially in tenure whether that tenure be called "allodial tenure," as the revisers termed it,[7] or "socage tenure," at least since the statute, 12 Charles

[1] § 35.

[2] 4 Comm. 3.

[3] Revisers' notes, 1 R. S. 718, §§ 3, 4.

[4] *Cf.* Challis, 29, 42, 167.

[5] Const. of 1846, art. I; Const. of 1894–5, art. 1; Fed. Const. art. 1, § 10, and Amendment XIV.

[6] People v. Trinity Church, 22 N. Y. 44; People v. Van Rensselaer, 9 id. 291, 318, 319; People v. Arnold, 4 id. 508; Johnson v. Spicer, 107 id. 185; Wendell v. People, 8 Wend, 183, 188; People v. Denison, 17 id. 312; Clark v. Holdridge, 12 App. Div. 613; *cf.* N. Y. Cent. & H. R. R. Co. v. Brennen, 12 id. 103.

[7] Note to 1 R. S. 718, §§ 3, 4, and see caption of art. I of "The Real Property Law."

II, chapter 24, swept away the feudal burdens. The only distinction between the so-called "allodial tenure" and socage tenure after Independence was the incident of "fealty" which still attached theoretically to the socage tenure of the State, in order to support the common-law remedy of distress. When fealty became no longer essential in New York to distraints, there was no real difference between the allodial tenures of the Revised Statutes, and the socage tenure of the *post*-revolutionary common law of New York. Yet strictly, *tenure* and "*allodium*" denote inconsistent relations in law.[1] But this is not invariably true, for "*allodium*" was in early times occasionally used to denote an inheritable feud.[2] Under this article the paramount rights of the State are broader than the feudal right of escheat, which accrued when the tenants' heirs failed, or *propter defectum sanguinis*.[3] This section implies the right of the State to take the benefit of the forfeiture occasioned by alienage.[4]

Leases. Section 13 of article I of the Constitution, relative to leases, is considered below in connection with "estates for years," under section 20 of "The Real Property Law,"[5] and in connection with estates of inheritance under section 21 of the same law.[6]

Restraints on Alienation. Section 14 of article I of the Constitution, relating to restraints on alienation, was declaratory.[7] Before 1846 a reservation of a quarter or a sixth of the purchase money upon any subsequent sale was deemed a void reservation in a grant in fee.[8] The prohibition is now express.

[1] Tenure denotes the specific feudal relation between the lord and the tenant. Atty.-Gen. of Ontario v. Mercer, 8 L. R. (App. Cas.) 767.

[2] Freeman, Norman Conquest IV, 38, notes.

[3] 1 R. S. 718, § 1; Watkins, Descents, 6; Johnston v. Spicer, 107 N. Y. 185.

[4] People v. Conklin, 2 Hill, 67.

[5] *Infra*.

[6] *Infra*.

[7] *Vide infra*, under § 3, The Real Prop. Law.

[8] Overbagh v. Patrie, 8 Barb. 28; S. C., 6 N. Y. 510; De Peyster v. Michael, Id. 467, overruling Jackson v. Schutz, 18 Johns, 174. De Peyster v. Michael was itself practically repudiated, in so far as its statement that the Statute "*Quia Emptores*" was not in force in New York. Van Rensselaer v. Hayes, 19 N. Y. 68.

THE REAL PROPERTY LAW.

CHAPTER 547.[1]

[General.]

AN ACT relating to real property, constituting chapter forty-six of the general laws.

Became a law May 12, 1896, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

CHAPTER XLVI OF THE GENERAL LAWS.

The Real Property Law.

ARTICLE 1. Tenure of real property. (§§ 1–9.)
2. Creation and division of estates. (§§ 20–56.)
3. Uses and trusts. (§§ 70–93.)
4. Powers. (§§ 110–163.)
5. Dower. (§§ 170–187.)
6. Landlord and tenant. (§§ 190–202.)
7. Conveyances and mortgages. (§§ 205–234.)
8. Recording instruments affecting real property. (§§ 240–277.)
9. Descent of real property. (§§ 280–296.)
10. Laws repealed; when to take effect. (§§ 300–301.)

ARTICLE I.

Tenure of Real Property.

SECTION 1. Short title; definitions; effect.
2. Capacity to hold real property.
3. Capacity to transfer real property.
4. Deposition of resident alien.
5. When and how alien may acquire and transfer real property.
6. Effect of marriage with alien.
7. Title through alien.
8. Liabilities of alien holders of real property.
9. Heirs of patriotic Indian.

[1] Laws of 1896.

SECTION 1. **Short title; definitions; effect.**— This chapter shall be known as the real property law. The terms "real property" and "lands" as used in this chapter are coextensive in meaning with lands, tenements and hereditaments. This chapter does not alter or impair any vested estate, interest or right, nor alter or affect the construction of any conveyance, will or other instrument which has taken effect at any time before this chapter becomes a law.

Formerly 1 Revised Statutes, 750, sections 10 and 11:

§ 10. The terms "real estate," and "lands," as used in this Chapter, shall be construed as co-extensive in meaning with lands, tenements and hereditaments.[1]

§ 11. None of the provisions of this 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 this Chapter shall be in force as a law.[2]

Comments on this Section. Were it not for the fact that the Commissioners of Statutory Revision in their Notes, or Report, to the Legislature, state that this section makes no change in the sections of the Revised Statutes just set forth, it would be unnecessary to point out an obvious distinction. 1 Revised Statutes, 750, section 10, refers only to the construction of chapter 1 of part II, Revised Statutes. But section 1 of The Real Property Law refers to the construction of the same words throughout this entire act, and yet in other parts of this act we must note that the term "real property" is to receive a more extended construction than that just declared by this section.[3] This section of this act should, therefore, have been divided into two distinct sections as in the Revised Statutes,[4] and the defining section then limited to those articles of this chapter preceding articles VII and VIII, which have definitely prescribed their own statutory construction.[5] Then this section would have corresponded with the sections of the Revised Statutes from which it purports to be taken.

Definitions. As throughout this entire chapter the terms "real property" and "lands" are declared the equivalent of "lands," "tenements" and "hereditaments," we may inquire what "lands," "tenements" and "hereditaments" mean. These are technical

[1] Repealed, chap. 547, Laws of 1896. Laws of 1892, being chap. I of the General Laws.

[2] Repealed, chap. 547, Laws of 1896.

[3] §§ 240, 280, The Real Prop. Law; *cf.* § 3, Stat. Const. Law, chap. 677,

[4] *Supra*, 1 R. S. 750, §§ 10, 11.

[5] §§ 240, 280, The Real Prop. Law.

terms of that common law adopted by the Constitution as the fundamental law of the State.[1]

The meaning of common-law terms is still settled by the common law, unless modified by statutes of the State.[2]

"'*Lands*,' *Terra*, in the legall signification comprehendeth any ground, soile or earth whatsoever; as meadowes, pastures, woods, moores, waters, marishes, furses, and heath. *Terra est nomen generalissimum et comprehendit omnes species terræ*, etc., etc."[3] In its general signification "*land*" has an indefinite extent upwards, "*cujus est solum ejus est usque ad cœlum.*" It includes everything terrestrial, not only the ground or soil, but everything attached to the earth, whether by the course of nature, as trees,[4] herbage[5] and water,[6] or by the hands of man, as houses and other buildings.[7] Grass partakes of the nature of land, but, on the other hand, crops produced by cultivation, as between heir and executor, pass to the latter.[8] Even young trees, in a nursery, may, as between landlord and tenant, form an exception to the general rule, and be regarded as not part of the land.[9]

Tenements are all those rights or things which were at common law the subject of tenure.[10]

Hereditaments include whatever may be inherited, be it corporeal or incorporeal, real, personal or mixt.[11] As Challis points out, "hereditaments" excludes "special occupancy."[12] It includes an easement to carry water across the lands of another.[13] It is a term of the largest signification.[14]

[1] Art. I, § 16, *supra*, p. 45.

[2] Chap. 530, Laws of 1873; Despard v. Churchill, 53 N. Y. 192, 199, *et supra*, pp. 45, 46.

[3] Co. Litt. 4a; 2 Black. Comm. 16; 3 Kent Comm. 401; Challis, 36; Pond v. Bergh, 10 Paige, 140.

[4] Vorebeck v. Roe, 50 Barb. 302; Goodyear v. Vosburgh, 57 id. 243; Warren v. Leland, 2 id. 613; Brooks v. Galster, 51 id. 196; Edson v. Howell, 86 Hun, 424.

[5] Matter of Chamberlain, 140 N. Y. 390.

[6] Rodgers v. Jones, 1 Wend. 237, 255; Jackson ex dem., etc., v. Halstead, 5 Cow. 216.

[7] Hoffman v. Armstrong, 48 N. Y. 201.

[8] Matter of Chamberlain, 140 N. Y. 390.

[9] Hamilton v. Austin, 36 Hun, 138.

[10] Co. Litt. 6a; 2 Black. Comm. 16; 3 Kent Comm. 401; Challis, 37. The definitions of Mr. Challis are justly esteemed as quite equal to those of any of his predecessors.

[11] Co. Litt. 6a; 2 Black. Comm. 17; 3 Kent Comm, 401; Canfield v. Ford, 28 Barb. 336; Nellis v. Munson, 108 N. Y. 453, 458.

[12] Challis, 38.

[13] Nellis v. Munson, 108 N. Y. 453.

[14] Canfield v. Ford, 28 Barb. 336.

Saving Clause. The general saving clause of this section,[1] saving all vested rights and the construction of any conveyance, will or other instrument effected before the passage of this act, was drafted for more abundant precaution, as the act itself could not have been retroactive in operation[2] so as to impair vested rights or estates.

[1] § 1, The Real Prop. Law.

[2] Dwarris, Stat. 75; Dash v. Van Kleeck, 7 Johns. 477; Sayre v. Wisner, 8 Wend. 661; Brewster v. Brewster, 32 Barb. 428; Sanford v. Bennett, 24 N. Y. 20; 44 id. 258; Westervelt v. Gregg, 12 id. 202; *cf.* Const. U. S., art. I, § 10 and amendment 14th; De Peyster v. Clendening, 8 Paige, 295, 304.

§ 2. **Capacity to hold real property.**—A citizen of the United States is capable of holding real property within this state, and of taking the same by descent, devise or purchase.

Formerly 1 Revised Statutes, 719, section 8:

§ 8. 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]

Federal Law.—This section is declaratory of a right embodied in the supreme Federal law.[2] Prior to Independence a naturalized or a native-born citizen of a British colony could take and hold lands in any other of the Crown dominions for he was a subject of the common king, and his *status* related to the empire and not to any portion of it.[3] The Articles of Confederation perpetuated this capacity.[4] Thence, it passed into the National, or Federal, Constitution and became organic.[5]

Citizenship under Federal enactments. Since the year 1790, the Federal government has exercised the sovereign power of naturalization[6] delegated by the Constitution.[7] As this delegated power is exclusive, when it has once been exercised by Congress, the States cannot now convert an alien into a citizen of the United States by process of naturalization.[8]

Citizens of the United States. The Federal law for the purposes of real property can then alone determine who are "citizens of the United States."[9] Citizens of the United States are those, (1) who remained citizens of any State, after a reasonable time from the outbreak of hostilities, in 1775, with England.[10] (2) All persons born in the United States and not subject to any foreign power,

[1] Repealed, chap. 547, Laws of 1896.

[2] Art. IV, U. S. Const.; Campbell v. Morris, (Md.) 3 H. & McH. 535; Ward v. Morris, 4 id. 330; People ex rel. Turner v. Plimley, 17 Misc. Rep. 457, 459.

[3] Calvin's Case, 7 Rep. 1; Pollock & Maitland, Hist. Eng. Law, I, 441; Burton, Real Prop., Appendix, 501; 23 Am. Law Rev. 762, 763; 30 id. 241.

[4] Art. IV.

[5] Art. IV, § 2; 2 Story Const. § 1806; Lynch v. Clarke, 1 Sandf. Ch. 583, 645.

[6] Lynch v. Clarke, 1 Sandf. Ch. 583, 645; Ludlam v. Ludlam, 26 N. Y. 356, 360; U. S. R. S. §§ 2165–2174.

[7] Art. I, § 8, subd. 4.

[8] Chirac v. Chirac, 2 Wheat. 259; U. S. v. Villato, 2 Dall. 370; Dred Scott v. Hanford, 19 How. 393; Matthews v. Ray, 3 Cranch C. C. 699; Golden v. Prince, 3 Wash. C. C. 314.

[9] Ludlam v. Ludlam, 26 N. Y. 356, 360; Comitis v. Parkerson, 56 Fed. Rep. 556, *et ut supra*.

[10] The authorities on this branch are collated at p. 76, "Histy. of Real Prop. in New York." Lynch v. Clarke, 1 Sandf. Ch. 583, 645; Minor v. Happersett, 21 Wall. 162, 167.

excluding Indians not taxed.[1] Indians born within the territorial jurisdiction of the United States occupy a peculiar *status*. By an abandonment of tribal subjection, coupled with the payment of a tax to the support of government, they may become *ipso facto* citizens;[2] or they may be naturalized.[3] (3) All those free whites and Africans whom the sovereignty of the United States has clothed with citizenship by naturalization,[4] or adoption,[5] and who remain subject to the jurisdiction thereof.[6] (4) By statute an alien woman, possessing capacity for citizenship, who intermarries with a citizen of the United States, either here or abroad, thereby becomes a citizen of the United States, no matter where she may reside.[7] That a citizen woman, by intermarriage with an alien becomes, under our law, an alien, is not so clear.[8]

Corporation. A foreign corporation is not a citizen within the meaning of this section of The Real Property Law.[9]

Sources of Citizenship. There are now but three sources of citizenship in the United States — birth,[10] marriage[11] and naturaliza-

[1] § 1992, U. S. R. S.; § 2172, U. S. R. S.; Amendment XIV to U. S. Const.; Slaughter House Cases, 16 Wall. 36, 72; In re Look Tin Sing, 21 Fed. Rep. 905; In re Wong Kim Ark, 71 id. 382. And see an article in 30 Am. Law Rev. 535.

[2] Amendment XIV, Fed. Const.; § 1992, U. S. R. S.; U. S. v. Elm, 23 Int. Rev. Rec. 419; Elk v. Wilkins, 112 U. S. 94.

[3] See the acts referred to in Elk v. Wilkins, 112 U. S. 103, 104.

[4] Amendment XIV to U. S. Const.; §§ 2165–2169, U. S. R. S. Mexicans are included; In re Rodriguez, 81 Fed. Rep. 337.

[5] § 2172, U. S. R. S.; Boyd v. Nebraska ex rel. Thayer, 143 U. S. 135; Burton v. Burton, 1 Keyes, 359; Kelly v. Owen, 7 Wall. 496.

[6] Comitis v. Parkerson, 56 Fed. Rep. 556. These words intended to exclude children of diplomatic personages, or consuls, or aliens. Slaughter House Cases, 16 Wall. 36.

[7] Act of Congress of Feb. 10, 1885, U. S. R. S. § 1994; Wainwright v. Low, 132 N. Y. 313; Kelly v. Owen, 7 Wall. 496; Halsey v. Beer, 52 Hun, 366; People v. Newell, 38 id. 78. There was an act in England in 8 Henry V (See Lewis Bowle's Case, Tudor, Lead. Cas. Real Prop. 73), enabling alien women, married to Englishmen, to have dower.

[8] Comitis v. Parkerson, 56 Fed. Rep. 556; 31 Am. Law Rev. 504, 505; *cf.* Wadsworth v. Wadsworth, 12 N. Y. 376; Ludlam v. Ludlam, 26 id. 356. And see below, under this section, on the doctrine of perpetual allegiance and the right of expatriation.

[9] Duquesne Club v. Penn Bank of Pittsburgh, 35 Hun, 390; *cf.* Paul v. Virginia, 8 Wall. 181; Connor v. Elliott, 18 How. 591; Lafayette Ins. Co. v. French, Id. 407; Ducat v. Chicago, 10 Wall. 410.

[10] Amendment XIV, U. S. Const. "Citizenship by birth" is the subject of several important papers in volumes 29 and 30, American Law Review (XXIX, p. 385; XXX, pp. 241, 355 and cases and authorities there cited). U. S. v. Wong Kim Ark, 169 U. S. 649; In re Look Tin Sing, 21 Fed. Rep. 905.

[11] *Supra.*

tion,[1] and the latter is limited in its application to free white persons and those of African nativity, or descent.[2] The general naturalization laws have no application to Mongolians or to those of half white and half Indian blood.[3] The naturalization of an alien already married operates to naturalize his wife[4] and resident minor children.[5] The children of alien tourists, denizens, or commercial agents, *in itinere*, or *animo revertendi domum*, who are not fully subject to the sovereignty and allegiance of the United States, are not citizens by birth, though born within the United States.[6]

Nativity not a Final Test. Foreign birth is not now conclusive of alienage, for children of citizen parents, or of a citizen father, though born out of the limits and territorial jurisdiction of the United States, are to be considered citizens of the United States;[7] nor is birth within the United States conclusive of citizenship in the case of the legitimate children[8] of diplomatic or consular alien personages, for such children are in legal contemplation born exterritorially, or within the allegiance and diplomatic jurisdiction of the parents' sovereign.[9]

Presumption of Law. The *status* of "alien" or citizen once fixed, is presumed to continue until the contrary be shown,[10] except in the case of deserters.[11] But an alien does not cease to be such

[1] 31 Am. Law Rev. 598; Elk v. Wilkins, 112 U. S. 94, 101; 14th Amend. Fed. Const.; Story Confl. of Laws, § 48; *cf.* Bacon Abr. tit. "Alien," but see female's marriage with citizen, *supra*, p. 56.

[2] § 2169, U. S. R. S.

[3] § 2169, U. S. R. S.; re Ah Yup, 5 Saw. 155; re Camille, 6 id. 541.

[4] Boyd v. Nebraska ex rel. Thayer, 145 U. S. 135; Burton v. Burton, 1 Keyes, 359; Kelly v. Owen, 7 Wall. 496; § 2172, U. S. R. S.

[5] People v. Newell, 38 Hun, 78; U. S. R. S. § 2172; Renner v. Miller, 44 N. Y. Super. Ct. 535.

[6] Slaughter House Cases, 16 Wall. 36, 73; 29 Am. Law Rev. 391; 30 id. 246, 247, 535; 23 id. 759; 31 id. 504; *cf.* Opins. Atty.-Genl. of U. S. X, 328; In re Wong Kim Ark, 71 Fed. Rep. 382; Lynch v. Clarke, 1 Sandf. Ch. 583; U. S. v. Wong Kim Ark, 169 U. S. 649.

[7] Act of Congress of January 29, 1795; §§ 1993, 2172, U. S. R. S.; U. S. v. Gordon, 5 Blatchf. 18; Ware v. Wisner, 50 Fed. Rep. 310; Lynch v. Clarke, 1 Sandf. Ch. 583; Opins. of Atty.-Genl. of U. S. X, 329; *cf.* 30 Am. Law Rev. 245 *et seq.*

[8] The political *status* of an illegitimate child is that of the mother.

[9] Lynch v. Clarke, 1 Sandf. Ch. 583, 658; In re Look Tin Sing, 21 Fed. Rep. 905; Slaughter House Cases, 16 Wall. 36, 73; 30 Am. Law Rev. 242, 243.

[10] Hauenstein v. Lynch, 100 U. S. 483; Charles Green's Son v. Salas, 31 Fed. Rep. 6; Lumley v. Wabash Ry. Co., 71 id. 21; *cf.* Boyd v. Thayer, 143 U. S. 135, as to what proof rebuts presumption.

[11] §§ 1996, 1997, 1998, U. S. R. S.; chap. 172, N. Y. Laws of 1872.

by merely declaring his intention of becoming a citizen of the United States.[1]

Expatriation; Perpetual Allegiance. The right of citizens of the United States to expatriate themselves and renounce their allegiance to the United States ought to be very clear, in view of the pronounced position of Congress on the right of foreigners to expatriate themselves.[2] But it is not so; the doctrine of perpetual allegiance of American citizens being strenuously held in former cases.[3]

What Law Determines Citizenship. In the absence of any law or decision of the United States, governing the particular case, the common law is, in New York, to determine, irrespective of English statutes, whether or not one is an alien or a citizen of the United States.[4]

Naturalization. Naturalization is a judicial act of record, and it can be proved by the record only,[5] and not by parol.[6] Naturalization may be also by a collective process, such as annexation of a foreign State or territory.[7]

Disabilities of Aliens by Common Law. The disabilities of aliens to hold lands and real property in this State, are due to the common law and the authority given it by the State Constitution.[8] But this statement is subject to one exception; a devise to an alien is void by statute.[9]

Removal of Disabilities. As the Legislature has the reserve

[1] In re Moses, 83 Fed. Rep. 995.

[2] U. S. R. S. § 1999; Charles Green's Son v. Salas, 31 Fed. Rep. 106; Jennes v. Landes, 84 id. 73; 23 Am. Law Rev. 769; 30 id. 243; 31 id. 504, 505.

[3] Comitis v. Parkerson, 56 Fed. Rep. 556; Opin. N. Y. Atty.-Genl. for 1868, p. 380; Beck v. McGillis, 9 Barb. 35 49; Shanks v. Dupont, 3 Pet. 242, 246, 2 Kent Comm. 43, *et seq.*; Ludlam v. Ludlam, 26 N. Y. 356.

[4] 30 Am. Law Rev. 241; Ludlam v. Ludlam, 26 N. Y. 356; Lynch v. Clarke, 1 Sandf. Ch. 583; *cf.* Bacon Abr., tit. "Alien," as to definitions at common law of citizen and alien, and Luhrs v. Eimer, 80 N. Y. 171.

[5] *Cf.* Boyd v. Thayer, 143 U. S. 135; McCarthy v. Marsh, 5 N. Y. 263, 284.

[6] Charles Green's Son v. Salas, 31 Fed. Rep. 106; U. S. v. Gleason, 78 id. 396; Pintsch Compressing Co. v. Bergin, 84 id. 140.

[7] Boyd v. Thayer, 143 U. S. 135; Opins. of Pothier, Felix and Heftner, Wheaton, Elements Internat. Law, Appendix, 631.

[8] Hansard on Aliens, 131; 1 Black. Comm. 366; 2 id. 249; 23 Am. Law Rev. 762, 768, 769; 30 id. 241; Ludlam v. Ludlam, 26 N. Y. 356; *cf.* § 5, The Real Prop. Law, formerly 1 R. S. 720, § 17; Wright v. Sadler, 20 N. Y. 320. The remote origin of the disabilities of aliens in all systems of law, is discussed in Prof. Bernheim's History of the Law of Aliens (N. Y., 1885).

[9] *Vide, infra*, pp. 59, 69.

power to alter the common law, it has, in many instances, removed the disabilities from particular aliens.[1]

Escheat. The common-law "escheat," which the State enforces against aliens who hold lands, is not of purely feudal origin; it grew out of national policy.[2] This remote origin of the disabilities of aliens, produced the distinction noted in the next paragraph.

Distinction between the Taking and the Holding of Lands. A distinction is always to be made, under the common law, between the *taking* and the *holding* of lands by aliens.[3] An acquisition by an alien through purchase (which includes every mode, except descent, by which property can be acquired[4]) was not void at common law, but only a cause of forfeiture.[5] The estate of an alien acquired by purchase could even be protected by action.[6] The estate vested in him until office found,[7] and could be conveyed by him subject to being divested on the recording of the inquisition.[8]

Devises to Aliens Void, unless Deposition Filed. The Revised Statutes changed the former or common-law rule, and made devises to an alien, living at the time of testator's death, void.[9] This provision was an augmentation, rather than a diminution, of the common-law disabilities of aliens,[1] and was soon changed by statute, so as to enable a resident alien to devise lands and a resident alien devisee to take and hold lands on filing a deposition of an intention to become a citizen of the United States.[11]

[1] See the statutes and cases adjudged, cited pp. 189–197, "History of the Law of Real Property in New York," and the cases cited *infra* under § 5, The Real Prop. Law.

[2] *Cf.* 2 Black. Comm. 249, 252; 3 id. 258; Bernheim, Hist. of the Law of Aliens, 124, 125; 23 Am. Law Rev. 769; 29 id. 386; Chitty, Prerog. of Crown, 215.

[3] Hall v. Hall, 81 N. Y. 130.

[4] See Stamm v. Bostwick, 122 N. Y. 48; McCartee v. Orphan Asylum, 9 Cow. 491–495; Daly v. Beer, 32 N. Y. St. Repr. 1064; Callahan v. O'Brien, 72 Hun, 216, 220, for a clear definition of "purchase."

[5] 2 Black. Comm. 293; Craig v. Leslie, 3 Wheat. 563, 588.

[6] Nolan v. Command, 11 Civ. Proc. Rep. 295; Craig v. Leslie, 3 Wheat. 563, 589.

[7] Jackson v. Lunn, 3 Johns. Cas. 109; People v. Conklin, 2 Hill, 67; Munro v. Merchant, 28 N. Y. 9; Goodrich v. Russell, 42 id. 177; Wright v. Sadler, 20 id. 320, 328; Wadsworth v. Wadsworth, 12 id. 376; Stamm v. Bostwick, 122 id. 48.

[8] Griffeth v. Pritchard, 5 Barn. & Ald. 765, 780; 2 Kent Comm. 61; *cf.* 1 R. S. 719, § 9; § 7, The Real Prop. Law.

[9] 2 R. S. 57, § 4; Mick v. Mick, 10 Wend. 379; Wadsworth v. Wadsworth, 12 N. Y. 376; Downing v. Marshall, 23 id. 366, 375; Hall v. Hall, 81 id. 130; Beekman v. Bonsor, 23 id. 298, 316; Van Courtland v. Nevert, 11 N. Y. Supp. 148, 152.

[10] Wadsworth v. Wadsworth, 12 N. Y. 376; Marx v. McGlynn, 88 id. 357, 376.

[11] Chap. 115, Laws of 1845; amended, chap. 261, Laws of 1874; 1 R. S. 720.

§ 3. **Capacity to transfer real property.**— A person other than a minor, an idiot, or person of unsound mind, seized of or entitled to an estate or interest in real property, may transfer such estate or interest.

Formerly 1 Revised Statutes, 719, § 10:

§ 10. Every person capable of holding lands, (except idiots, persons of unsound mind, and infants), seized of, or entitled to, any estate or interest in lands, may alien such estate or interest at his pleasure, with the effect, and subject to the restrictions and regulations provided by law.[1]

History of this Section. The section of the Revised Statutes now re-enacted was taken from an older statute of this State,[2] which in terms owed its enactment to the fundamental revision by Jones and Varick of the great English statutes presumed to have extended to New York before its independence,[3] and to have been adopted by the first Constitution of the State.[4] The English statutes thus re-enacted were not new laws, but old laws dressed in a more suitable garb and adapted to the new order of things.[5] Messrs Jones and Varick, authors of the revision of 1789, took the original of the section in question from the statute commonly called *Quia Emptores terrarum*.[6] The history of a tenant's power to alienate his lands has been already indicated at length in the Introductory Chapter[7] and need not be repeated. The complement of this section is now found in article I of the Constitution: "all fines, quarter sales, or other like restraints upon alienation reserved in any grant of land hereafter to be made shall be void."[8] The Statute of *Quia Emptores* has now been firmly held to have been in force in the province of New York, the intimation to the contrary being rejected.[9]

Restraints on Alienation. Restraints on alienation are now prohibited also by our statute directed against perpetuities;[10] regulated

§ 15; Hall v. Hall, 81 N. Y. 130; *cf.* Marx v. McGlynn, 88 id. 376; chap. 207, Laws of 1893; §§ 4, 5, The Real Prop. Law.

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 R. L. 70, § 1; Id. 74, § 5.

[3] 2 J. & V. 67; Id. 68.

[4] § 25, Const. of 1777.

[5] Corning v. McCullough, 1 N. Y. 64; People v. Clarke, 9 id. 349, 362; Van Rensselaer v. Hayes, 19 id. 74; Jackson v. Schutz, 18 Johns. 186; 4 Kent Comm. 494. Note of Revisers to part 2, chap. 1, tit. 1, art. 1, R. S.

[6] 18 Edw. I; 2 Inst. 500.

[7] *Supra*, pp. 10, 11, 12, 13, 14.

[8] *Supra*, p. 45.

[9] *Supra*, p. 49; Van Rensselaer v. Hayes, 19 N. Y. 68; *cf.* De Peyster v. Michael, 6 id. 467, and see observation p. 49, note 8, on the Statute of *Quia Emptores*.

[10] § 32, The Real Prop. Law.

by the unrepealed portion of the common law relating to persons *non sui juris*,[1] and forbidden by the constitutional prohibition given above.[2] This section of the present act is of historical interest, being a mutilated survival of the old Statute of *Quia Emptores*, with the portion relating to tenures obliterated.[3]

What Estates and Interests Transferable. What estates and interests are transferable are denoted under subsequent sections of The Real Property Law.[4]

Interpretation of Section 3, Supra. So far as this section of The Real Property Law is now concerned, it is sometimes regarded as auxiliary.[5] But in the case of married women's property it was at one time cited as an enabling act.[6] The notable change in the language of the Revised Statutes,[7] made by this section of The Real Property Law,[8] is contradicted by the note of the Statutory Revision Commission — that it is unchanged in substance.[9] The section in the Revised Statutes, it will be observed, limited its own application to persons capable of holding lands. The present revision changes this language to "*a person * * * seised of or entitled to an estate or interest in real property.*" Seisin in modern law *simpliciter* means ownership.[10] In feudal law it meant the investiture of the tenant, whereby he was admitted into possession of the feud.[11] At one time it referred to a possession protected by the Assizes.[12] It now refers to an estate, not to lands,[13] and is often used even in connection with chattels, as synonymous with possession.[14] In this sense of the term seised, this section, as now framed, may, standing alone, enable aliens to transfer estates or interests in lands, and this irrespective of section 7 of this act.[15]

Exceptions Made by this Section. This section excepts minors, idiots, and persons of unsound mind. By the common law persons *non sui juris* are unable, of themselves, to transfer rights of prop-

[1] *Infra*, under this section.

[2] *Supra*, p. 45.

[3] See Const. art. 1, § 14, *supra*, p. 45.

[4] *Infra*, article II.

[5] *Sed. cf.* Freeborn v. Wagner, 49 Barb. 43, 54; Wetmore v. Kissam, 3 Bosw. 321, 327.

[6] Dickerman v. Abrahams, 21 Barb. 551; Andrews v. Shaffer, 12 How. Pr. 441, 443.

[7] 1 R. S. 719, § 10.

[8] § 3, *supra*.

[9] *Vide* Appendix I, note to § 3.

[10] Matter of Dodge, 105 N. Y. 585, 591; *et vide infra*, under §§ 280, 281, The Real Prop. Law.

[11] Jackson ex dem., etc., v. Demont, 9 Johns. 55, 58; Vanderheyden v. Crandall, 2 Den. 9, 22, 23.

[12] Holmes, London Law Quar. I, 168.

[13] Van Rensselaer v. Poucher, 5 Den. 35.

[14] Challis, 47, note.

[15] *Cf.* § 7, The Real Prop. Law.

erty. Infants may not alien their lands, but may purchase, subject to the right to disaffirm on their attaining majority.[1] Idiots,[2] and lunatics,[3] labor under similar disability.[4] The law makes, in most cases, provision for the necessary alienation of the lands of persons thus situated, by means of trustees, guardians, curators and committees.[5]

[1] 1 Black. Comm. 465; 2 id. 291; *cf.* 2 Kent Comm. 235 *et seq.*; Chapin v. Shafer, 49 N. Y. 407, 412; Gillett v. Stanley, 1 Hill, 121; Conroe v. Birdsall, 1 Johns. Cas. 127.

[2] 2 Black. Comm. 291; 2 Kent Comm. 450; Valentine v. Lunt, 51 Hun, 544; 1 Thomas, "Estates by Will," 47 *seq.*

[3] 2 Black. Comm. 291; Hughes v. Jones, 116 N. Y. 67.

[4] The cases on this head are very fully collated in 1 Thomas, "Estates by Will," 47 *seq.*

[5] *Vide* Girard, Titles to Real Estate, chaps. 25, 30.

§ 4. **Deposition of resident alien.**— An alien who, pursuant to the laws of the United States, has declared his intention of becoming a citizen, and who is, and intends to remain, a resident thereof, may make a written deposition to such facts, before any officer authorized to take the acknowledgment or proof of deeds to entitle them to be recorded within the state. Such deposition must be certified by the officer before whom it is made, and may be filed in the office of the secretary of state, and when so filed, must be recorded by him in a book kept for that purpose.[1] Such deposition shall be presumptive evidence of the facts therein contained.

Formerly 1 Revised Statutes, 720, section 15, as amended by chapter 272, Laws of 1834:

§ 15. Any alien who has come, or who may hereafter come into the United States, may make a deposition or affirmation in writing before any officer authorized to take the proof of deeds to be recorded, that he is a resident of, and intends always to reside in the United States, and to become a citizen thereof, as soon as he can be naturalized, and that he had taken such incipient measures as the laws of the United States require, to enable him to obtain naturalization; which shall be certified by such officer, and be filed and recorded by the secretary of state in a book to be kept by him for that purpose; and such certificate, or a certified copy thereof, shall be evidence of the facts therein contained.[1]

Interpretation of Section. As this section is merely permissive, the decisions bearing on its results are properly reserved for the enabling section following, without which this section is incomplete, except as to a rule of evidence therein stated.

Oath or Affirmation. An oath or an affirmation may be made to the deposition referred to in this section.[2]

[1] Repealed, chap. 547, Laws of 1896.

[2] Note to this section, Appendix I, citing § 847, Code Civ. Pro.; § 2165, U. S. R. S.

§ 5. **When and how alien may acquire and transfer real property.**— An alien may, for a term of six years after filing the deposition described in the last preceding section, take, hold, convey and devise real property. If such deposition be filed, or such alien be admitted to citizenship, a grant, devise, contract or mortgage theretofore made to or by him is as valid and effectual as if made thereafter; provided, however, that a devise to an alien shall not be valid unless a deposition be filed by him, or he be admitted to citizenship, within one year after the death of the testator, or if the devisee is a minor, within one year after his majority. If a person who has filed such a deposition dies within six years thereafter, and before he is admitted to citizenship, his widow is entitled to dower in his real property, and if he dies intestate, his heirs or the persons who would otherwise answer to the description of heirs, inherit his real property, upon such persons being admitted to citizenship, or filing a deposition in their own behalf, within one year after such death, or if minors, within one year after their majority. If an action or proceeding is commenced by the state to recover real property held by an alien, such action or proceeding shall be suspended upon the filing of such deposition, and the service of a certified copy thereof upon the attorney-general, and the payment of the costs to the time of such service.

Formerly 1 Revised Statutes, 720, sections 16, 17 and 18, and 1 Revised Statutes, 721, section 19:

§ 16. Any alien who shall make and file such deposition, shall thereupon be authorized and enabled to take and hold lands and real estate, of any kind whatsoever, to him, his heirs and assigns forever, and may, during six years thereafter, sell, assign, mortgage, devise and dispose of the same, in any manner, as he might or could do if he were a native citizen of this state, or of the United States, except that no such alien shall have power to lease or demise any real estate, which he may take or hold by virtue of this provision, until he becomes naturalized.[1]

§ 17. Such alien shall not be capable of taking or holding any lands or real estate, which may have descended, or been devised or conveyed to him previously to his having become such resident, and made such deposition or affirmation as aforesaid.[2]

§ 18. When such alien shall die within six years after making and filing such deposition, intestate, leaving heirs inhabitants of the United States, such heirs shall take by descent, and hold any real estate of which such

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

alien died seised, in the same manner as they would have inherited if such alien had been, at the time of his death, a citizen of this state.[1]

§ 19. If any alien shall sell and dispose of any real estate, which he is entitled by law to hold and dispose of, he, his heirs and assigns, may take mortgages in his or their own name, as a collateral security for the purchase money due thereon, or any part thereof; and such mortgagee, his heirs, assigns or legal representatives, or any of them, may re-purchasé any of the said premises, on any sale thereof made by virtue of any power contained in such mortgage, or by virtue of any judgment or decree of any court of law or equity, rendered in order to enforce the payment of any part of such money, and may hold the same premises, in the like manner, and with the same authority, as the same were originally held by such mortgagor.[2]

Note of Commissioners. The Commissioners of Statutory Revision have, with unusual fullness, commented on the changes made by this article of "The Real Property Law" in respect of aliens.[3]

Aliens can Take by Purchase. By the common law aliens might take lands by purchase (which includes devise[4]) and hold them as against every one but the King.[5] The disabilities of aliens being primarily due to the common law[6] adopted in this State, have been removed to some extent by legislation.

Disabilities of Aliens Removed. The disabilities of certain resident aliens were removed at a very early period in New York by special acts of the Legislature. This legislation was of a two-fold character: I. Quieting the titles of those who then held lands in the State of New York, deduced from aliens.[7] II. Enabling alien residents, or friends, to take and hold lands, and in certain cases to transmit title thereto.[8] By such legislation aliens were

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] *Vide infra*, Appendix No. I, preliminary note, "aliens."

[4] *Supra*, p. 59, under § 2, The Real Prop. Law.

[5] Craig v. Leslie, 3 Wheat. 563; 2 Kent Comm. 61.

[6] *Supra*, p. 58.

[7] Chap. 42, Laws of 1789; 2 Greenleaf, 279; chap. 123, Laws of 1807; chap. 297, Laws of 1826; 1 R. S. 754, § 22; chap. 115, Laws of 1845. The *status* of aliens in New York prior to Independence may be determined from certain English statutes. 13 Geo. II, chap. 7; 2 Geo. III, chap. 25; 13 Geo. III, chap. 25; 11 & 12 Wm. III, chap. 6, and see index, "aliens," Hist. Real Prop. in New York.

[8] The principal acts are, chap. 72, Laws of 1798, construed in chap. 25, Laws of 1819; chap. 49, Laws of 1802; chap. 109, Laws of 1804; chap. 25, Laws of 1805; chap. 21, Laws of 1807; chap. 123, Laws of 1807; chap. 175, Laws of 1808 (the last five acts are in 2 R. L. 541, 544); chap. 307, Laws of 1825; chap. 171, Laws of 1830; chap. 87, Laws of 1843; 1 R. S. 719, § 9; *cf.* 1 R. S. 754, § 22, now § 294, The Real Prop. Law.

empowered to take by devise or descent from such aliens as were then lawfully seised, but not otherwise. Having thus acquired title, aliens might continue to hold and transmit title to the lands so transmitted to them, until such lands came into the hands of citizens.[1] Such aliens might also mortgage their lands.[2]

Disabilities, how Removed. The Revised Statutes, consolidating an act of 1825,[3] empowered any alien coming into the State to make and file a deposition, etc., of intended residence and naturalization,[4] and thereupon to take and hold lands, and during six years to dispose of the same in any way, except by demise.[5] This license to aliens was not retroactive so as to enable them to hold lands acquired before the filing of the declaration or deposition, as against the State.[6] In 1845 a demise theretofore made by an alien to a citizen or an alien capable of holding real estate was made valid.[7] In the same year the Revised Statutes touching aliens' declarations or depositions of an intention to become citizens[8] was so amended as to have a retroactive effect on property theretofore granted, devised or conveyed to such aliens.[9] But these statutes constitute a mere authority to aliens. They are merely probationary, and the filing of such a deposition or declaration of intention does not constitute an alien a citizen of the United States,[10] and the failure of the declarant to complete the naturalization within the time allotted is equivalent to an abandonment of the license.[11]

Title by Descent through and of Aliens. At common law no descent was cast on an alien, nor had an alien inheritable blood.[12]

[1] Duke of Cumberland v. Graves, 7 N. Y. 305; Heney v. Brooklyn Benevolent Soc., 39 id. 333; People v. Snyder, 41 id. 397; Howard v. Moot, 64 id. 262; Watson v. Donelly, 28 Barb. 653; Parish v. Ward, Id. 328.

[2] *Vide infra*, under this section.

[3] Chap. 307, Laws of 1827, p. 427; 1 R. S. 720, §§ 15, 16, 17 and 18, *supra;* Wright v. Saddler, 20 N. Y. 320.

[4] Amended, chap. 272, Laws of 1834, to any aliens coming into the United States. *Vide* § 4, The Real Prop. Law, and 1 R. S. 720, § 14, set out above in full.

[5] *Vide supra*, 1 R. S. 720, §§ 16, 17 and 18, set out in the text. *Cf.* chap. 115, § 9, Laws of 1845; Dusenberry v. Dawson, 9 Hun, 511.

[6] Heeney v. The Brooklyn Benevolent Soc., 39 N. Y. 333; Goodrich v. Russell, 42 id. 177; Jackson v. Beach, 1 Johns. Cas. 399; 1 R. S. 720, § 71, *supra.*

[7] Chap. 115, § 9, Laws of 1845.

[8] 1 R. S. 720, §§ 15–18 (*Vide supra*, under this section).

[9] Chap. 115, Laws of 1845; amended, chap. 576, Laws of 1857.

[10] In re Moses, 83 Fed. Rep. 995.

[11] McCarty v. Deming, 6 Lans. 440.

[12] Leary v. Leary, 50 How. Pr. 122; Goodrich v. Russell, 42 N. Y. 177, 181. And see observation under § 2, The Real Prop. Law.

The Revised Statutes, consolidating prior acts of the Legislature,[1] regulated descents from aliens who should file declarations, or depositions of intended citizenship, in case declarants died within six years, leaving heirs inhabitants of the United States. Such heirs were empowered to take as if such alien had died in possession of citizenship.[2] In 1845 the Legislature made important amendments or alterations of the common law, *inter alia*, enabling aliens to inherit lands purchased by resident aliens dying seised.[3] This act failed to remove the incapacity of aliens to inherit from citizens.[4] This was remedied by further legislation, enabling aliens to take by descent from citizens.[5] But, both under the act of 1845 and its amendments, if such aliens were males of full age, they were required to take steps toward naturalization before they could hold the lands as against the State.[6] None of these acts enabled non resident aliens to take lands acquired by aliens by descent; nor did they enable resident aliens to take as the representatives of non-resident aliens.[7] But in 1893 an act was passed, evidently designed to remedy even this state of things.[8] This last act the Commissioners of Statutory Revision have not caused to be re-enacted, and it is now repealed.[9] Capacity of citizens and denizens to inherit through alien ancestors is discussed under article IX of this act.[10]

What Law Regulates Title by Descent. The extent of the common-law disabilities of aliens to inherit depends on the law

[1] Chap. 261, Laws of 1826, p. 348; chap. 5, Laws of 1827; *cf.* McCarty v. Deming, 6 Lans. 440.

[2] 1 R. S. 720, § 18. If such alien lived beyond six years, and did not complete his adjudication of citizenship, his heirs lost the benefit of the act. McCarty v. Deming, 6 Lans. 440.

[3] Chap. 115, Laws of 1845; Ettenheimer v. Hefferman, 66 Barb. 374; Goodrich v. Russell, 42 N. Y. 177; Stamm v. Bostwick, 122 id. 48; Wainwright v. Low, 132 id. 317; Callahan v. O'Brien, 72 Hun, 216.

[4] Leary v. Leary, 50 How. Pr. 122; Luhrs v. Eimer, 80 N. Y. 171; *cf.* 1 R. S. 753, § 16; § 291, The Real Prop. Law.

[5] Chap. 261, Laws of 1874; chap. 38, Laws of 1875; Wainwright v. Low, 132 N. Y. 313; Stamm v. Bostwick, 122 id. 48; Daly v. Beer, 10 N. Y. Supp. 893.

[6] Chap. 115, Laws of 1845, as amended by chap. 261, Laws of 1874, and chap. 38, Laws of 1875; Goodrich v. Russell, 42 N. Y. 177; Dusenberry v. Dawson, 9 Hun, 511; Maynard v. Maynard, 36 id. 227.

[7] Branagh v. Smith, 46 Fed. Rep. 517; Callahan v. O'Brien, 72 Hun, 216.

[8] Chap. 207, Laws of 1893; *cf.* § 294, The Real Prop. Law.

[9] See Appendix I, Revisers' Preliminary Note to The Real Prop. Law, and schedule of laws hereby repealed, *infra*.

[10] § 294, The Real Prop. Law.

in force at the time of the death of the person from whom they claim to inherit.[1]

Brothers and their Descendants. The common-law rule, that aliens had no inheritable blood, did not, at common law, impede descent between citizen sons of an alien father,[2] or between their descendants. Such descent is immediate.[3] But a citizen nephew, whose father is an alien, could not inherit from a citizen uncle under this exception.[4] Otherwise, after the Revised Statutes, if the father were dead.[5]

Mortgages to Aliens. Aliens seised of real estate, which by any law they were permitted to hold and dispose of, were empowered by the Revised Statutes to take back mortgages thereon and enforce the same, and, if necessary, they or their representatives might repurchase and hold the same.[6] This provision was not, however, new to the statute book.[7] Irrespective of this authority, an alien may take and hold a mortgage on lands, as it is now only collateral security.[8]

Wives of Aliens Entitled to Dower. The wives of any alien residents of this State, seised of real estate, were by statute entitled to dower therein, whether they were aliens or citizens.[9] As the common law took no notice of an alien,[10] estates created by operation of law could not pass to an alien, and consequently an alien could

[1] Renner v. Muller, 44 N. Y. Super. Ct. 535.

[2] 2 Black. Comm. 250; Jackson v. Green, 7 Wend. 333; McGregor v. Comstock, 3 N. Y. 408; McLean v. Swanton, 13 id. 535, 542; Luhrs v. Eimer, 80 id. 171; Renner v. Muller, 44 N.Y. Super. Ct. 535; Hyatt v. Pugsley, 33 Barb. 373, 375.

[3] McGregor v. Comstock, 3 N. Y. 408; Banks v. Walker, 3 Barb. Ch. 438; McLean v. Swanton, 13 N. Y. 535, 542; Parish v. Ward, 28 Barb. 328; Wheeler v. Clutterbuck, 52 N. Y. 67, 71; Luhrs v. Eimer, 80 id. 171, 179.

[4] The People v. Irvin, 21 Wend. 128; Lessees of Levy v. McCartee, 6 Pet. 102; Jackson v. Green, 7 Wend. 333.

[5] Redpath v. Rich, 3 Sandf. 79; Jackson v. Fitzsimmons, 10 Wend. 9. And see § 294, The Real Prop. Law.

[6] 1 R. S. 721, § 18.

[7] 2 R. S. 541. All now repealed by § 300, The Real Prop. Law (Schedule of Laws Repealed).

[8] Ludlow v. Van Ness, 8 Bosw. 178; *cf.* Atty.-Genl. v. Sir George Sands, Tudor, Lead. Cas. Real Prop, 760, 774.

[9] One of the first statutes passed in England on this subject was 8 Hen. V; Lewis Bowle's Case, Tudor, Lead. Cas. Real Prop. 73. In 1802, chap. 49, a similar act was passed in New York. But the general act was chap. 115, § 2, Laws of 1845; Burton v. Burton, 1 Keyes, 359; 1 Abb. Ct. App. Dec. 271; Goodrich v. Russell, 42 N. Y. 177, 182; *cf.* Currin v. Finn, 3 Den. 229; 1 R. S. 740, § 2.

[10] Jackson v. Green, 7 Wend. 333; Jackson v. Jackson, 7 Johns. 214; Orser v. Hoag, 3 Hill, 79; McLean v. Scranton, 13 N. Y. 535; Luhrs v.

not have either curtesy or dower.[1] The act of 1845 was not the first to change this rule.[2] Since 1855, alien women who marry citizens of the United States are declared *ipso facto* to be citizens,[3] and are, of course, entitled to dower on the same principle as other citizens. But this was not so formerly, for at common law a woman might be an alien and her husband a citizen.[4]

Devises to Aliens Void. The New York Statute of Wills declared devises to aliens void.[5] This statute was, however, modified by the act of 1845, so as to permit resident aliens to take by devise on complying with that act.[7]

Alien Women may Take by Marriage Settlement. By the act of 1845 [8] an alien woman being a resident was made capable of taking lands by marriage settlement [9] or by devise,[10] and of executing every power in respect to the realty devised to her.[11] The act of 1845 is now hereby wholly repealed.[12]

Citizen Women who Marry Aliens. Concerning the rights and powers of citizen women who marry aliens and lose their original political *status*, and the rights of the issue of such marriage, consult the next succeeding section of this act.[13]

Trusts for Aliens. If lands be devised to citizens on active trusts for aliens, the trusts are not necessarily invalid, as the trustees have capacity to take and hold,[14] and where the land is directed to be sold and proceeds distributed among aliens this is a gift of money.[15] Where money of aliens is converted into lands without

Eimer, 80 id. 171; Leary v. Leary, 50 How. Pr. 122.

[1] Jackson v. Lunn, 3 Johns. Cas. 109, 121; Jackson v. Fitz Simmons, 10 Wend. 9, 16; Mick v. Mick, Id. 379; Connolly v. Smith, 21 id. 59; Currin v. Finn, 3 Den. 229; Wright v. Saddler, 20 N. Y. 320; Story, Confl. Laws, § 448.

[2] Chap. 49, Laws of 1802; Sutliff v. Forgay, 1 Cow. 89; affd., 5 id. 713; But the act of 1802 was of limited application. 1 R. S. 740, § 2.

[3] U. S. R. S. § 1994; Kelly v. Owen, 7 Wall. 496; *et vide supra*, p. 56, under § 2, The Real Prop. Law.

[4] Bacon Abr. tit. "Alien;" Currin v. Finn, 3 Den. 229; *cf.* Priest v. Cumming, 16 Wend. 617; revd., 20 id. 338.

[5] 2 R. S. 57, § 4; *vide supra*, p. 59, under § 2, The Real Prop. Law.

[6] Chap. 115, Laws of 1845.

[7] Hall v. Hall, 81 N. Y. 130.

[8] Chap. 115, Laws of 1845.

[9] § 8, id.

[10] § 7, id.

[11] § 7, id.; *cf.* § 121, The Real Prop. Law.

[12] § 300, The Real Prop. Law, and schedule thereto attached.

[13] § 6, The Real Prop. Law.

[14] Marx v. McGlynn, 88 N. Y. 357, 376; Wainwright v. Low, 132 id. 313, 319; *cf.* Beekman v. Bonsor, 23 id. 298, 316; Ludlow v. Van Ness, 8 Bosw. 178; Tudor, Lead. Cas. Real Prop. note, 774.

[15] Meakings v. Cromwell, 5 N. Y. 136.

the consent or knowledge of such aliens, the land is money in equity.[1] But where an alien for the purpose of evasion purchases land and takes a conveyance in the name of a third person, without any written declaration, a resulting trust will not arise in favor of the alien.[2] A mortgage of lands to citizen trustees for the security of aliens is not now prohibited.[3] Where an alien has authority to hold lands for his own use, he may take and hold as trustee.[4]

Effect of this Section. At common law an alien who held lands, by purchase, might hold them as against all the world except the State, and they could be conveyed by him subject to being divested on the recording of the inquisition.[5] Under this section of the Real Property Law the alien may defeat the State by taking the steps prescribed in section 4 of this act.

Surrender or Release by the State. The disabilities of particular aliens are often relieved by acts of the Legislature, either surrendering the rights of the State or by vesting such rights in particular persons; but such surrender cannot operate to defeat prior vested rights of citizens.[6]

Treaty. By treaty between the government of the United States and foreign powers, the disabilities of alien subjects are frequently removed in respect of real property.[7] As the treaty power is lodged only in the Federal government, that government takes, by implication, an authority to suspend the action of such laws of any State of the Union as may conflict with a treaty.[8] The treaty is ineffectual unless it become the supreme law of the land.[9] The constitutional power of the United States to thus abrogate the law of a State is fully affirmed.[10] When a treaty thus regulates the *status* of particular aliens to take and hold lands, the treaty is

[1] Anstice v. Brown, 6 Paige, 448.

[2] Leggett v. Dubois, 5 Paige, 114.

[3] Ludlow v. Van Ness, 8 Bosw. 178.

[4] Duke of Cumberland v. Graves, 9 Barb. 595; 7 N. Y. 305; Howard v. Moot, 64 id. 262.

[5] *Vide supra*, pp. 59, 70, 77, under § 2, The Real Prop. Law, and § 7, The Real Prop. Law.

[6] Luhrs v. Eimer, 80 N. Y. 180; Wainwright v. Low, 132 id. 313; Recor v. Blackburn, 71 Hun, 54; Jackson v. Lyon, 9 Cow. 664.

[7] Matter of Beck, 31 N. Y. St. Repr. 965; Wieland v. Renner, 65 How. Pr. 245.

[8] For a general discussion of this subject, see Prof. Bernheim's "History of the Law of Aliens" (New York, 1885), 148, *et seq.*

[9] Kull v. Kull, 37Hun, 476, 478.

[10] Hauenstein v. Lynham, 100 U. S. 483; Geofroy v. Riggs, 133 id. 258; Opin. U. S. Atty.-Genl. VIII, 411; Wheat. Internat. Law, 139; Halleck, Internat. Law, 157; 4 Kent Comm. 420; Whart. Am. Law, 261.

equivalent to a personal law exempting them from the operation of the regular and general law of the land.

Effect of this Section. It will be observed that, under this section,[1] an alien woman may have dower, contrary to the common law,[2] and alien heirs have inheritable blood contrary to the common-law[3] rule, provided the husband and father file his preliminary papers or deposition and die within six years.

[1] § 5, The Real Prop. Law.
[2] *Supra*, p. 68.
[3] *Supra*, p. 66.

§ 6. **Effect of woman's marriage with alien on rights of herself and her descendants.**— Any woman born a citizen of the United States, who shall have married or shall marry an alien, ~~and~~ the foreign born children and descendants of any such woman, shall, notwithstanding her or their residence or birth in a foreign country, be entitled to take, hold, convey and devise real property situated within this state in like manner, and with like effect, as if such woman and such foreign born children and descendants were citizens of the United States; and the title to any such real property shall not be impaired or affected by reason of such marriage, or residence, or foreign birth; provided that the title to such real property shall have been or shall be derived from or through a citizen of the United States.

Formerly chapter 756, Laws of 1897, which became a law May 22, 1897, and amended section 6 of The Real Property Law as originally enacted.

Note on Section 6, Supra. Originally section 6 of The Real Property Law was as follows:[1]

§ 6. **Effect of marriage with alien.**— A woman who, being a citizen of the United States, marries an alien not entitled to hold real property in this state, may, notwithstanding such marriage, take by grant, will or descent, and hold, convey and devise real property within this state; and the descendants of such a woman who dies intestate, inherit her real property within this state, and any real property which she would have been entitled to take, by descent, if living; and such descendants may take real property by grant or devise from their mother, or from any citizen to whom she would be an heir, may hold real property acquired under this section, and may convey and devise it to any person capable of holding the same.

The acts repealed by The Real Property Law[2] are given below; Laws of 1872, chapter 120, was as follows: "An act to authorize the descent of real estate to female citizens of the United States, and their descendants, notwithstanding their marriage with aliens."

SECTION 1. 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 descend, be devised or otherwise conveyed to such woman, or to her lawful children, or to their descend-

[1] Chap. 547, Laws of 1896.

[2] Chap. 547, Laws of 1896.

ants, be impaired or affected by reason of her marriage with an alien, or the alienage of such children or their descendants.

(2) This act shall take effect immediately.[1]

Laws of 1889, chapter 42: "An act to enable the foreign born children and descendants of any woman born in the United States, and notwithstanding her marriage with an alien and residence in a foreign country, to take, etc., real estate," etc.

SECTION 1. That the foreign born children and descendants of any woman born in the United States, and notwithstanding her marriage with an alien and her residence in a foreign country, shall be entitled to take, hold, have, possess, enjoy, convey and devise real estate situated in this State, in the same manner, and to the same extent, and with the same effect, as if such foreign born children and descendants were citizens of the United States; nor shall the title to any such real estate which has descended or which shall descend, or which has been or shall be devised or conveyed, to such woman or to such foreign born children or descendants, be impaired or affected by reason of her marriage with an alien, or the alienage of such children or their descendants; provided that the title to such real estate shall be or shall have been derived from or through such woman, or from or through some ancestor of such woman, which ancestor shall be or shall have been a citizen of the United States.

§ 2. This act shall take effect immediately.[2]

Observation on Section 6, Supra. The section as originally adopted disturbed many persons.[3] The amendment restores the foregoing acts of 1872 and 1889.

Status of Married Women. By the modern law of nations (often denied in this country),[4] the political *status* and domicile of a woman follow that of her husband,[5] and by marriage a citizen woman may lose her original domicile and even her original citizenship and be presumed to adopt those of her husband.[6] The statute of her native State often removes the disabilities consequent upon her marriage, so as to enable her to continue to take and hold real property and transmit title thereto.[7] Similar rights and powers are often extended to her alien descendants.[8]

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Note, Appendix No. I, to § 6, The Real Prop. Law.

[4] Beck v. McGillis, 9 Barb. 35; Shanks v. Dupont, 3 Pet. 242. *Cf.* Bacon Abr. tit. "Alien."

[5] Story, Conf. Laws, § 181.

[6] This principle seems assumed in Wadsworth v. Wadsworth, 12 N. Y. 376; and see Story, Conf. Laws, § 49; Act of Congress, April, 1898, re Mrs. Sartoris.

[7] See Stat. 8 Hen. V, noticed in Lewis Bowles's Case; Tudor, Lead. Cas. Real Prop. 73.

[8] *Supra*, chap. 42, Laws of 1889; chap. 120, Laws of 1872; Van Courtland v. Nevert, 11 N. Y. Supp. 148, 152.

§ 7. **Title through alien.**— The right, title or interest in or to real property in this state of any person entitled to hold the same cannot be questioned or impeached by reason of the alienage of any person through whom such title may have been derived. Nothing in this section affects or impairs the right of any heir, devisee, mortgagee, or creditor by judgment or otherwise.

As this section of The Real Property Law is the sequent of many similar enactments only now repealed,[1] it is deemed best to set them out in full:

Laws of 1802, chapter 49, section 3:

§ 3. And be it further enacted, That the title of any citizen or citizens of this state, to any land or lands within this state, heretofore conveyed to such citizen or citizens, 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, That nothing in the said last clause contained, shall extend to the Military or Bounty Lands so called, in the counties of Onondaga and Cayuga.[2]

Laws of 1807, chapter 123, section 2:

§ 2. And be it further enacted, That the title of any citizen or citizens of this state to any land or lands within this state, heretofore conveyed to such citizen or citizens and now in the actual possession of such citizen, 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.[3] [4]

1 Revised Statutes, 719, section 9:

§ 9. No title or claim of any citizen of this state, who was in the actual possession of lands on the twenty-first day of April, one thousand eight hundred and twenty-five, or at any time before, shall be defeated or prejudiced on account of the alienism of any person through or from whom his title or claim to such lands may have been derived.[5]

Chapter 115, Laws of 1845, section 9:

§ 9. Every grant, devise, demise, lease or mortgage of any lands within this state, heretofore made and executed in due form of law by an alien to any citizen of this state, or to any resident alien capable of taking and holding any real estate, or any beneficial interest therein within this state, or which may hereafter be made and executed 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 on any such lease or demise, and all lawful covenants and conditions in

[1] See note of Commissioners of Statutory Revision to § 7 of the Real Prop. Law, *infra*, Appendix I.

[2] Repealed, chap. 547, Laws of 1896.

[3] Repealed, chap. 547, Laws of 1896.

[4] These laws were not revised in the Revised Statutes, nor were they repealed. See 1 R. S. 341 *seq*, 1st edition.

[5] Repealed, chap. 547, Laws of 1896.

any such lease or demise, are hereby confirmed, and shall be deemed and taken to be as valid and effectual, as if made by or between citizens of this state.[1]

Laws of 1857, chapter 576, section 1:

SECTION 1. The several provisions of the act entitled "An act to enable resident aliens to hold and convey real estate, and for other purposes," passed thirtieth of April, eighteen hundred and forty-five, are hereby extended and applied to any such grant, demise, devise, lease or mortgage which are enumerated in said act, and which have been heretofore 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 hereby are re-enacted. The deposition or affirmation required to be made in the first section of the act hereby extended, shall be made and filed in the office of the secretary of state, within two years from the time when this act shall take effect, and if any person who, according to the provisions of the act hereby re-enacted and extended, is required to make and file in the office of the secretary of state the deposition or affirmation herein mentioned, shall neglect or omit to make and 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.[2]

Laws of 1868, chapter 513, section 1:

SECTION 1. The title of any citizen or citizens of this state, to any land or lands within this 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.[3]

Laws of 1872, chapter 141, sections 1, 2:

SECTION 1. The title of any citizen or citizens of this state to any lands within this state, shall not be questioned or impeached by reason of the alienage 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.

§ 2. Nothing in this act shall affect or impair the right of any heir, devisee, mortgagee or creditor by judgment or otherwise.[4]

Laws of 1872, chapter 358, section 1:

SECTION 1. The title of any citizen or citizens of this state to any land or lands within this state, which may have heretofore been purchased by any such citizen or citizens from any alien or aliens, and for which a conveyance has been heretofore taken by any such citizen or citizens from any alien or aliens, shall not, in any manner, be questioned or impeached by reason or on account of the alienage of the person or persons from whom such conveyance shall have been taken, or by reason of any devise of any

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] Repealed, chap. 547, Laws of 1896.
[4] Repealed, chap. 547, Laws of 1896.

such land or lands to any such person or persons, in any last will and testament being inoperative or void on account of the alienage of such person or persons: but all devises of land or lands heretofore made by any last will and testament to any alien or aliens from whom a conveyance of such land or lands so devised shall heretofore have been taken by any citizen or citizens of this state, are hereby declared to be valid and effectual, so far that the title of such citizen or citizens to such land or lands, shall not be affected by any invalidity of any such devise: provided, however, that nothing in this act contained shall affect the rights of this state in any case in which proceedings for escheat have been already instituted prior to the first day of January, one thousand eight hundred and seventy-two.[1]

Laws of 1875, chapter 336, section 1:

SECTION 1. The title of any citizen or citizens of this State to any lands within this State, shall not be questioned or impeached by reason of the alienage 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 this State, in any case in which proceedings for escheat have been instituted.

§ 2. Nothing in this act shall affect or impair the rights of any heir, devise, mortgagee, or creditor, by judgment or otherwise.

Laws of 1877, chapter 111, section 1:

SECTION 1. The right, title or interest of any citizen or citizens of this State in or to any lands within this State now held or hereafter acquired shall not be questioned or impeached by the reason of the alienage 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.

§ 2. Nothing in this act shall affect or impair the right of any heir, devisee, mortgagee or creditor by judgment or otherwise.[2][3]

History of this Enactment. Subsequent to the statute 12 Charles II, chapter 24, when an alien died intestate seised of lands, held by the socage tenure, as he had no inheritable blood,[4] and the common law took no notice of alien heirs,[5] the lands escheated and vested in the Crown, as it is said, without any necessity of inquest of office.[6] The State of New York succeeded to all the rights of the Crown in respect of escheats of lands, and to all its seignioral rights in respect of the old socage tenure, which was

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] This act was followed by another, chap. 207, Laws of 1893, now also repealed. See Report of Commissioners of Statutory Revision, and *infra* art. X, The Real Prop. Law.

[4] *Supra*, p. 66.

[5] *Supra*, p. 68; Luhrs v. Eimer, 80 N. Y. 171, 179.

[6] Jackson ex dem., etc., v. Lunn, 3 Johns. Cas. 109, 120; Jackson ex dem., etc., v. Adams, 7 Wend. 367; Goodrich v. Russell, 42 N. Y. 177; Larreau v. Davignon, 5 Abb. Pr. (N. S.) 367, 370; Challis, 29, 31; 2 Black. Comm. 72.

universal in New York before the War of Independence.[1] When the socage tenure was abolished in New York, and lands were made allodial, the prior law of escheats *propter defectum sanguinis* was preserved, and escheats declared by statute to be in the State.[2] This provision is now transferred to the Constitution.[3] In this way escheats are preserved to the State, notwithstanding the abolition of tenures. It was never decided, before Independence, whether the Crown or the lord of the manor had escheat, within the manors of New York — an interesting question.[4] But be this as it may, the State's original right to escheats was originally wholly due to its succession to the Crown's legal and seignioral rights over the lands held by the socage tenure.[5] This right the State might waive in any way it saw fit, and the series of acts above set forth[6] are evidence of such waiver, and serve to abrogate several disabilities of aliens whereby succession to estates in lands from or through aliens, was embarrassed.

Effect of this Section. The enactment now re-embodied in this section of The Real Property Law relieves those who take title from alien purchasers of a subsequent liability to be divested of such title by the State by action of ejectment, in the nature of an inquest of office.[7] Before such enactment the prerogative right of escheat was not barred by an alienation to a citizen by an alien. His conveyance might bar himself, but not the sovereign upon office found.[8] The complement of this section is to be found in another article of this act, regulating descents through alien ancestors.[9]

[1] Chap. 25, Laws of 1779; 1 J. & V. 44, § 14; 1 Black. Comm. 302; 2 id. 89.

[2] 1 R. S. 718, § 1; Johnston v. Spicer, 107 N. Y. 185.

[3] Art. 1, § 10, Const. of 1894.

[4] Escheats were, at common law, not necessarily in the Crown, but in the chief lord of the fee. *Cf.* Challis, 29. It is here said that it is often difficult to prove the rights of other lords to escheats.

[5] This was perfectly understood by former generations of lawyers in New York.

[6] *Cf.* § 294, The Real Prop. Law, *infra*.

[7] Ejectment became the remedy of the State by 1 R. S. 282, § 1; 2 id. 586, § 53. The Code of Civ. Proc. now regulates ejectment.

[8] 2 Kent Comm. 61.

[9] § 294, The Real Prop. Law.

§ 8. **Liabilities of alien holders of real property.**—Every alien holding real property in this state is subject to duties, assessments, taxes and burdens as if he were a citizen of the state.

Formerly 1 Revised Statutes, 721, section 20, and chapter 115, Laws of 1845, section 12:

§ 20.[1] Every alien who shall hold any real estate by virtue of any of the foregoing provisions, shall be subject to duties, assessments, taxes and burthens, as if he were a citizen of this State; but shall be incapable of voting at any election, or of being elected or appointed to any office, or of serving on any jury.[2]

Laws of 1845, chapter 115, section 12:

§ 12. Every alien who shall hold any real estate by virtue of any of the foregoing provisions, shall be subject to duties, assessments, taxes and burdens, as if he were a citizen of the United States; but shall be incapable of voting at any election, or of being elected or appointed to any office, or of serving on any jury.

Changes in this Section. Section 8 of The Real Property Law is composed of the foregoing enactments, with the following change: The words "but shall not be elected to any office or serve on any jury," are omitted as unnecessary. The Code of Civil Procedure (§ 1027) prescribes the qualifications of trial jurors, and the Revised Statutes (Pt. IV, chap. 2, § 3, p. 720) prescribe the qualifications of persons who may be placed on the grand jury lists. Public Officers Law (§ 3) prescribes the qualifications for holding office.[3]

Aliens' Disabilities. Aliens cannot serve as jurors.[4] Nor is an alien entitled longer to be tried by a jury partly composed of aliens,[5] nor to a jury *meditatis linguæ*.

[1] Laws of 1825, p. 427, § 4.

[2] Repealed, chap. 547, Laws of 1896.

[3] Note of Commissioners of Statutory Revision to § 8, The Real Prop. Law.

1 R. S. 721; § 1027, Code Civ. Proc.; Bennett v. Matthews, 40 How. Pr. 428, 434.

[5] § 1190, Code Civ. Proc.

§ 9. **Heirs of patriotic Indian.**—The heirs of an Indian to whom real property was granted for military services rendered during the war of the revolution may take and hold such real property by descent as if they were citizens of the state at the time of the death of their ancestors. A conveyance of such real property to a citizen of this state, executed by such Indian or his heirs after March seventh, eighteen hundred and nine, is valid, if executed with the approval of the surveyor-general or state engineer and surveyor, indorsed thereupon.

Formerly 1 Revised Statutes, 720, section 13:

§ 13. The heirs of every Indian to whom land has been granted for military services rendered during the war of the Revolution, shall be and are capable of taking and holding any such lands by descent, in the same manner as if such heirs were citizens of this state, at the death of their ancestors; and every conveyance executed by such patentee, or his heirs, after the seventh day of March, one thousand eight hundred and nine, to any citizen of this state, for any such land, shall be valid, if executed with the approbation of the surveyor-general of this state, to be expressed by an indorsement made on such conveyance and signed by him.[1]

Account of this Section. This section of the Revised Statutes purports to have been taken from chapter 92 of the Laws of 1813, which consolidated a great number of prior acts on the same subject.[2] Similar provisions were contained in the Revised Laws of 1813.[3] Before the acts of 1809 and 1810, in respect to the conveyance of lands by Indians, an Indian owning lands, though by title from the government, had no capacity to convey.[4]

The reader will take notice that there are no sections of The Real Property Law between sections 9 and 20.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] See 2 R. L. 153, and the head and side notes to the chapter of that edition of New York Laws.

[3] 2 R. L. 175, § 55; Gillett v. Stanley, 1 Hill, 121.

[4] Murray v. Wooden, 17 Wend. 531; Jackson v. Brown, 15 Johns. 264; Jackson v. Hill, 5 Wend. 532.

[5] See the next article of this act.

ARTICLE II.[1]

Creation and Division of Estates.

SECTION 20. Enumeration of estates.
21. Estate in fee simple and fee simple absolute.
22. Estates tail abolished; remainders thereon.
23. Freeholds; chattels real; chattel interests.
24. When estate for life of third person is freehold; when chattel real.
25. Estates in possession and expectancy.
26. Enumeration of estates in expectancy.
27. Definition of future estates.
28. Definition of remainder.
29. Definition of reversion.
30. When future estates are vested; when contingent.
31. Power of appointment not to prevent vesting.
32. Suspension of power of alienation.
33. Limitation of successive estates for life.
34. Remainders on estates for life of third person.
35. When remainder to take effect if estate be for lives of more than two persons.
36. Contingent remainder on term of years.
37. Estate for life as remainder on term of years.
38. Meaning of heirs and issue in certain remainders.
39. Limitations of chattels real.
40. Creation of future and contingent estates.
41. Future estates in the alternative.
42. Future estates valid though contingency improbable.
43. Conditional limitations.
44. When heirs of life tenants take as purchasers.

[1] The original Revised Statutes in the article entitled, "Of the Creation and Division of Estates" (formerly art. 1, tit. 2, chap. 1, part 2, R. S.), was in reality concerned with the rules of law relating to the limitations of executory estates, or those estates to commence in possession at a future day. 1 R. S. 723, § 10, now § 27, *infra*, and 1 R. S. 726, § 43, now § 55, The Real Prop. Law. Estates in possession or executed estates are not treated of in that article further than that the *quantum* of such estates is defined and they are classified. Hawley v. James, 16 Wend. 128. When a person seised of a fee simple transfers his entire estate to another it is very obvious that that other succeeds to the same estate which his grantor had in respect of the land conveyed. "*Non debeo melioris conditionis esse quam auctor meus a quo jus in me transit.*" D. 1, 17, 175, 1. Whether such a transfer as this instanced may be regarded as the creation of an estate within the meaning of this article of the Revised Statutes, is doubtful from some points of view. The trans-

SECTION 45. When remainder not limited on contingency defeating precedent estate takes effect.
46. Posthumous children.
47. When expectant estates are defeated.
48. Effect on valid remainders of determination of precedent estate before contingency.
49. Qualities of expectant estates.
50. Disposition of rents and profits.
51. Accumulations.
52. Anticipation of directed accumulation.
53. Undisposed of profits.
54. When expectant estates are deemed created.
55. Estates in severalty, joint tenancy and in common.
56. When estate in common; when in joint tenancy.

SECTION 20. **Enumeration of estates.** — Estates in real property are divided into estates of inheritance, estates for life, estates for years, estates at will, and by sufferance.

Formerly 1 Revised Statutes, 722, section 1:

§ 1. Estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance.[1]

Meaning of "Estate." An estate in lands had, before the introduction of English law in New York, come to have a very well-settled technical meaning, and, as Blackstone's definitions and classification were all-powerful with the revisers of the statutes of the State of New York in 1827–30, it is sufficient to give his definition: "An estate in lands, tenements and hereditaments, signifies such interest as the tenant hath therein.[2] It will be remem-

action is in reality a succession to an existing estate. But as an absolute conveyance not only extinguishes the rights of the grantor, but originates the rights of the grantee (Holland, Juris. 134), it is not perhaps altogether inconvenient to treat of such transfers in a statutory article relating to the *creation* of *estates*. But executory derivative estates, or those executory estates derived out of a fee and less in *quantum* than a fee, may accurately be said to be *created* by a grantor or devisor, and are properly treated of in this article. Nevertheless this article is after all concerned with the rules relating to the limitation of executory or future estates, and it may be so described in brief. In reference to all future estates in land, or estates in expectancy, this article of the statute furnishes the entire law. It is final and the courts must look exclusively to it when called upon to expound the law. Hawley v. James, 16 Wend. 128. As regards the quantity and quality of estates in possession this article has in reality very little to do; they are left to the common law. *Infra*, § 55, The Real Prop. Law.

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 Comm. 103.

bered that in Blackstone's day all estates in England were tenements.[1] The Crown was the sole allodial owner, and in legal theory every subordinate proprietor was a tenant. The estate, or *status* of the tenant, in respect of his land, was regulated primarily by the common law of England. The transmission and devolution of such estates were subsequently subjected to the influence of statute law. It is quite unnecessary here to trace back of Blackstone's day the origin of the term "estate," and it will be sufficient to point out that in the time of Bracton it had not yet acquired a settled meaning. At a later period the "Year Books," however, show that "estate" had acquired a well-settled technical significance, and until the great statute 12 Charles II, chapter 24, taking away the burdens of feudal tenure, the term "estate" could not have varied the significance so acquired. An estate for life was "*status ad terminum vitae*," and an estate in fee "*status in feodo simplici*" of the earlier law.[2] In the year 1664, when the Crown of England came into possession of the lands of New York, Blackstone's subsequent definition of the interest which a subject could hold in lands in England proved descriptive of the estates actually granted by the Crown to the various settlers in the province of New York. Every landholder was a tenant, and his interest and rights over the land granted to him constituted his "estate" therein. The manner in which estates held by the socage tenure became allodial in New York is shown in the introductory chapter of this book.[3]

Estates in New York. It is, perhaps, not accurate to term any original estate in New York "a common-law estate." Strictly, a common-law estate is confined to England, being of very ancient origin, and relatively all estates in New York are estates *de novo*. But, as by a process of extension the English law of land was made applicable to the lands of New York after 1664, the original estates in New York were created by the Crown according to that law, and thus the original estates in New York were limited by the Crown on precisely the same terms and subject to the same rules then applicable to the ancient common-law estates. All the original estates in New York were fee simples of the quantity and quality known in the seventeenth and eighteenth centuries in England. The original New York estates never were feuds, and were created only after the abolition of the feudal system by the

[1] The original settlements of the land were very ancient. *Supra*, p. 53.

[2] *Vide* 2 Pollock & Maitland, Hist. Eng. Law, chap. IV, § 1.

[3] *Supra*, pp. 41, 43.

statute 12 Charles II, chapter 24. They were such estates as the common law then permitted in lands.

Estates in Allodial Lands. Prior to the act making lands allodial in New York, a tenant of a freehold was not seised of the lands, but of an estate therein, and it was, to say the least, formerly inartificial to plead a seisin of the lands themselves.[1] The "act concerning tenures"[2] makes the tenures of certain lands allodial, but not the lands; whereas, the Revised Statutes more correctly made the lands themselves allodial,[3] and since then it would seem not inartificial to plead "seisin of the lands," although now seisin can mean nothing more than ownership,[4] its feudal significance having passed away with the abolition of tenures.[5] The sections of the Revised Statutes making lands allodial and declaring the relation of the State to lands within its jurisdiction,[6] perpetuated a condition of things practically existent since the birth of the State. If we have reference to the language of these sections, we perceive that the proprietor of allodial lands has still only an estate in them, and that the abolition of such tenures as existed here after the War of Independence is largely academic and intended only to preserve the general scheme of the revision.[7] Indeed, Chancellor Kent states that there is no distinction between an estate held by the reformed socage tenure and an estate in the lands made allodial by statute in New York.[8] If we consider escheats and the law of merger, we shall be convinced that an estate in allodial lands is not materially changed from an estate in socage lands after the statute of 12 Charles II, chapter 24, taking away the feudal burdens from tenure. Although the term "estate" is frequently used as the equivalent of "property,"[9] even since the Revised Statutes, it really denotes the legal relation which a citizen may have in respect of a particular piece of land. It connotes the rights, duties and obligations of the owner of the land. An "estate" is, in fact, *universitas juris*, or the totality of a man's rights, obligations and powers in respect of a certain piece of land.

[1] Van Rensselaer v. Poucher, 5 Den. 35, 41, 44.

[2] 2 J. & V. 67; 1 K. & R. 64; 1 R. L. 70.

[3] 1 R. S. 718, § 3; Const. of 1894, art. 1, § 12.

[4] Matter of Dodge, 105 N. Y. 585, 591.

[5] Jackson v. Demont, 9 Johns. 55, 58; 1 R. S. 718, § 4.

[6] 1 R. S. 718, §§ 1, 3; *cf.* Const. of 1846, art. 1, § 11; Const. of 1894, art. 1, § 10.

[7] People v. Trinity Church, 22 N. Y. 44; *cf.* People v. Van Rensselaer, 9 id. 318, 319; *cf.* Powers v. Bergen, 6 id. 358, 366; Taylor v. Porter, 4 Hill, 140.

[8] 4 Kent Comm. 2, 3.

[9] Wharton Prin. Conv. 8.

Estates Before the Revised Statutes. Prior to the Revised Statutes estates in the lands of New York, reduced to private dominion, were in legal contemplation of two classes: (1) Those held by the free and common socage tenure of the People of the State, who in their political capacity had been substituted for the Crown in all its relations to the old socage tenure.[1] (2) Those derived from the State under the great seal or from the Commissioners of Forfeitures under the Acts of Confiscation and Sale.[2] The second class were first declared to be allodial by the "Act Concerning Tenures" passed in 1787.[3] These acts had been either re-enacted in subsequent revisions,[4] or else were in force until the Revised Statutes went into effect. Prior to the Revised Statutes there was, however, no substantial difference between those estates in lands, held of the State by the socage tenure, and the estates in lands declared allodial.[5] The courts had practically given the right to distrain for rent to the proprietors of the allodial lands without the necessity of either tenure or fealty; it was held sufficient in all cases if the landlord had the reversion.[6] The original estates in New York created by the Crown suffered then no material change by the acts making lands allodial. Consequently, when the statutory provisions were carried into the Constitution of 1846 and that now in force,[7] existing estates were not abridged in any essential particular.[8]

Original Estates in New York. We have seen that the precise nature of an original estate in lands in the State of New York had prior to the Revised Statutes distinct reference not only to the terms of the original grant,[9] but also to the fundamental law. By the Constitution of the State the former law of the province had been continued subject to such alterations as the Legislature might make therein.[10] This legislative power to change the law was ultimately subjected by the Federal Constitution to a great

[1] Journal of the Provincial Convention, I, 554; chap. 25, Laws of 1779; 1 J. & V. 44, § 14; 1 Greenl. 26, § 14; Cornell v. Lamb, 2 Cow. 652; Wendell v. People, 8 Wend. 182, 188; Const. art. 1, § 10.

[2] 1 J. & V. 39, 159; 1 Greenl. 359.

[3] 2 J. & V. 67.

[4] See 1 Greenl. 26, 359; index of 3 Webster Laws, at p. 593; 1 K. & R. 64; 1 R. L. of 1813, p. 70.

[5] 4 Kent Comm. 2, 3; *et supra*, p. 48.

[6] Cornell v. Lamb, 2 Cow. 652.

[7] Art. 1, § 12.

[8] The allodial statutes always saved rents and socage services. *Cf.* Const. 1894, art. 1, § 11.

[9] Const. of 1777, § 36; Const. of 1821–2, art. 7, § 14.

[10] Const. of 1777, § 35; Const. of 1821–2, art. 7, § 13.

limitation, prohibiting any impairment of the grant or charter creating the original estates in fee. The constitutional protection of the original estates in lands in New York and the adoption of the former law of the province, perpetuated both the original estates and derivative estates as well as the laws regulating them.

Estates under the Revised Statutes. Thus, the revisers of 1829–30 found estates in lands legally existing, and as the Legislature had no power to impair an existing estate in fee, it could only regulate its future transmission and devolution, and estates derived out of the original estates. The Revised Statutes, therefore, simply described existing estates, and divided them into "estates of inheritance, estates for life, estates for years, and estates at will and by sufferance."[1] This declaration refers to the *quantum* or quantity of such estates. The division by quantity of estates in lands is ancient, but not primitive.[2] It is substantially as old as Littleton as a quantative division, and, therefore, obviously older in practice. The sections of the Revised Statutes, touching the quantity of interest one might have in these estates, introduced no new principle in the law, in so far as the *quantum* or the devolution of these estates is concerned. *Estates for years* were declared to be still chattels real, and were not classed as real estate in the chapter of the Revised Statutes relating to title by descent; they go to the personal representatives as assets for distribution.[3]

Estates of Inheritance. Estates of inheritance will be considered under the next section of this act.[4] "*Hereditaments*" are included within "estates of inheritance" under this section, and, therefore, a perpetual easement to carry water across the land of another is an estate of inheritance within this section.[5] So, although at common law "*terms of years*" were not strictly estates, they became such in the reign of Henry VIII, when the termor was protected.[6] This section includes terms of years with estates in land, in conformity with the law as it stood prior to Independence, although terms of years remain chattels real.[7]

[1] *Supra*, § 20; 1 R. S. 722, § 1.

[2] At common law there were only two estates in respect of quantity, of inheritance, and for life. Challis, chap. 8.

[3] Averill v. Taylor, 8 N. Y. 44, 52; Despard v. Churchill, 53 id. 192, 199; Moore v. Littel, 41 id. 66, 75; 1 R. S. 722, § 5; The Real Prop. Law, § 23; Id. § 280.

[4] § 21, *infra*,

[5] Nellis v. Munson, 108 N. Y. 453.

[6] Challis, 46, 47; Averill v. Taylor, 8 N. Y. 44, 52; Burr v. Stenton, 43 id. 462, 465; Despard v. Churchill, 53 id. 192, 199.

[7] The Real Prop. Law, § 39.

Estates for Years. Estates for years are commonly associated with "demises" or "leases,"[1] But an "estate for years" by the common law may be something else besides a lease or demise; it may be created by a will, a settlement or a mortgage, no rent whatever being reserved. Long terms of a thousand years were formerly common in wills and settlements in England,[2] and such terms were often kept alive for the purpose of attending and protecting the inheritance. These attendant terms have never been used in practice in New York,[3] many of the purposes for which they existed in England being rendered useless here by the recording acts protecting creditors. While there is now no positive prohibition against long terms of years involving urban lands in this State,[4] trust terms and terms to protect the inheritance are, as Chancellor Kent thought, opposed to the spirit of the Revised Statutes regulating uses and trusts in lands.[5]

Terms of Years. Rent is not the essential sign of a term of years or even of a demise or lease which may exist without a reservation of rent.[6] The origin of money rents is instructive in this connection. Within a century after the Norman Conquest the services due from the prædial villeins had been generally commuted for money payments, and money rents had become very common by the reign of Edward III.[7] Terms of years were probably first differentiated from life estates by the incident of rent in money or kind.[8] But a term of years is not necessarily a lease reserving rent, although a lease reserving rent is a "term of years." The essential features of tenancy for terms of years is the certainty of the boundary of the tenant's interest.[9] In this it is distinguished from an estate in fee, which may endure forever, and originally from an estate for life.

A Term of Years an Estate. A term of years is acutely called an anomalous estate because it grew up later than the feudal settle-

[1] 4 Kent Comm. 85; *sed. cf.* Hawley v. James, 16 Wend. at p. 154; Parsell v. Stryker, 41 N. Y. 480.

[2] Hayes & Jarman's Forms of Wills, 379; Williams R. P. 411–419, 430; 1 Washb. Real Prop. 311, *seq.*

[3] 4 Kent Comm. 94.

[4] *Vide infra*, and also under § 21 of this act.

[5] 4 Kent Comm. 94.

[6] Taylor Landl. & Ten. § 14; Henderson v. Henderson, 46 Hun, 509, 513.

[7] 1 Gardner, Hist. Eng. 168, 248; Dalrymple, Feudal Prop. chap. 2, socage tenure.

[8] Thus presenting a departure from the principle of tenure, which relates to *status;* whereas terms of years related to contract in some measure. See under § 23, The Real Prop. Law, *infra.*

[9] Co. Litt. 45b.

ment and only ripened into the dignity of an "estate" when termor was given a remedy to falsify a recovery obtained on feigned titles. This was not until the reign of Henry VIII.[1] Since then terms of years have been regarded as "estates" in lands by the commentators,[2] although the interest of tenant for term of years survived only as a chattel interest, thus indicating its late origin.[3] The revisers classify terms of years for some purposes with estates in land in deference to the practice existing in their time.[4]

Terms of Years Bound by Judgments. Terms of years being chattels real are bound by judgments and decrees in this State.[5]

Leases of Agricultural Lands. Long demises or terms of years of farming or agricultural lands were intended to be prevented in this State by the adoption of the Constitution of 1846, which provided that, "no lease or grant of agricultural land, for a longer period than twelve years, in which shall be reserved any rent or service of any kind, shall be valid."[6] This provision is contained in the present Constitution.[7] It is expressly confined to agricultural lands and to terms of years on which rents or services are reserved.[8] It has expressly no reference to lands not agricultural. This measure was adopted in view of the agrarian disturbances which had grown out of long or perpetual leases and grants of farms subject to a rent. The tenants objected to the provisions of these leases and grants, and much political and social discontent ensued.[9] This provision of the Constitution of 1846, restricting demises to twelve years, was intended to prevent such perpetual leases, and a recurrence of like agitations. Before this time perpetual rents of agricultural lands were frequently reserved in New York on grants of estates in fee.[10] The perpetual reservation was then lawful by the law of both the province and the State of New

[1] Challis, 46, 47; see remarks under § 23, The Real Prop. Law, *infra*.

[2] "Estates less than freehold." 2 Black. Comm. 140.

[3] *Supra*, p. 85.

[4] § 20, *supra*.

[5] See under § 39, The Real Prop. Law.

[6] Const. of 1846, art. 1, § 14.

[7] Art. 1, § 13.

[8] Stephens v. Reynolds, 6 N. Y. 454, 458; Parsell v. Stryker, 41 id. 480; Odell v. Durant, 62 id. 524; Clark v. Barnes, 76 id. 301; Parish v. Rogers, 20 App. Div. 279, 285.

[9] Jenkin's Polit. Hist. of New York, Appendix.

[10] Springstein v. Schermerhorn, 12 Johns. 357; Hawley v. James, 16 Wend. 154, 275; Jackson ex dem. Van Rensselaer v. Hogeboom, 11 Johns. 163; Dutch Church in Garden Street v. Mott, 7 Paige, at p. 82; Jackson ex dem. Blanchard v. Allen, 3

York. If an agricultural lease exceed twelve years it is not altogether void it seems, but is good for eleven years and a fraction.[1]

Leases of Urban Lands. As the constitutional restraint does not extend to grants, or to demises, of lands situated in cities or large towns,[2] (wherein land is not agricultural), the law of these long or perpetual estates remains of practical interest at the present time. The older law reports of New York are full of adjudications bearing on estates for years, and many of the opinions cannot be understood without reference to historical considerations; for the law concerning them is of very ancient origin. There can be no question that pure leases or demises, where a reversion exists in the grantor or lessor, are still valid if the land is not agricultural, even if such demises are made almost or theoretically perpetual.[3]

Rents Reserved on Grants in Fee. How far grants in fee reserving rent remain valid is a question which will be considered under the next section.

Leases for Twenty-one Years, with Renewals. A custom of making urban leases for twenty-one years, with renewals, had grown up before the act of 1846,[5] taxing longer leases. This custom was probably in New York originally due to old Trinity Church leases. In England corporations were frequently restricted by statute to terms of twenty-one years, in order to prevent impoverishing their successors; so tenants in tail, and even the Crown.[6] Whether these acts of Parliament extended to New York is doubtful, but they may, nevertheless, account for the custom. When all the English acts were repealed, except those then re-enacted,[7] there was certainly no reason for terms of this precise duration until the act of 1846, mentioned above, twice taxed longer terms.[8]

Cow. 220; 2 R. L. 267; Church v. Shultes, 4 App. Div. 378; Hunter v. Hunter, 17 Barb. 25; Bradt v. Church, 110 N. Y. 537.

[1] Parish v. Rogers, 20 App. Div. 279.

[2] *Cf.* Robert v. Thompson, 16 Misc. Rep. 638, 639.

[3] Dutch Church in Garden Street v. Mott, 7 Paige, at p. 82; Church v. Shultes, 4 App. Div. 378; Church v. Wright, Id. at p. 312; Van Rensselaer v. Dennison, 35 N. Y. 393, 400; 2 R. L. 267 limits Columbia College to leases of sixty-three years. Roberts v. Thompson, 16 Misc. Rep. 638, 639; Martin v. Rector, 118 N. Y. 476.

[4] The Real Prop. Law, § 21.

[5] Chap. 327, Laws of 1846, as amended by chap. 809, Laws of 1873.

[6] Comyn Landl. & Ten. 12; 32 Hen. VIII, chap. 28; 1 Eliz. chaps. 10, 19; 39 id. chap. 5, § 2; 1 Anne, chap. 7, §§ 5, 6.

[7] Jones & Varick's Revision of 1788 and 1789.

[8] Van Rensselaer v. Dennison, 8 Barb. 23; 35 N. Y. 393.

But a covenant will not be construed to be one for perpetual renewals, as such a covenant is, in this State, said to tend to a perpetuity.[1] Where a lease, with covenants for renewal, contains an arbitration clause to determine the value of the fee and the improvements separately, as a basis for renewal or determination, it is incumbent on both parties to act with diligence and caution.[2]

Rent and its Collection in Law. As rent furnishes usually the main consideration to the lessor on the creation of those terms of years, commonly called "demises" or "leases," a brief review of this subject may not be amiss in connection with our consideration of "estates for years." Many of the more difficult historical problems mentioned in the adjudications bearing on terms of years turn upon the question of liability for rent. Now, the obligation to pay a sum of money as rent for land, independently of the rendition of any feudal service, and upon a purely contractual basis, is a conception of later origin than the common-law remedies for the collection of rent.[3] Yet the common-law forms and remedies continued to regulate the collection of rent after this modification of feudal tenures. The clash of the legal theories of contract and tenure is discernible in the older law reports of New York, and it adds to the reader's difficulty unless he has a firm grasp of principle.[4]

Rents, how Classified. Before the formal abolition of the feudal system, in the days of King Charles II,[5] rent was divided by lawyers into "rent service," "rent charge" and "rent seck."[6] Rents

[1] Syms v. Mayor, etc., 105 N. Y. 153; Banker v. Braker, 9 Abb. N. C. 411; Piggott v. Mason, 1 Paige, 412, 415; Carr v. Ellison, 20 Wend. 178; *cf.* Rutgers v. Hunter, 6 Johns. Ch. 215. While, at common law, covenants for perpetual renewal are not favored, there is nothing unlawful about them. Lord Waterpark v. Austen, 1 Jones, 627, n.; Calvert v. Gason, 2 Sch. & Lef. 561, and see Comyn Landl. & Ten. 186; 4 Kent Comm. 109; 1 Hilliard Real Prop. 213; 2 id. 401.

[2] Van Beuren v. Wotherspoon, 12 App. Div. 421; and see as to measure of value, Bright v. Boyd, 2 Story, 605; Van Cortlandt v. Underhill, 17 Johns. 405; Livingston v. Sage, 95 N. Y. 289; and as to no necessity of inserting in renewed lease covenants for further renewal, see Carr v. Ellison, 20 Wend. 178; Banker v. Braker, 9 Abb. N. C. 411; Willis v. Astor, 4 Edw. Ch. 594; Muhlenberger v. Pooler, 40 Hun, 526; as to other covenants, Rutgers v. Hunter, 6 Johns. Ch. 215.

[3] The feudal settlement and the later feudal remedies for violation of feudal obligations took no note of money rents, or of rents payable in provisions. Later on the law was forced to consider them.

[4] *Vide infra* under this section.

[5] 12 Car. II, chap. 24, *supra*, p. 38.

[6] Litt. § 213; Cornell v. Lamb, 2 Cow. 652; 3 Kent Comm. 460.

issuing out of an estate granted in fee are known as quit rents,[1] in manors or seigniories[2] or as fee-farm rents.[3] As quit rents and fee-farm rents belong to estates of inheritance or to estates in fee, we may reserve our consideration of perpetual rents until we come to the next section of this act.[4] Quit rents in seigniories usually depend on tenure and not on reservation.[5]

Theories of the Remedies for Non-payment of Rent. In the time of Littleton a certain money rent, as it was legally associated with the feudal fruits of tenure, is "rent service." It cannot in law, even in Littleton's day, be disassociated from the service called fealty.[6] As the great common-law remedy for all the fruits of tenure was distress, distress became the main common-law remedy for the collection of a certain money rent,[7] and remained such in this State until 1846 when this remedy was abolished.[8] During the first two centuries of our political history, the right to distrain for rent depended on the existence of the obligation of fealty or tenure or else on a rent charge. Unless fealty was theoretically due or there was a rent charge, the landlord could not distrain.[9] The rent was "rent seck," and the remedy complicated.[10] The abolition of tenure and the declaration that certain lands were allodial, therefore, suggested a legal difficulty where allodial lands were rented and the rent not paid.[11] But as in all the acts and provisions abolishing the socage tenure, rents and socage services were always expressly saved,[12] the same remedy by distress was accorded in New York on leases of the lands declared allodial.[13] Thus, the remedy by distress became, necessarily, independent of tenure or fealty, and it could now be imputed to contract independently of feudal considerations, or the ancient common law.

[1] De Lancey v. Piepgras, 138 N. Y. 36, 39.

[2] New York, being a proprietory government at first, was a feudal seigniory. Penn v. Lord Baltimore, 1 Ves. Sr. 441.

[3] 2 Washb. Real Prop. chap. I; Van Rensselaer v. Hayes. 19 N. Y. 68, 76; Dalrymple, Feudal Property, 33.

[4] § 21.

[5] Verschoyle v. Perkins, 13 Irish Eq. 72, 82.

[6] Litt. § 213.

[7] *Cf.* Tomlin's note to his edition of Littleton, 242; Smith v. Colson, 10 Johns. 91.

[8] Chap. 271, Laws of 1846.

[9] See Cornell v. Lamb, 2 Cow. 652, 653; Co. Litt. 142a; id. n. 5, 144a; Van Rensselaer v. Hayes, 19 N. Y. at p. 76; 3 Kent Comm. 461.

[10] 3 Kent Comm. 461. There was a remedy in equity for a rent seck. Story, Equity Jurisp. § 684.

[11] 3 Kent Comm. 462, note.

[12] 12 Car. II, chap. 24; 2 J. & V. 67, 68; 1 R. L. 380; 1 R. S. 718, § 4; Const. of 1894–5, art. 1, § 11.

[13] 3 Kent Comm. 462, note; 1 R. S. 747, § 24; chap. 274, Laws of 1846; 2 R. S. 295, § 15.

Rents Reserved on Estates in Fee. The Statute of *Quia Emptores* it will be remembered destroyed the existence of tenure between a common person who granted a fee simple estate and his grantee.[1] Therefore, after that act a perpetual rent reserved on an estate in fee could not be enforced by distress by a common person unless the rent was charged on the land by a special clause of distress.[2] But the Statute of *Quia Emptores* had no reference to terms of years, but only to grants in fee.[3] A tenure of some kind sufficient to support a right to distrain existed after that statute between a lessor of a term and lessee,[4] as it did between a donor and a donee of a fee tail.[5] The Statute of *Quia Emptores* only destroyed sub-infeudation when the grant was in fee.

Modern Right of Action to Recover Rents. At the present day the summary remedy for the collection of rent due on terms of years is regulated by statute,[6] and after considerable litigation perpetual rents reserved on grants in fee have also been subjected to appropriate remedies regulated by statute.[7] A change of remedies on a lease by act of the Legislature is always presumed to be within the contemplation of the parties,[8] provided such changes of remedies are not an impairment of the contract within the Federal Constitution.

Assignees of Reversions. At common law the assignee of a reversion could not enter for condition broken, nor could he take advantage of a breach of covenant in a lease by his assignor.[9] The statute, 32 Henry VIII, chapter 34, first gave assignees of reversions all the rights of their assignor, and it gave the tenant the same remedies against the assignee that he had against the assignor.[10] This act extended to the province of New York and was re-enacted by the State of New York at the time of the gen-

[1] 18 Edw. I; 2 Inst. 501.

[2] Mr. Hargrave, note 5, Co. Litt. 144a; Van Rensselaer v. Hayes, 19 N. Y. at p. 76; Challis, 3.

[3] Litt. § 132; Burton, Compend. Real Prop. §§ 1001, 1002; Bingham & Colvin on Rents, 40.

[4] Saunders v. Hanes, 44 N. Y. 353, 361.

[5] Burton, Compend. Real Prop. § 1003.

[6] Code Civ. Proc. chap. 17, tit. 2. In the city of New York see the "Consolidation Act." The basis of the remedies not of feudal origin are regulated either by the common actions for enforcing all contracts or by the substitutes for the common-law real actions. *Cf.* Bradt v. Church, 110 N. Y. 537; Church v. Wright, 4 App. Div. 312, 316.

[7] See text under next section (21) of this act.

[8] Martin v. Rector, 118 N. Y. 476.

[9] Co. Litt. 214a, 214b, 215a, and see remarks *infra* under § 193, The Real Prop. Law.

[10] Id. *supra.*

eral revision of the English statutes extending here and continued in force by the first Constitution.[1] Finally it was revised in the Revised Statutes of 1830,[2] where it remained until transferred to article 6 of the present law.[3] At common law the right to maintain actions of annuity and assize of novel disseisin followed the ownership of the rent when it passed from the person to whom it was reserved, whether it passed by descent or assignment.[4] Attornment by the tenant was necessary to entitle the assignee to distrain or to maintain annuity and actual seisin of the rent by payment of a part, to authorize an action of assize, but the necessity of attornment was removed by statute.[5]

Estates at Will. An estate at will is where lands and tenements are leased, to be held at the will of the lessor.[6] At common law it is determined by a conveyance of the owner of the land to a third person.[7] The tendency of modern courts is to construe this tenancy as an estate from year to year.[8]

Estates by Sufferance. An estate by sufferance, by the common law, is one where tenant comes into possession of land by lawful title, and holds over by wrong after the determination of his interest.[9] Independently of statutes a tenant by sufferance is not entitled to notice to quit.[10] But the statute requiring notice of thirty days to terminate tenancy by sufferance[11] has now no reference to a holding over without the consent of the landlord.[12]

[1] 2 J. & V. 184; 1 R. L. 363.

[2] 1 R. S. 747, § 23; chap. 274, Laws of 1846.

[3] *Infra*, § 193, The Real Prop. Law.

[4] Van Rensselaer v. Read, 26 N. Y. at p. 564.

[5] Van Rensselaer v. Read, *supra*; 4 Anne, chap. 16, § 9; Van Schaack N. Y. Laws of 1773, p. 769; 2 J. & V. 281; 1 R. S. 739, § 146; § 193, The Real Prop. Law.

[6] 4 Kent Comm. 110, 111; Litt. § 68; Talamo v. Spitzmiller, 120 N. Y. 37; Burns v. Bryant, 31 id. 453; Larned v. Hudson, 60 id. 102; Sarsfield v. Healy, 50 Barb. 245; Post v. Post, 14 id. 253.

[7] Parmalee v. Oswego & Syracuse R. R. Co., 6 N. Y. 74; Jackson ex dem. v. Bryan, 1 Johns. 322. See § 198, The Real Prop. Law, as to present law.

[8] The Real Prop. Law, § 198; People ex rel., etc., Cooper v. Fields, 1 Lans. 222, 239; Taylor, Landl. & Ten. § 59; Post v. Post, 14 Barb. 253, 257; Jennings v. McCarthy, 40 N. Y. St. Repr. 678; *cf.* Coudert v. Cohn, 118 N. Y. 309; English v. Marvin, 128 id. 380, 385; Prindle v. Anderson, 19 Wend. 391; Jackson ex dem., etc., v. Bryan, 1 Johns. 322, 324.

[9] Co. Litt. 57b; 4 Kent Comm. 116; *sed. cf.* § 198, The Real Prop. Law; Smith v. Littlefield, 51 N. Y. 539; Livingston v. Tanner, 14 id. 64; Bristoe v. Burr, 12 N. Y. St. Repr. 638.

[10] Taylor, Landl. & Ten. § 64. This tenancy may be determined by mere entry. Archibald Landl. & Ten. 78; Jackson v. Parkhurst, 5 Johns. 128; Jackson v. McLeod, 12 id. 182. See the present law, stated under § 198, The Real Prop. Law.

[11] 1 R. S. 745, § 7; The Real Prop. Law, § 198, *infra*.

[12] Rowan v. Lytle, 11 Wend. 616; Livingston v. Tanner, 14 N. Y. 64;

§ 21. **Estates in fee simple and fee simple absolute.**—An estate of inheritance continues to be termed a fee simple, or fee, and, when not defeasible or conditional, a fee simple absolute, or an absolute fee.

Formerly 1 Revised Statutes, 722, section 2:

§ 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, or an absolute fee.[1]

Estates of Inheritance. The *quantum* of an estate of inheritance, by the terms of this section, remains as before the Revised Statutes. Since the abolition of the feudal system a "fee" has always meant an estate of inheritance, not a subject of tenure.[2] The term "fee simple," by a series of gradations, extends back to the feudal times when it denoted a fief or "feud" of inheritance passing to heirs generally. It was soon contradistinguished from a fee conditional, and from one limited to some particular heirs, exclusive of others.[3]

Fee Simple and Fee Simple Absolute Contrasted. The Revised Statutes, in the section quoted above, contrast a "fee simple" and a "fee simple absolute," although the terms are originally *ejusdem generis*, denoting strictly the same thing, an inheritable estate passing to heirs generally.[4] Text writers not infrequently divide fees simple into fees absolute, fees conditional and fees qualified.[5] But this division in reality refers to the character of the various limitations of a fee simple, and not to the character of the fee simple itself,[6] which is always an estate of inheritance passing to heirs generally, as contradistinguished from an estate tail, or one passing to particular heirs. The revisers obviously intended, by the contrast mentioned in this section, to preserve the different modes of limitation of a fee simple as far as was consistent with the other new rules. Thus, it was intended that a fee might still be limited conditionally, or with a defeasance.[7] The distinction which the revisers made between a "fee simple" and a "fee simple

Smith v. Littlefield, 51 id. 539; Coudert v. Cohn, 118 id. 309; note to § 64, Taylor Landl. & Ten., and cases cited under § 198, The Real Prop. Law, *infra*.

[1] Repealed, chap. 547, Laws of 1896.

[2] Challis, 167

[3] 2 Black. Comm. 110.

[4] Lott v. Wykoff, 2 N. Y. 355, 357; Jackson v. Van Zandt, 12 Johns. 169, 177.

[5] Crabb, Law of Real Prop. § 952.

[6] Challis, chap. 17.

[7] Willard, Real Prop. 52; Norris v. Beyea, 13 N. Y. 273, 284; Vanderzee v. Slingerland, 103 id. 47; Matter of

absolute" makes this point conclusive; for it is a distinction which pointed directly to existing and contemporaneous classifications of fees[1] and to well-known limitations of estates carved out of fees simple.

Classification of Fees. Fees and estates have been long variously classified by writers on the laws of England. Those classifications are now in reality, as already suggested, based on the nature of the limitation creating the estate, for the nature of an estate in fee simple is not changed by the limitation of some lesser or qualified estate carved out of it. The nature of these limitations being thus confused with the nature of the fee simple, it is expedient to consider them in connection with the classifications of fees.

Limitations of Estates in Fee. The limitations which an owner of a fee simple may now make in transmitting his own estate of inheritance to another by purchase or devise are marked out by the law. In this State the common law still furnishes, in substance, the law of estates in possession; at least in the absence of any alternative statute of the State.[2] As it has long been a custom of writers to classify the effect of the limitations of fee simple estates, rather than the limitations themselves, we may point out that Chancellor Kent, ignoring a very comprehensive but involved classification by Mr. Preston, prefers Lord Coke's classification, and then states that he will use the terms "qualified," "base" and "determinable" fees promiscuously.[3] Yet in no technical sense are these terms equivalents.

Base Fees. A *base fee* strictly is one which springs from a fee tail;[4] but, as Mr. Preston points out, every estate not simple and absolute in regard to continuance of time is base in reference to one possessing these attributes. It is in this sense and with a view to this distinction that the epithet base is now applied to estates.[5] This use of the term base fee has, no doubt, been adopted by writers of the first rank.[6] It has not been adopted universally, for, as stated above, a base fee strictly is one derived from a fee tail, and some writers confine their use of the term to fees so derived.

Miller, 11 App. Div. 537; Chapman v. Moulton, 8 id. 64.

[1] *Vide infra*, "fees determinable."

[2] Williams v. Williams, 8 N. Y. 525, 541; Bogardus v. Trinity Church, 4 Paige, 178, 198.

[3] 4 Comm. 9.

[4] Cruise, Dig. tit. 2, chap. 2, § 14; Challis, 44, 264; Tudor, Lead. Cas. Real Prop. 745.

[5] 1 Prest. Est. 439; Matter of N. Y., L. & W. R. Co., 105 N. Y. 89.

[6] 2 Black. Comm. 109; 4 Kent Comm. 9; 2 Crabb, Law Real Prop. 9.

Fees Simple now the only Fees in New York. There are now in New York no fees other than fees simple. Fees tail having been abolished as estates[1] or converted into fees simple the instant they arise,[2] the only fees now known to the law of this State are fees simple or pure fees, sometimes, in contrast to a qualified limitation, called fees simple absolute. Conditional fees, which were at common law fees tail before the Statute *De Donis*,[3] and "qualified fees," or fees passing by descent to heirs of a particular ancestor,[4] are both now unknown in practice in New York although good formerly at common law. When the statutes abolishing entails were first enacted in this State it was claimed that fees conditional at common law were restored by such acts. But this contention was said to be a strained construction of the statutes and repudiated.[5] The act of 1786,[6] "An act to abolish entails," etc., was certainly broad enough to act also on conditional fees before the Statute *De Donis*. So we may regard conditional fees at common law as within the purview of that act and always thereafter turned into fees simple in this State. So qualified fees must have disappeared with the act of 1782 prescribing a new course of descents for estates in fee and altering the common law.[7] It would not be competent after this statute for tenant in fee simple to make any limitation in fee which should alter the statutory course of descent.[8] Thus all estates of inheritance in the State of New York are now fees simple. But, as a fee simple is regarded as either *absolute*[9] or *determinable*[10] according to the nature of the limitation, we may for convenience continue to divide fees into "fees simple absolute" and "fees simple determinable or base."

Definition of "Limitation of an Estate." By a limitation of an estate is here meant the sentence which serves (in an instrument of conveyance recognized by the State) to create and mark out an estate in lands.[11] It is believed accurate to classify all possible valid limitations of fee simple estates, now tolerated in New York,

[1] Chap. 2, Laws of 1782; 1 J. & V. 245.

[2] 1 R. S. 722, § 3; *infra*, § 22.

[3] Challis, 209; *cf.* 1 Sanders, Uses & Trusts, 210.

[4] Challis, 215.

[5] Johnson ex dem., etc., v. Van Zandt, 12 Johns. 169, 172, 177.

[6] Chap. 12, Laws of 1786; 1 J. & V. 245.

[7] Chap. 2, Laws of 1782; chap. 12, Laws of 1786; 1 J. & V. 245.

[8] See 1 Preston, Estates, 449, as to whether a qualified fee is not an entail in certain cases.

[9] § 21, *supra*; 1 R. S. 722, § 2.

[10] Grout v. Townsend, 2 Den. 337; Hadley v. Kuhn, 97 N.Y. at p. 35; Stilwell v. Melrose, 15 Hun, 378; *et infra*, pp. 97, 98.

[11] *Cf.* Smith's "Executory Interests," §§ 24, 26.

about as follows: (1) Determinable limitations; (2) limitations on or subject to a defeasance or condition; (3) simple or direct limitations. The last class may serve to refer to those limitations which pass a fee simple absolute[1] (by which is meant the normal and largest estate of inheritance known in our law), or any lesser estate, which is unrestricted by anything tending to abridge its longest possible duration. Simple or direct limitations require no further discussion; they denote our common form of deeds. All limitations of fees, excepting direct limitations, create base fees,[2] or to put it in another way: Base fees may arise here in two modes only: (1) By determinable limitations and (2) by limitations of fees on or subject to a defeasance or condition.

Determinable Limitation of a Fee. A determinable limitation of a "fee" is one expressed to be made to the grantee and his heirs until the happening of some future event which must be of such a kind that it may by possibility never happen at all;[3] for it is an essential characteristic of all fees that they may by possibility endure forever.[4] "The language by which the future event is introduced into the limitation of a determinable fee may take either of the two following shapes: (1) Until a specified contingency shall happen, which may by possibility never happen; or (2) so long as an existing state of things shall endure, which is such that it may by possibility endure forever."[5] In the limitation of a so-called "determinable fee," the doing by the grantee of the act or the happening of the event which is to determine the estate, is made a part of the limitation itself, and the doing of the act or the happening of the event will *ipso facto* determine the estate without any entry or claim on the part of the person entitled to the possibility of reverter.[6] Determinable limitations are partly limitations good by the common law,[7] but they are more frequently met with after the Statutes of Uses and Wills and then they operate by way of use or devise.[8] Under the Revised Statutes of New York a determinable limitation of a fee simple inheritance may be contained in a deed or "grant" or in a will.

[1] *Supra*, § 21; 1 R. S. 722, § 2.

[2] Base in respect of a pure or unqualified fee (*supra*, p. 94); Matter of Moore, 152 N. Y. 602, 609.

[3] If the event must happen the estate is necessarily not a fee, but an estate for life, for years, or at will; 1 Sanders, Uses & Trusts, 155.

[4] Challis, 197; 1 Prest. Est. 479.

[5] Challis, 198.

[6] Challis, 206; Plowden, 242; *cf.* 1 Sanders, Uses & Trusts, 156; Miller v. Levi, 44 N. Y. 489.

[7] *Infra*, p. 99.

[8] Challis, 200.

Determinable Limitation of Lesser Estate. A determinable limitation of an estate less than a fee may also be contained in any instrument operating as a conveyance or devise thereof.[1]

Determinable Estates. A determinable fee, or estate, continues always, subject to be put an end to on the happening of the event described in the determinable limitation, in whatever hands such fee or estate may come by purchase or descent.[2]

Former Rules Touching Limitations of Fees. At common law a fee could not be mounted on a fee; but it is said that it might have been mounted upon a determinate one.[3] At a later day, when executory limitations became common, under the Statutes of Uses and Wills, and estates might be limited to take effect by way of use or devise, an executory limitation,[4] upon an event happening to terminate an estate in fee, was permitted, but the contingent fee must vest within the time prescribed by the rule against perpetuities.[5] While a fee, limited by either a determinable limitation or a limitation on a condition, is now indifferently termed a base fee to distinguish it from a pure fee or fee simple, yet the rules touching these several limitations are not the same even under the Revised Statutes.

Collateral, Conditional and Contingent Limitations. A determinable limitation, sometimes called by Preston a "*collateral limitation*," is not confined to the limitation of fees. Any estate, an estate for life or years, may be made liable to determine in like manner; but in the case of a determinable limitation of a fee, the future event must be of such a kind that it may possibly never happen, or else it is incompatible. These limitations are sometimes styled *limitations on a contingency*,[6] at others *conditional limitations*,[7] and sometimes *conditions in law*.[8] The distinction between determinable or conditional limitations and limitations on, or subject to, a condition, is that the estate limited ceases in the one case without claim or entry, and, in the other, continues until entry by the person entitled to take the benefit of the

[1] *Vide infra.*

[2] 4 Kent Comm. 9; Challis, 207.

[3] Case of Bagshaw in 1 Hargrave's Collect. Jurid. 383.

[4] "Conditional limitation" of 1 R. S. 725, § 27.

[5] Challis, 200; Leonard v. Burr, 18 N. Y. 96.

[6] Shep. Touch. 117.

[7] Smith, Executory Interests. § 148; Challis, 199. But this term *conditional limitation*, is used in many senses. Challis, 199; Towle v. Remsen, 70 N.Y. at p. 312; 1 R. S. 725, § 27.

[8] Litt. § 380; Plowden, 242; or deed, 2 Black. Comm. 155.

breach of condition.[1] The term "conditional limitation" is employed by some writers and judges as the equivalent of a determinable limitation, even when no estate is limited over after the event determining the first fee.[2] But, in the State of New York, such a usage is at variance with the revisers' notion, which would confine the term "conditional limitation" to a limitation of an estate, operating to abridge or determine a precedent estate.[3] The use of the term "conditional limitation" was formerly confined to executory limitations contained in deeds,[4] but the revisers do not restrict its use to deeds, but make it the equivalent of an "executory devise," and, indeed, there is now no need for a distinction, as the construction of limitations of estates in deeds or in wills is the same.

Determinable Limitation of a Fee. There are few reported cases thus far met with in the New York courts involving an unqualified determinable limitation of a fee.[5] In Leonard v. Burr,[6] a devise "to the use of A. until Gloversville shall be incorporated as a village," was held not to give "A." a fee even since the Revised Statutes.[7] But the case is not very satisfactory in its reasoning, it being apparently both admitted and denied that a determinable fee determines only on the happening of the event specified in the limitation.[8] But upon the construction adopted the case affords an example of a determinable limitation of an estate for life, as the curtailing event was one which might, by possibility, never happen at all during the life of "A."[9] It is to be noticed in this case that the court's observations on the duration of a determinable fee are *obiter dicta*, as A.'s interest was adjudged not to be a fee; and so were its observations on the effect of void executory limitations in enlarging all determinable fees into fees simple.[10] A fee

[1] Shep. Touch. 117; *cf.* Towle v. Remsen, 70 N. Y. at p. 312; Bacon's Abr. *Condition*, H; Beach v. Nixon, 9 N. Y. at p. 37; 1 Sanders, Uses & Trusts, 155; Miller v. Levi, 44 N. Y. 489.

[2] Gray, Restraints on Alienation, § 22; note to 13 Abb. N. C. 82; Leonard v. Burr, 18 N. Y. at p. 199; Miller v. Levi, 44 id. 489; *cf.* Challis, 199.

[3] 1 R. S. 725, § 27; Towle v. Remsen, 70 N. Y. at p. 312; *cf.* Cornish on Uses, 94; Fearne, Conting. Rem. 13.

[4] Mr. Butler's note to Fearne, Conting. Rem. 382, 385.

[5] A determinable fee being good at common law, seems to be good now. *Cf.* Chapl. Susp. Power of Alienation, § 131; Dodge v. Stevens, 94 N. Y. 209; Stilwell v. Melrose, 15 Hun, 378.

[6] 18 N. Y. 196.

[7] 1 R. S. 748, § 1, abolishing the necessity of word "heirs" to carry a fee.

[8] 18 N. Y. pp. 99, 100.

[9] 18 N. Y. p. 104; Bramhall v. Ferris, 14 id. 41.

[10] 18 N. Y. p. 106. Mr. Fearne's observations, and those of Mr. Lewis,

simple, subject to an executory limitation, proving void, of course remains a fee simple; and so a fee determinable upon the happening of some event, other than the vesting of an executory interest, is not enlarged into a fee simple by reason of the invalidity of the next contingent estate, because of remoteness. In other words, if A.'s interest had been held to be a fee, in the case of Leonard v. Burr, it undoubtedly terminated when Gloversville became a village,[1] and was not enlarged into a fee simple because the "future estate" of Gloversville proved too remote. A distinction, therefore, is to be made between a fee made determinable by the vesting of an executory limitation, and one made determinable, irrespective of such executory limitation. The distinction denoted was not observed in all the observations made in the case now under consideration. Had "A.'s" interest been held to be a fee determinable, it would have terminated when Gloversville became a village, and the possibility of reverter would have then taken effect or have been vested in interest. A.'s determinable fee could not be enlarged into a fee simple by reason of the invalidity for remoteness of a devise over, such as one to the village of Gloversville in this case, without a release of the possibility of reverter.[2]

Common-law Fees. A fee limited by a determinable limitation is often classed as a common-law fee and is contrasted with the other common-law fees, a fee simple, a conditional fee and a qualified fee simple.[3] There would seem to be no principle of existing law violated by a determinable limitation of a fee simple, *e. g.*, "as long as Trinity Church shall stand."[4] But as the cases in New York State have not expressly sanctioned a very remote determinable limitation, when it occurs it will no doubt be open to the suggestion that any distant interruption of the course of descents of a fee simple is now repugnant to the nature of the estate even though a determinable fee is good at common law and its creation violates no statute of the State.[5]

quoted in the opinion, do not maintain that a "determinable fee" is enlarged by the fact that an executory limitation, subject to such a fee, is too remote.

[1] 18 N. Y. p. 106; Challis, 206.

[2] Challis, 200.

[3] Challis, 43; Preston's Shep. Touch. 203; Whart. Conv. 38; Hatfield v. Sneden, 54 N. Y. 280.

[4] Chapl. Susp. Alien. § 131; Williamson v. Field, 2 Sandf. Ch. 533, 552; Stilwell v. Melrose, 15 Hun, 378; Bramhall v. Ferris, 14 N. Y. 41; Dodge v. Stevens, 94 id. 209; Grout v. Townsend, 2 Den. 336.

[5] *Cf.* note 1 to § 22, Gray, Rest.; 1 Gilbert, Uses, 209; Lewis, Perp. 60; Bramhall v. Ferris, 14 N. Y. at p. 44; note the word condition in § 15 (1 R. S. 723) defining a perpetuity.

Classes of Determinable Limitations of a Fee. There are two classes of determinable limitations of a fee: (1) Where a fee is expressed to endure until some event shall happen, which event is entirely independent of any default of the tenant of the fee, *e. g.*, "as long as Trinity Church shall stand."[1] (2) Where the fee is granted subject to a condition subsequent,[2] *e. g.*, "on condition that grantee shall, within a reasonable time, erect a church building on the premises hereby granted."[3] Formerly a grant in fee farm or subject to a perpetual rent was also a determinable fee with a possibility of reverter.[4] But it is not now so regarded at least in this State.[5]

Possibility of Reverter. A "determinable fee," when no executory limitation is predicated of its determination, leaves a possibility of reverter in the grantor. This possibility is sometimes called "a bare possibility." At common law such a possibility was descendible but not devisable, nor assignable.[6] A possibility of reverter is not an estate in lands under the Revised Statutes, and, until the contingency happens, the whole title is in the grantee.[7] A determinable fee does not contravene the rule against perpetuities, for the possibility of reverter in no wise suspends the power of alienating the fee.[8] The possibility is a vested interest,[9] susceptible of being released, or of being merged in the inheritance when the possibility and the legal title come into the same hands. The power of alienation is, therefore, not suspended by a condition subsequent.[10] The possibility of reverter was not

[1] Challis, 201; 1 Preston, Estates, 431, 433, 479; *cf.* 1 Sanders, Uses & Trusts, 208, 209.

[2] Challis, 63; Upington v. Corrigan, 151 N. Y. 143.

[3] Upington v. Corrigan, 151 N. Y. 143.

[4] Butler's note "a" to Fearne, Conting. Rem. 382; Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 121, quoted in Upington v. Corrigan, 151 id. at p. 150.

[5] Van Rensselaer v. Read, 26 N. Y. 558, 563; *cf.* 1 Sanders, Uses & Trusts, 206.

[6] Challis, 58, 60; *cf.* Judge Hare's note to Dumpor's Case, 1 Smith, Lead. Cas.; 1 Sanders, Uses & Trusts, 208, 209; Upington v. Corrigan, 151 N. Y. 143; Stillwell v. Melrose, 15 Hun, 378.

[7] Nicoll v. N. Y. & Erie Ry. Co., 12 N. Y. 121, 133; Vail v. L. I. R. R. Co., 106 id. 283; *cf.* Van Rensselaer v. Read, 26 id. 558, 563, as to possibility of reverter on limitation of a fee reserving a perpetual rent; Butler's note "a," Fearne, Conting. Rem. 382.

[8] 1 Sharswood & Budd, Lead. Cas. Real Prop. 132, 189.

[9] 4 Kent Comm. 9; Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.), 142; 1 Sharswood & Budd, Lead. Cas. Real Prop. 132, 189.

[10] Challis, 152, 153; *cf.* Gray, Restraints on Alienation, note on p. 30, and 1 Sanders, Uses & Trusts, 206.

assignable or devisable at common law,[1] but it is said to be assignable now,[2] though not devisable under our Statute of Wills in New York.[3]

Descent of Possibilities. The rule regulating descent of a possibility of reverter at the present time is considered under a subsequent section of The Real Property Law.[4]

Determinable Limitation and Limitation Subject to Condition. There may be now, at this day, an important distinction between an estate of freehold created by a determinable limitation, and one created by a limitation on or subject to a condition.[5] In the first case dower and curtesy may not cease when the event happens determining the fee;[6] but an estate determined by a condition and entry of the grantor relates back to, and restores the original estate, and dower and curtesy fall.[7]

Conditions. It was said that a base or impure or determinable fee may be created in this State also by a limitation of a fee simple on, or subject to, a condition.[8] Conditions are either express or implied. Conditions which are annexed to, or are in defeasance of, a fee simple, are subject to the rules of the common law adopted in this State. Express conditions may be contained in any instrument operative to create an estate or interest in lands;[9] or in a separate defeasance executed at the same time.[10] A condition is never a "limitation" in the narrowest sense of that term, for it does not create an estate, but either defeats its creation or avoids it when created.[11] Express conditions were anciently classified as *precedent* and *subsequent* by English writers.[12] Conditions precedent are ordinarily annexed to those donations or leases which never take effect as estates, but they may be contained in any deed. Such conditions always defeat the vesting of estates. On the other hand, conditions subsequent operate to avoid estates already vested and existing.[13] The distinction between the two

[1] Preston, Shep. Touch. 120; Challis, 153.

[2] Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 121; Towle v. Remsen, 70 id. at p. 312; Upington v. Corrigan, 151 id. at p. 152; *sed. cf.* § 1910, Code Civ. Proc.

[3] Upington v. Corrigan, 151 N. Y. 143.

[4] § 49, *infra*.

[5] Challis, 206.

[6] 4 Kent Comm. 32; *sed. cf.* Plowd. 557.

[7] Cornish, Uses, 93.

[8] *Cf.* Radley v. Kuhn, 97 N. Y. 26, 34, 35; Stilwell v. Melrose, 15 Hun, 378, 380.

[9] Shep. Touch. 11, Preston's ed.

[10] Willard, Real Estate, 440.

[11] Shep. Touch. 117.

[12] Bacon's Abr. Condition (I); Cruise Dig.; Shep. Touch. "Condition."

[13] Shep. Touch. 117; Towle v. Remsen, 70 N. Y. at p. 309; Upington v. Corrigan, 151 id. 143.

kinds of conditions is not, however, always clear.[1] The classification of the Civilians is much more logical. They term a condition *suspensive* when the commencement of the operation of an act is made to depend on its occurrence, and *resolutory* when the termination of the operation of the act is made to depend upon its occurrence.[2] No precise words are essential in a deed to make a condition, nor is the situation of the clauses of a sentence conclusive in determining whether the condition is precedent or subsequent. The intention of the parties is to be ascertained from the whole instrument, and, when found, that will determine the nature of the condition.[3]

Implied Conditions. Implied conditions are such as are inferred from the situation of the parties to a conveyance. When the conveyance by tenant for life or years of a greater estate than he himself had worked a forfeiture of his estate,[4] there was a condition implied and annexed to any assurance of his original estate, to the effect that he would not work a forfeiture thereof by any such conveyance. This class of conditions has lost much of its former importance by reason of the acts taking away the forfeitures and turning such conveyances of the tenant into estoppels and assignments of their present or actual interests.[5] The subject need not be pursued.

Conditions, when Void. The adjudged cases in New York touching the law of conditions only give concrete instances of the application of principles found laid down by the early writers on the common law. Common-law conditions may be void in their creation, because (1) impossible;[6] (2) contrary to positive rules of law or public policy;[7] (3) repugnant to the nature of the estate limited.[8]

Conditions, how Construed. It is unnecessary for our present purpose to consider further the common law relating to conditions; the subject is already too much amplified in a multitude of

[1] Nicoll v. N. Y. & Erie Railway, 12 N. Y. 130; Bennett v. Culver, 97 id. 250.

[2] 2 Puchta, Inst. 365.

[3] Per Paige, J., in Parmalee v. Oswego, etc., R. R. Co., 6 N. Y. at p. 80; Towle v. Remsen, 70 id. at p. 311; Post v. Weil, 115 id. 361.

[4] 1 J. & V. 98, 101; 1 K. & R. 525; 1 R. L. 181.

[5] 1 R. S. 739, § 145; Sparow v. Kingman, 1 N. Y. 242, 257; Moore v. Littel, 41 id. 66, 78.

[6] Bacon, Abr. Conditions, M.

[7] Bacon, Abr. Conditions, K.

[8] 6 Rep. 41a; Bacon, Abr. Conditions, L; De Peyster v. Michael, 6 N. Y. 467; Overbagh v. Patrie, Id. 510; Plumb v. Taylor, 41 id. at p. 446; Const. of 1846 and 1894, art. 1, § 14.

treatises, adding nothing to the older books. It will suffice to point out that conditions subsequent are construed strictly, because they tend to destroy estates,[1] and that unavoidable breaches are sometimes relieved in equity.[2] So, forfeitures occasioned by breaches of conditions operating to determine estates in lands are easily deemed to be waived by those in whose favor they are.[3] Conditions subsequent may, at common law, be reserved only for the benefit of the grantor and his heirs, and no others may take the benefits of a breach of them.[4] A right of re-entry for a breach of a condition subsequent does not pass by a conveyance of land, and is not assignable.[5]

Determinable Fees Enlarged into Fees Simple Absolute. In order to enlarge a fee determinable by a condition into a fee simple absolute, courts will sometimes construe a condition subsequent, a breach of which forfeits the whole estate, into a covenant on which only the actual damage can be recovered.[6] Covenants to pay rent on a grant in fee in New York run with the land, and will be binding upon the heirs and assigns of the covenantor successively as to all breaches of such covenants which occur during their respective ownership of the lands.[7] The distinction between a condition and a covenant is not always clear, and wherever this is the case the condition will be construed as a covenant,[8] even if it have the effect of conferring a remedy on a successive owner not entitled to enforce a breach of a condition subsequent.[9]

Rents Reserved on Estates in Fee. As rents may be reserved on estates in fee, and as certain perpetual rents may be limited in

[1] Jackson ex dem. v. Harrison, 17 Johns. 66; Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. at p. 131; Woodworth v. Paine, 74 id. 196; Graves v. Deterling, 120 id. 447.

[2] 2 Story, Eq. Juris. § 1319 *et seq.*

[3] Wheeler v. Dunning, 33 Hun, 205; note to Dumpor's Case, 1 Smith Lead. Cas.

[4] Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. at p. 131; Hoyt v. Dillon, 19 Barb. 644, 651; Towle v. Remsen, 70 N. Y. at p. 312; Countryman v. Deck, 13 Abb. N. C. 112.

[5] Towle v. Remsen, 70 N. Y. at p. 312; Main v. Green, 32 Barb. 448; Countryman v. Deck, 13 Abb. N. C. 110, 112.

[6] Avery v. N. Y. Central & H. R. R. R. Co., 106 N. Y. 142, 155; Countryman v. Deck, 13 Abb. N. C. 110; Graves v. Deterling, 120 N. Y. 447, 456.

[7] Van Rensselaer v. Read, 26 N. Y. 558, 564.

[8] Note to Spencer's Case, 1 Smith L. C.; note, 13 Abb. N. C. 114; Avery v. N. Y. Cent. R. R., 106 N. Y. p. 155; Countryman v. Deck, 13 Abb. N. C. 110.

[9] Avery v. N. Y. Cent. & H. R. R. R. Co., 120 N. Y. 142, 155; *cf.* Gibert v. Peteler, 38 id. 165, 168; Trustees, etc., v. Lynch, 70 id. 40, 451, 452.

fee simple, and there is no reason why they should not be, questions of importance touching them may arise in the future as they have arisen in the past. It being difficult to find the law on this subject systematically arranged, it is now attempted to be stated at some length, for the convenience of those interested in this obscure subject.

Fee Farm Rents and Fees Farm. Fee farm, or perpetual, rents, are hereditaments, descendible and devisable.[1] In one aspect an estate of inheritance subject to a perpetual rent, reserved in favor of the grantor, is now regarded as an estate on condition, or as one limited upon a condition subsequent.[2] A perpetual rent reserved on an estate of inheritance or in fee is in manors, or seignories, termed a "quit rent," or a fee farm rent, and the estate of inheritance in the land itself is a "fee farm.[3] It is highly probable that fee farms originally indicated a "feud" or fief of inheritance subject to a rent, and held by the free socage tenure.[4] Classifications of estates were for a long time in English law wholly incomplete or inconsistent. Scientific classification comes very late to any system. Some persons have thought the *quantum* of the rent determined a fee farm. It is now conceded that the *quantum* of the rent does not make a "fee farm" rent, as stated by some writers.[5] It is the reservation of a rent, or "farm,"[6] on an estate in fee which constitute a fee farm.

Perpetual Rents in New York. Perpetual or "fee farm" rents[8] were very common in early times in New York, and by the law of this State their reservation is still lawful on grants in fee, except in so far as the constitutional provision restraining leases of agri-

[1] Van Rensselaer v. Hayes, 19 N. Y. 68; Cruger v. McLaury, 41 id. 219, 222.

[2] De Lancey v. Piepgras, 138 N. Y. 26; *cf.* People v. Trinity Church, 22 id. 44, as to adverse claim of grantee in fee, and also Stuart v. City of Easton, 74 Fed. Rep. 854.

[3] *Supra*, § 20, p. 90; Van Rensselaer v. Read, 26 N. Y. at p. 564.

[4] Dalrymple, Feudal Prop. at p. 33, suggests this origin very indirectly. Professors Pollock and Maitland so intimate, 1 Hist. Eng. Law, 218, 273, 617; but it should be said that, prior to the publication of their great work, the writer of these lines had, unaided, crudely struggled to a like conclusion. Hist. Real Prop. in N. Y. 40.

[5] 2 Black. Comm. 43; Coke, 2 Inst. 43, note.

[6] Skeat, Dict., says, "farm" means rent; *cf.* Dalrymple, Feudal Prop. 33.

[7] Tomlin, Littleton, 272, note k; Hargrave, note 5 to Co. Litt. 143b; 2 Washb. Real Prop. 7.

[8] As to what are fee farm rents, see Van Rensselaer v. Read, 26 N. Y. at p. 564; Devisees of Van Rensselaer v. The Exrs. of Platner, 2 Johns. Cas. 24, 26; 3 Preston, Abstracts of Title, 54.

cultural lands prohibits them.[1] In England no subject could reserve a rent as a mere incident of tenure after the Statute of *Quia Emptores* (A. D. 1290).[2] In the province of New York the existence of manors probably led, in legal theory, to a tenure by suit and service of the manor, *non obstante* the Statute of *Quia Emptores*, and to the reservation of perpetual rents, even without a rent charge or clause of re-entry[3] on grants of land in fee, where such land was situated within the limits of the manor. Without the manors the reservation of a perpetual rent on grants in fee, without a rent charge, or clause of re-entry, was no doubt invalid.[4] How far the practice of the manors may have influenced the subsequent law regarding perpetual rents in New York, where there was no rent charge, is an interesting, but uncertain, question. Prior to the War of Independence, and in 1774, the Legislature intervened in favor of all perpetual rents, reserved within or without the bounds of the manors, giving a remedy on them in case they had been paid for three years within the twenty years preceding.[5] This act was a repetition of the English statute, 4 George II, chapter 28, making "rents seck" rents of assize and chief rents, collectible as were rents reserved on leases. Enough stress has not been laid on this act in any of the late cases involving rents reserved on estates in fee.

Remedies for the Collection of Perpetual Rents. In 1805 the act 32 Henry VIII, chapter 34,[6] enabling grantees of reversions to take advantage of conditions and covenants, was extended by an act of the Legislature to "grants or leases in fee."[7] In 1860, the

[1] Van Rensselaer v. Platner, 2 Johns. Cas. 17; People ex rel., etc., v. Haskins, 7 Wend. 463; Hunter v. Hunter, 17 Barb. 25; Church v. Shultes, 4 App. Div. 378; Id. 312; Tyler v. Heidorn, 46 Barb. 439; affd., 6 Alb. L. J. 199; Van Rensselaer v. Dennison, 35 N.Y. 393; Cent. Bank v. Heydorn, 48 id. 260; Parsell v. Stryker, 41 id. 480; Bradt v. Church, 110 id. 537; Jackson ex dem. Van Rensselaer v. Hogeboom, 11 Johns. 163; Const. 1894, 1895, art. 1, § 13; *et supra*, p. 87, under § 20, "The Real Prop. Law."

[2] Challis, 3; Watkins, Descents, note to 4th ed., Lond., p. 247; 1 Sanders, Uses & Trusts, 208, 209.

[3] The draftsmen of the grants in fee, in the manors, usually reserved a right of re-entry for non-payment of rent or services reserved, and charged the same on the land. But see Hosford v. Ballard, 39 N. Y. at p. 150, as to reservation of right to distrain.

[4] Co. Litt. 144a, and Mr. Hargrave's note; Watkins, Descents (4th Eng. ed.), note, p. 247; Van Rensselaer v. Hayes, 19 N. Y. 68, 76; 1 Sanders, Uses & Trusts, 208, 209; *cf.* chap. 14, N. Y. Laws of 1774.

[5] Chap. 14, N. Y. Laws of 1774.

[6] 2 J. & V. 184; *supra*, pp. 91, 92.

[7] Chap. 98, Laws of 1805; 1 R. L. 364, § 3; 1 R. S. 748, § 25; *infra*, § 193, The Real Prop. Law.

Legislature, however, provided that the act of 1805 and its several re-enactments should not extend to conveyances in fee thereafter made, or made before the act of 1805.[1] But the courts then determined that, independently of these acts, a covenant for the payment of rent passed to the devisee or assignee of the rent.[2]

Effect and Object of the Statutes of New York. The effect of the acts of 1805 and those other acts saving rents depended much on the former common law. As after the Statute *Quia Emptores* no subject outside of the old manors could reserve rents in England as an incident of tenure,[3] the reservation of perpetual rents in New York out of estates in fee, led even within the old manors to much litigation and discussion.[4] In order to save such rents on grants in fee it was maintained in some cases that the Statute of *Quia Emptores* never was in force in New York before 1787,[5] when it was re-enacted in Jones and Varick's revision of the English statutes.[6] This absurd contention was finally decorously negatived in Van Rensselaer v. Hayes.[7] It will be remembered that in 1786, two lawyers, Messrs. Jones and Varick, were appointed by the Legislature of this State, revisers, for the purpose of determining what acts of the English Parliament had extended to the province of New York, and were fit for re-enactment under the Constitution of 1777.[8] They prepared the "Act concerning tenures"[9] re-enacting the Statute "*Quia Emptores.*" The subsequent confusion about this act was due to lawyers' inability to account for the manors of New York, as they were regarded, at first, as inconsistent with the existence of the Statute *Quia Emptores* in the province of New York.[10] In reality this great statute did not prohibit the erection of manors by the Crown in the colonies, or where the land was not in tenure prior to the statute.[11]

[1] Chap. 396, Laws of 1860, and § 193 of The Real Prop. Law.

[2] Van Rensselaer v. Read, 26 N. Y. 558; Cruger v. McLaury, 41 id. 219, 227, note; Cent. Bank v. Heydorn, 48 id. 260.

[3] Challis, 3; 1 Sanders Uses & Trusts, 208, 209; Watkins, Descents (4th ed.), note, p. 247; Van Rensselaer v. Hayes, 19 N. Y. 68, 76.

[4] See "Rents, Covenants and Conditions," by Bingham and Colvin, Albany, 1857, for a one-sided and confused history of the tenants' contentions.

[5] De Peyster v. Michael, 6 N. Y. 467; Van Rensselaer v. Smith, 27 Barb. 104.

[6] 2 J. & V. 67, 68.

[7] 19 N. Y. 68.

[8] 1 J. & V. 281.

[9] 2 J. & V. 67, 68.

[10] De Peyster v. Michael, 6 N. Y. 467; Van Rensselaer v. Smith, 27 Barb. 104.

[11] In some colonies, as in Pennsylvania, for instance, there was a *non obstante* clause in the charter. But without this, the Crown was not prevented from erecting manors out of

Perpetual Rents Within the Manors of New York. The manors of New York were, with the exception of the Dutch patroonships, all created subsequently to the statute abolishing in England the feudal incidents of tenure.[1] While it was quite competent for the sovereign to create manors in Crown-lands not in tenure prior to 18 Edward I,[2] such modern freehold and non-feudal manors in New York can only be defined "as seisin of a defined district with the power of sub-infeudation therein and the existence of freeholders holding of the manor and the right to a court baron in which the feudatories were judges."[3] Undoubtedly most of the pre-revolutionary grants in fee reserving a perpetual rent in New York, without a rent charge, were of lands originally situated within the precincts of the supposed manors. It is highly probable that in these modern freehold manors counsel relied in drafting conveyances in fee on the existence of sub-infeudation and on the freeholders' tenure of the manor.[4]

Perpetual Rents after Independence. When the War of Independence disturbed in America the whole English theory of government and law, there was an effort by the Legislature of New York to preserve existing rents and to substitute for tenure some statutory provision.[5] These acts preserved future reservations. This theory will probably be found to explain the early practice in New York. At a later period other acts saved all rents reserved. But quite independently of such acts the courts of the State finally uphold any reservation of rent on grants of non-agricultural lands in fee.[6] These grants in fee after 1805 stood, however, on the same footing in New York as demises, or leases, at least, until 1860,[7] and were, therefore, often called "leases," evidently with

England. Verschoyle v. Perkins, 13 Ir. Eq. 72; Van Rensselaer v. Hayes, 19 N. Y. 68.

[1] 12 Car. 2, chap. 24.

[2] Challis, 18, 19; Van Rensselaer v. Hayes, 19 N. Y. 68.

[3] Delacherois v. Delacherois, 11 H. L. Cas. at p. 83. A New York manor implied either this or nothing excepting a territorial ownership.

[4] Delacherois v. Delacherois, 11 H. L. Cas. 62; Verschoyle v. Perkins, 13 Irish Eq. 72, 82.

[5] Chap. 14, N. Y. Laws, 1774; 2 J. & V. 68, § 5; 1 K. & R. 64; 2 R. L. of 1813, 71; chap. 98, Laws of 1805; Van Rensselaer v. Smith, 27 Barb. pp. 151, 152; Tyler v. Heidorn, 46 Barb. 439; 1 R. S. 718, § 4; Id. 747, §§ 23, 24, 25; Old Code, §§ 111, 112.

[6] Van Rensselaer v. Read, 26 N. Y. 558; Van Rensselaer v. Dennison, 35 id. 393; Parsell v. Stryker, 41 id. 480; Cent. Bank v. Heydorn, 48 id. 260; Bradt v. Church, 110 id. 537.

[7] Per Wright, J., in Van Rensselaer v. Smith, 27 Barb. 104; People ex rel. v. Haskins, 7 Wend. 463; chap. 98, Laws of 1805; 2 R. L. 364, § 3; 1 R. S. 748, § 25; chap. 396, Laws of 1860,

a view to reconcile them to the statutes and law relating to demises.[1] But estates in fee, reserving perpetual rents, were nevertheless not "terms of years," but estates of inheritance or "fees."[2] The real reason for dubbing them "leases" has been explained, and will be repeated for emphasis.

Fee Farms not Leases. Fee farms were called "leases" with a view to obtain the benefit of all the statutes of New York, saving rents. These acts sometimes referred to fee farm grants as "perpetual leases."[3] But it is obvious that a fee simple cannot be a term of years; a demise is a term, while a fee may last forever. A lease or demise has a *terminus a quo* and a *terminus ad quem*, or it is no term of years. An estate enduring possibly forever has no term, and must be a fee. So to call a grant of a "fee" a "lease" is both an anachronism and a logical inconsistency, yet in New York this is done by such high authority as to make the departure from principle honored in the breach.

Legal Disputes over Fee Farm Rents. The great mass of litigation which has taken place over fee farm rents in New York has been largely due to counsels' failure to distinguish between remedies due to tenure and remedies not due to tenure.[4] At common law rent incident to tenure could be collected only by the feudal remedy of distress, or by virtue of the Statute "*Cessavit per biennium*."[5] But where rent was reserved in a written instrument under seal covenant lay, and in several cases modern statutes aided the collection of rents seck and chief rents.[6] Parties to a contract of this character must always be presumed to have contracted in reference to the change of remedies.[7] Subsequent to Independence, the old custom of reserving and demanding perpetual rents was continued, but not without protests. In the cases of Main

and § 190, The Real Prop. Law; Bradt v. Church, 110 N. Y. 537.

[1] Van Rensselaer v. Jewett, 2 N. Y. 141; Church v. Wright, 4 App. Div. 312; Church v. Shultes, Id. 378; chap. 98, Laws of 1805; Tyler v. Heidorn, 46 Barb. 447; Willard, Real Prop. 206; 1 R. S. 748, § 25.

[2] Verschoyle v. Perkins, 13 Irish Eq. 72; Stuart v. City of Easton, 74 Fed. Rep. 854; *sed. cf.* DeLancey v. Piepgras, 138 N. Y. 26; People ex rel. v. Haskins, 7 Wend. 463.

[3] *Cf.* 2 J. & V. 108; chap. 98, Laws of 1805, and see note to Cruger v. McLaury, 41 N. Y. pp. 227, 228.

[4] *E. g.*, see "Rents and Covenants" by Bingham and Colvin, *passim*.

[5] 6 Edw. I, chap. 4; 13 Edw. I, chap. 21.

[6] *Supra*, pp. 105, 106; 4 Geo. II, chap. 28; chap. 14, Laws of 1774; chap. 98, Laws of 1805; 1 R. L. of 1813, § 3, and see 1 R. S. 747, § 23; chap. 247, Laws of 1846; 2 R. S. 334, § 4; 2 R. S. 295, § 15, as to heir.

[7] Martin v. Rector, 118 N. Y. 476.

v. Feathers,[1] Van Rensselaer v. Bonesteel,[2] and Van Rensselaer v. Chadwick,[3] the counsel for the owners of the lands subject to fee farm rents maintained strenuously that since the abolition of tenure in the State of New York, fee farm rents were uncollectible by distress or by any other statutory substitute, and that the only remedy of the original grantor was personal on the covenant; that an assignee or devisee of the rent could not recover on the covenant, and that an assignee of the land took it discharged from the rent, as covenants to pay rent did not run with the land, except where there was a tenure subsisting, such as that between a lessor and a lessee.[5] These propositions made the issue a very plain one.

Theories Concerning Remedies for Collecting Perpetual Rents. It is very obvious that, at first, after the partial abolition of tenure in New York, the enforcement of covenants and conditions subsequent annexed to fee farm rents was generally thought to depend largely on the Legislature.[6] Hence, the celebrated act of 1805,[7] mentioned above. The statute, 32 Henry VIII, chapter 34, enabling grantees and assignees of reversions to take advantage of conditions annexed to the estate, was not really applicable to a fee farm, as sometimes said; it related to estates which were less than a fee.[8] Thus, remedies for rent due in New York on a fee farm have arisen here wholly out of the necessities of the case,[9] and were probably intended originally to protect those perpetual "leases" which arose before Independence in the manors, and which were made at a time when the seigniories were supposed to be valid, and to create the obligations of tenure on those demises devoid of a rent charge.[10] The portions of the statute of the

[1] 21 Barb. 646.

[2] 24 Barb. 365.

[3] 24 Barb. 333.

[4] *Sed. cf.* chap. 14, Laws of 1774, founded on 4 Geo. II, chap. 28.

[5] *Sed. cf.* chap. 98, Laws of 1805; 1 R. L. 364, § 3; 1 R. S. 747, § 23; chap. 274, Laws of 1846; 2 R. S. 195, § 15; § 193, The Real Prop. Law.

[6] Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. at pp. 131, 132.

[7] Chap. 98, Laws of 1805; 1 R. S. 747, §§ 23, 24; 1 R. S. 748, § 25; Nicoll v. The N. Y. & Erie R. R. Co., 12 N. Y. at p. 131; Van Rensselaer v. Hayes, 19 id. 68; Van Rensselaer v. Ball, Id. 100.

[8] 2 J. & V. 184. At common law a possibility, right of entry, thing in action, cause of suit, or title for condition broken, could not be assigned over. Hence, 32 Hen. VIII, chap. 34; 2 J. & V. 184; Comyn, Landl. & Ten. 267.

[9] 4 Webster, 254; chap. 98, Laws of 1805; 1 R. L. 363, § 3; *cf.* 2 J. & V. 237, § 18; Judge Hare's note to Dumpor's Case, 1 Smith, Lead. Cas.

[10] Delacherois v. Delacherois, 11 H. L. Cas. 62; Verschoyle v. Perkins, 13

State enabling assignees of reversions to take advantage of a breach of conditions annexed to estates less than fee were, however, taken from the statute 32 Henry VIII, chapter 34, which was always supposed to be in force in New York; and on this supposition it was contained in Jones and Varick's Revision of the English Statutes extending here.[1] So, the assignability of a condition subsequent reserved on a fee farm grant was statutory.[2] At common law, while a fee farm rent was assignable,[3] a right to re-enter reserved was not assignable *inter vivos*,[4] nor devisable.[5] The statutes changed these rules.[6]

Prevailing Legal Theory. But, subsequent to 1860, after the repeal of the statutes,[7] it was finally held that "fee farm," or "perpetual," rents are covenants real which run with the land, and are binding upon the heirs and assigns of the covenantor successively during their respective ownership.[8] It was also held that the grant left no possibility of reverter, or reversion,[9] and that the rent was a tenement or incorporeal hereditament, and devisable, assignable and descendible.[10] These litigations over deeds in fee reserving rents are among the most interesting and instructive in our judicial history, and entitled to be regarded among most wisely-decided cases of any country. In summing

Irish Eq. 72. If the seigniories were valid, the Statute *Quia Emptores* did not operate on conveyances within the manor, and the tenure was by suit and service of the manor. The lord of the manor had escheats and reversions, and could always invoke all remedies sanctioned by tenure. I have elsewhere expressed a doubt as to the validity of the seigniories in these modern manors, irrespective of statutes validating the grants.

[1] 2 J. & V. 184; *supra*, p. 91, § 20.

[2] Chap. 98, Laws of 1805; 1 R. S. 747, § 23; Id. 748, § 25; Upington v. Corrigan, 151 N. Y. at p. 150.

[3] Gilbert, Rents, 138; Shep. Touch. 238; Co. Litt. 143b, note.

[4] 2 J. & V. 233; Litt. § 347; 1 R. L. 434, § 17; Judge Hare's note to Dumpor's Case, 1 Smith, Lead. Cas.; *cf.* Van Rensselaer v. Read, 26 N. Y. at p. 564.

[5] Challis, 153; Shep. Touch. 120; Upington v. Corrigan, 151 N. Y. 143.

[6] Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 121, 131.

[7] Chap. 98, Laws of 1805; 1 R. S. 748, § 25; chap. 396, Laws of 1860; see note to Cruger v. McLaury, 41 N. Y. at p. 227.

[8] Van Rensselaer v. Read, 26 N. Y. 558, 564; Cent. Bank v. Heydorn, 48 id. 260; Hunter v. Hunter, 17 Barb. 25.

[9] Van Rensselaer v. Ball, 19 N. Y. at p. 104; Cruger v. McLaury, 41 id. at p. 224; Van Rensselaer v. Read, 26 id. at p. 563; *sed. cf.* Upington v. Corrigan, 151 id. at p. 150, quoting Nicoll v. N. Y. & Erie R. R. Co., 12 id. at p. 132.

[10] Van Rensselaer v. Slingerland, 26 N. Y. 580; Van Rensselaer v. Read, Id. 558, 564; Cruger v. McLaury, 41 id. 219; Hunter v. Hunter, 17 Barb. 25; § 49, The Real Prop. Law.

up the present condition of the law on this head, the court say "that, since the act concerning tenures,[1] the courts (of New York) have given careful attention to the distinction existing between conditions implied by the law of tenures and those created by the acts of the parties and expressed in the conveyance. Any condition by acts of the parties, if expressed in the conveyance, is valid unless it contravenes some general rule of law; and if the condition expressed in the 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 valid."[2] It will be observed that such a reservation on a grant of urban lands in fee[3] must intend a "possibility of reverter," for on a breach of the condition subsequent the grantor, his heirs or assigns, may enter.[4] It is, therefore, now lawful in practice to reserve "a possibility of reverter" on breach of a condition subsequent in a grant of a fee determinable, notwithstanding that no such possibility is said to be implied by the mere reservation of a rent on a grant in fee simple.[5] Unless there is a provision for a re-entry on a grant in fee reserving a rent, or something from which it can be fairly inferred that the continuance of the estate is to depend on the condition, the reservation may be a mere covenant and not a condition subsequent.[6]

Ejectment Determines the Estate. Ejectment by the owner of a fee farm rent determines the so-called perpetual lease, and, after twenty years therefrom, a title by adverse possession begins to run.[7]

Validity of a Reservation of Perpetual Rents. As was intimated in Hawley v. James, there is nothing *per se* in a perpetual reservation of a rent which is hostile to the rule against a perpetuity.

[1] 2 J. & V. 67; 1 K. & R. 64; 2 R. L. 70.

[2] Van Rensselaer v. Dennison, 35 N. Y. at p. 400; *cf.* 1 Sanders, Uses & Trusts, 208, 209, as to law of England after the Stat. of *Quia Emptores terrarum*.

[3] Const. of 1846 and 1894 (art. 1) prevents leases of agricultural lands for longer than twelve years.

[4] Challis, 63; Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 133; Towle v. Remsen, 70 id. 309; Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.), 142; § 193, The Real Prop. Law, formerly 1 R. S. 747, § 23; chap. 274, Laws of 1846; 2 R. S. 295, § 15.

[5] Van Rensselaer v. Read, 26 N. Y. at p. 563; Van Rensselaer v. Dennison, 35 id. at p. 399; 1 Sanders, Uses & Trusts, 288, 289.

[6] Graves v. Deterling, 120 N. Y. 447, 457; Van Rensselaer v. Read, 35 id. at p. 576; Van Rensselaer v. Dennison, Id. 393; Cruger v. McLaury, 41 id. at p. 222.

[7] Church v. Wright, 4 App. Div. 312; Church v. Shultes, Id. 378, and cases there cited.

The land itself is as much in the market as ever. The holder of the rent, for the time being, may sell, assign or discharge the rent for a gross sum at any time he chooses.[1] Rents reserved on alienations in fee are incorporeal hereditaments,[2] descendible from those to whom they are reserved[3] as a new purchase, and not incident to the reversion at common law.[4]

De Lancey v. Piepgras. A recent and most interesting case in New York has construed the rights of the Crown and its successor, the State of New York, in respect of fee farm grants and rents,[5] holding that the estate of the tenant was a qualified or conditional fee, and that for non-payment of the rent the Crown might, by inquisition, have the estate declared at an end and resume possession.[6] The decision is of great historical interest, and elsewhere it has been since considered with reference to some authorities not discussed in that case. As some points of the decision in question are *obiter dicta*, it is open to the practitioner to consider whether the decision is accurate too, in holding that a "fee farm" grant was a qualified or conditional fee, and that the Crown had, in New York, any special, or summary, remedy for the non-payment of quit rents. The grants of territory in New York by the Crown were usually of estates in fee simple, subject to a quit rent. They contained no express conditions, and no clause for distress or re-entry. They were consequently, in colonial times, considered defective,[7] and great embarrassment was often found in the overt attempts to collect the quit rents due to the Crown. Any rights of the Crown, in respect of rents here, probably depended wholly on the nature of the royal seigniory or on tenure.[8] As nearly all the reported cases refer to tenure between subject and subject, it may be pointed out that the king's seigniorial rights

[1] *Cf.* 16 Wend. at p. 154.

[2] Hunter v. Hunter, 17 Barb. 25; citing 2 Black. Comm. 41, *et supra*, p. 104.

[3] Hunter v. Hunter, Id. *supra*, citing Watkins, Descents, 290; 1 Inst. 12b; 3 Preston, Abstracts of Title, 54.

[4] 3 Preston, Abstracts of Title, 54.

[5] State farm rents having all been commuted by statute (1 J. & V. 250; chap. 23, Laws of 1786; chap. 33, Laws of 1798; chap. 222, Laws of 1819), a case of this character rarely arises in the courts. But, as shown in the case in question, the learning is not obsolete. Before the Revolution in this country, a question concerning a royal seigniory was justiciable only in England. Stokes, British Colonies, 6.

[6] De Lancey v. Piepgras, 138 N. Y. 26; *cf. in arguendo*, Stuart v. City of Easton, 74 Fed. Rep. 854, as to conditions in grants in fee simple.

[7] Doc. relating to Colonial Hist. of N. Y. vol. 5, 363.

[8] Verschoyle v. Perkins, 13 Irish Eq. 72, 80.

were not dependent on the legal bond, termed a "reversion," but on that termed "escheat," a reversion denoting, strictly, the superior rights of some mesne lord.[1] The seigniorial rights of the Crown over a royal seigniory of the character of the province of New York had been much modified by legislation, after the feudal settlement, and it is, perhaps, even now open to further discussion, whether the Crown ever had, in New York, any reversion on a fee farm, or any such summary remedy for the collection of quit rents, as that definitively intimated in De Lancey v. Piepgras. The Statute of Marlebridge,[2] in any event, took away the seigniorial power to distrain a fee, and this statute, we know, bound the king.[3] In consequence whereof, the remedy of feudal lords became personal, and then was passed the Statute of Gloucester[4] and Westminister 2d,[5] which gave them the writ of *cessavit per biennium*, in case the quit rents were not paid for two years. There are cases in the English books which certainly tend to hold that a fee farm is not an estate on condition, and that the remedy of the Crown for the collection of quit rents, where there was no right of re-entry reserved, and no rent charge, was very dubious and dilatory.[6] As soon as a tenant in fee had acquired, in English law, the right of alienation without consent of the lord, the feudal escheat for failure of heirs became a sort of caducary succession,[7] and thereafter the right of the lord to forfeit a fee for non-payment of a quit rent depended largely, if not wholly, on statute.[8] Before the Revolutionary War there was, however, no court in the colonies competent to pass upon the legality of the claims of the Crown in respect to its seigniory;[9] hence, probably, the reason for the paucity of authority on the point in De Lancey v. Piepgras.

Presumption of Payment of Perpetual Rent. In an action to recover rent reserved on a grant in fee, non-payment of rent for a period of sixty-three years does not raise a conclusive presumption of release when the covenant sued on remains in the hands of covenantor, his heirs or assigns, uncanceled.[10]

[1] Watkins, Descents, 2.
[2] 52 Hen. III, chap. 22.
[3] 2 Inst. 142; *cf.* Gilbert, Rents, 92.
[4] 6 Edw. I, chap. 4.
[5] 13 Edw. I, chap. 21.
[6] Atty.-Gen. v. Mayor of Coventry, 2 Vern. 713.
[7] Burgess v. Wheate, 1 Eden, 177; Verschoyle v. Perkins, 13 Irish Eq. 72.
[8] Re-enacted in New York, 2 J. & V. 108; chap. 98, Laws of 1805.
[9] Stokes, British Colonies, 6.
[10] The Cent. Bank v. Heydorn, 48 N. Y. 260.

Perpetual Rent Bound by Judgment, When. A fee farm or perpetual rent reserved out of an estate in fee was, if containing a rent charge, an interest in land which was bound by a judgment, and it might be sold on execution, but otherwise of a rent seck.[1]

Rents, how Limited. Rents thus reserved might themselves be the subject of estates, limited in analogy to estates in lands. The restriction on the creation of such estates *de novo* is in the present law.[2]

Estate of Inheritance, when Cut Down. An estate of inheritance given in one part of a will in clear and decisive terms is not cut down by implication by subsequent words not equally clear and decisive.[3] But when by limiting the character of the first estate the second may be preserved, the court will give such construction unless it is subversive of the entire scheme.[4]

[1] The People ex rel. Rosekrans v. Haskins, 7 Wend. 463.

[2] § 50, The Real Prop. Law.

[3] Washbon v. Cope, 144 N. Y. 287; Byrnes v. Stilwell, 103 id. 453, 460; Campbell v. Beaumont, 91 id. 464; Roseboom v. Roseboom, 81 id. 356; Clarke v. Leupp, 88 id. 228; Clay v. Wood, 153 id. 134; Thomas v. Troy City Nat. Bank, 19 Misc. Rep. 470; *cf.* Harriot v. Harriot, 25 App. Div. 245.

[4] Wager v. Wager, 96 N. Y. 164, 174; Smith v. Van Ostrand, 64 id. 278; Norris v. Beyea, 13 id. 273; Banzer v. Banzer, 156 id. 429.

§ 22. **Estates tail abolished; remainders thereon.**—Estates tail have been abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed before the twelfth day of July, seventeen hundred and eighty-two, shall be deemed a fee simple; and if no valid remainder be limited thereon, a fee simple absolute. Where a remainder in fee shall be limited on any estate which would be a fee tail, according to the law of this state, as it existed previous to such date, such remainder shall be valid, as a contingent limitation on a fee, and shall vest in possession on the death of the first taker, without issue living at the time of such death.

Formerly 1 Revised Statutes, 722, sections 3 and 4:

§ 3. All estates tail are abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the twelfth day of July, one thousand seven hundred and eighty-two, shall hereafter be adjudged a fee simple; and if no valid remainder be limited thereon, shall be a fee simple absolute.[1]

§ 4. Where a remainder in fee shall be limited upon any estate, which would be adjudged a fee tail, according to the law of this state, as it existed previous to the time mentioned in the last section, 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.[2]

Estates Tail Turned into Fees Simple. Estates tail had been converted into estates in fee simple at an early period after independence of the Crown.[3] The Revised Statutes simply modified the older statutes abolishing entails so as not to cut off a remainder in fee limited upon a fee tail.[4] An estate tail is, however, only abolished at the present day by being converted into an estate in fee simple, which, if no valid remainder is limited thereon, is now termed a fee simple absolute.[5] The statutes of 1782 and 1786, abolishing entails, and prescribing the course of descents in New York, operated prospectively, as well upon vested remainders in tail as upon those estates tail which had taken effect in possession.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Chap. 2, Laws of 1782, and revised in 1786, chap. 12, Laws of 1786; 1 J. & V. 245. The act of 1782 was defective. Jackson ex dem. v. Van Zandt, 12 Johns. 169, and Medcef Eden's Case, 20 id. 483; Lytle v. Beveridge, 58 N. Y. 592, 601.

[4] § 22, *supra*; 1 R. S. 722, § 4; Matter of Moore, 152 N. Y. 602.

[5] § 22, *supra*; 1 R. S. 722, § 3.

[6] Jackson ex dem. v. Van Zandt, 12 Johns. 169; Vanderheyden v. Crandall, 2 Den. 9; Van Rensselaer v. Poucher, 5 id. 35.

Before the Revised Statutes the acts abolishing entails had cut off remainders limited on an estate tail.[1]

Remainders Limited on a Fee Tail Saved. The Revised Statutes expressly saved remainders on a fee tail.[2] But the Revised Statutes did not actually prohibit the creation of estates tail in the sense of making them void; but they allowed them to arise, and on the instant they arose converted them into estates in fee simple absolute.[3] Nevertheless, in so far as an estate tail in remainder may be regarded as a "future estate," under the Revised Statutes,[4] it is abolished.[5]

What Words Create an Estate Tail. The books of the common law are very replete on this subject,[6] but it is also discussed in many cases in this State.[7]

Estates Tail in Personalty. Estates tail could not be formerly in limitations of personal property.[8] But at the present day, as limitations of future estates in personalty are subject to all the provisions of this article,[9] it is assumed that the creation of an estate tail in personal property, being a future interest therein, would be subject to the provisions of this section.[10]

[1] Lott v. Wyckoff, 2 N. Y. 355; Van Rensselaer v. Kearney, 11 How. (U. S.) 297.

[2] Matter of Moore, 152 N. Y. 602; Harriot v. Harriot, 25 App. Div. 245, 248.

[3] Wilkes v. Lyon, 2 Cow. 333; Lott v. Wyckoff, 2 N. Y. 355, 359; Buel v. Southwick, 70 id. 581; Nellis v. Nellis, 99 id. 505, 511; *cf.* Mr. Harrison's argument in Medcef Eden's Case, 16 Johns. at p. 392 *et seq.*; Seaman v. Harvey, 6 Hun, 71; Coe v. De Witt, 22 id. 428; Matter of Kirk v. Richardson, 32 id. 434. As to what words create "estate tail," see Baker v. Lorillard, 4 N. Y. 257; Harriot v. Harriot, 25 App. Div. 245, 248.

[4] § 27, *infra;* 1 R. S. 723, § 10.

[5] § 26, *infra;* 1 R. S. 726, § 42.

[6] Tudor, Lead. Cas. R. P. 750–754; Challis, 237, 238.

[7] Baker v. Lorillard, 4 N. Y. 257, 263; Harriot v. Harriot, 25 App. Div. 245, 248.

[8] Norris v. Beyea, 13 N. Y. 273.

[9] 1 R. S. 773, § 2.

[10] *Cf.* Norris v. Beyea, 13 N. Y. 273; Van Horne v. Campbell, 100 id. 287, 305.

§ 23. **Freeholds; chattels real; chattel interests.**— Estates of inheritance and for life, shall continue to be termed estates of freehold; estates for years are chattels real; and estates at will or by sufferance, continue to be chattel interests, but not liable as such to sale on execution.

Formerly 1 Revised Statutes, 722, section 5:

§ 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.[1]

Freehold Estates. The words "freehold estates" were preserved by the Revised Statutes to denote both a fee simple and an estate for life.[2] Hence, as before the revision, no less an estate than these can constitute a freehold.[3] "Freehold" and "freeholder," formerly in New York as in England, indicated the *status* of the tenant and were significant of political privileges now almost swept away in this State. At the time of the Revised Statutes the *status* of freeholder had still some political significance, and the adoption of the ancient definition of a freehold estate in lands made allodial was, therefore, still convenient. After defining "estates of freehold" the revisers proceeded to define "estates not of freehold."[4]

Estates not of Freehold. In treating of estates not of freehold, the Revised Statutes provided that "estates for years" were to be denominated "chattels real;" but "estates at will" or "by sufferance," were to be "chattel interests."[5] This section was declaratory of existing law.[6] The history of "terms of years," in the law of England, is not obscure.

Terms of Years. Long "terms of years" are very ancient in practice,[7] but the common law did not rank them as legal estates. Nothing was an "estate" at common law which could not be protected by the common law itself.[8] It is said by Challis that terms

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 R. S. 722, § 5.

[3] Mr. Josiah W. Smith says that in England "*freehold*" *simpliciter* has come to denote an estate for life in opposition to an estate of inheritance. Real & Per. Prop. 133.

[4] See next paragraph.

[5] 1 R. S. 722, § 5.

[6] *Cf.* Putnam v. Westcott, 19 Johns. 73, 76.

[7] The records of the monasteries show long leases at a very early day.

[8] Challis, 46, 47, Spelman Gloss. *voce* "Catalla." *Catalla dicuntur omnia bona mobilia, et immobilia, quæ nec feuda sunt nec libera tenementa.* This is equivalent to stating that only a fee or feud of inheritance and a life tenement were estates. And see under § 20, *supra*, pp. 86, 87.

of years became legal estates only by virtue of the statute 21 Henry VIII, chapter 15, which enabled the termors to falsify recoveries obtained on feigned titles. Step by step terms of years were raised to the dignity of legal estates.[1] Littleton, while fully recognizing tenancies and the quantity of interest each kind of tenancy denoted, nowhere calls "terms of years" estates.[2] The *status* of terms of years as legal estates, therefore, was no doubt later than Littleton's time, as Challis so well points out. But this *status* was settled before the law of England was applied to New York, and the revisers of the statutes simply adopted an existing description of the quantity of interest a termor might have, treating the interests, in conformity to pre-existing law, as legal estates.[3] *Estates for years*, being chattels real,[4] did not, however, at common law go to heirs but to executors as personal property.[5] The Revised Statutes modified the common law in respect of estates for years, for although they are still chattels real and go to executors,[6] a judgment binds and is a charge on them as assets for distribution.[7]

Chattels Real. While chattels real are personal property they are not within the purview of the chattel mortgage statutes, requiring filing and refiling to preserve the lien against creditors.[8]

Execution against Estate for Years. An estate for years might, under the Revised Statutes, be sold on execution (2 R. S. 182, 359; 1 id. 722, § 5), and the same provision now applies to unexpired terms of five years.[9] The owner of such an estate may redeem a prior incumbrance.[10]

[1] Averill v. Taylor, 8 N. Y. at pp. 51, 52.

[2] *Cf.* § 68.

[3] *Cf.* Averill v. Taylor, 8 N. Y. at p. 52; Pugsley v. Aikin, 11 id. 494, 498; Burr v. Stenton, 43 id. 462, 465.

[4] Putnam v. Westcott, 19 Johns. 73, 76; *et* § 39, The Real Prop. Law.

[5] 2 Black. Comm. 143.

[6] § 2712, Code Civ. Proc.; 2 R. S. 82, § 6; Pugsley v. Aikin, 11 N. Y. 494, 498; Despard v. Churchill, 53 id. 192, 199.

[7] Bennett v. Crain, 41 Hun, 183; Despard v. Churchill, 53 N. Y. 192, 199; People ex rel. v. McAdam, 84 id. 287, 295.

[8] Chap. 279, Laws of 1833; chap. 677, Laws of 1892; Booth v. Kehoe, 71 N. Y. 341; State Trust Co. v. Casino Co., 19 App. Div. 344.

[9] Code Civ. Proc. §§ 1430; O'Rourke v. The Henry Prouse Cooper Co., 11 Civ. Proc. 321; Brewster v. Striker, 1 E. D. Smith, 321; Broman v. Young, 35 Hun, 173, 180.

[10] Burr v. Stenton, 43 N. Y. 462, 465.

§ 24. **When estate for life of third person is freehold, when chattel real.**—An estate for 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; after his death it shall be deemed a chattel real.

Formerly 1 Revised Statutes, 722, section 6:

§ 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.[1]

Estates for the Life of Third Persons. An estate *pur autre vie* being declared to be a freehold only during the life of the grantee or devisee, was, on the grantee's death, made to pass to his executors during the remainder of the life of *cestui que vie*.[2] Thus, the old right of any stranger to take possession by special occupancy of such lands after the grantee's death,[3] where the lands were not limited also to the grantee's heirs or executors, was taken away.[4] In this State estates *pur autre vie* had long been devisable,[5] passing under a general devise of lands and tenements.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 R. S. 722, § 6; see Revisers' note, and Lalor, Law of Real Prop. New York, 62.

[3] Crooked Lake Nav. Co. v. Kenka Nav. Co., 37 Hun, 9, 13; 2 R. S. 82, § 6; *cf.* Co. Litt. 41b; Gillis v. Brown, 5 Cow. 388; Smith, Real & Pers. Prop. 380.

[4] Cruise, tit. 3, chap. 1, §§ 43–48.

[5] 1 K. & R. 178, § 4; *cf.* Mr. Hargrave's note 241, Co. Litt. 41b, as to English statutes to same effect, 29 Car. 2, chap. 3.

[6] Wright v. Trustees Meth. Church, Hoffm. Ch. 201, 225.

§ 25. **Estates in possession and expectancy.**— Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy. An estate which entitles the owner to immediate possession of the property, is an estate in possession. An estate, in which the right of possession is postponed to a future time, is an estate in expectancy.

Formerly 1 Revised Statutes, 722, section 7, and 1 Revised Statutes, 723, section 8:

§ 7. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.[1]

§ 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.[2]

Comment on Section 25. The foregoing section of the Revised Statutes adopted Blackstone's classification, and divided estates into estates in possession and estates in expectancy.[3] In a note the original revisers indeed refer to Cruise's Digest for the definition of estates in expectancy.[4] It is, therefore, obvious that there was no intention on the part of the revisers to depart very widely from the pre-existing or common-law notions touching the quantity and the quality of estates in lands. They expressly state in their notes that their real object was to simplify the learning connected with estates in expectancy. This motive is, however, independent of classifications. But as classifications of estates had become very minute in the writings of modern lawyers, the revisers adopted the more general scheme.

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] 2 Black. Comm. 163.
[4] Cruise Dig. tit. 16, chap. 1, § 1; Revisers' notes to 1 R. S. 723, § 8, Appendix II, *infra*.

§ 26. **Enumeration of estates in expectancy.**— All expectant estates, except such as are enumerated and defined in this article, have been abolished. Estates in expectancy are divided into,

1. Future estates; and
2. Reversions.

Formerly 1 Revised Statutes, 726, section 42, and 1 Revised Statutes, 723, section 9:

§ 42. All expectant estates, except such as are enumerated and defined in this Article, are abolished.[1]

§ 9. Estates in expectancy, are divided into,

1. Estates commencing at a future day, denominated future estates: and
2. Reversions.[2]

Estates Tail. The abolition of all expectant estates, except such as are saved by enumeration and definition in this article, requires us to consider, 1. Estates tail, 2. Uses. (1) *Estates tail.* A fee tail is by this act converted into a fee simple in the first taker; but it cannot be abolished, for unless the fee tail is still allowed to be created, its conversion into a fee simple could not take place.[3]

Uses. 2. *Uses.* By the Statute of Uses[4] (27 Hen. VIII, chap. 10) re-enacted in New York in 1787 (2 J. & V. 68; 1 R. L. 72), uses became legal estates whenever the statute operated. The quantity of such estates depended on the limitation of the use; but, like estates created by common-law assurances, executed uses could be divided in respect of their quantity only into estates for years, for life, in fee, or in tail.[5] So the quality of the use controlled the estate created by the statute.[6] The Revised Statutes declared all uses not expressly saved in the act abolished,[7] yet the important sections of the Statute of Uses (27 Hen. VIII, chap. 10) were re-enacted.[8] Uses, therefore, cannot be said to be wholly abolished,[9] but if not saved as trusts, they are still converted by the statute into legal estates of the quantity enumerated in section 20 of the present act.

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] *Vide supra*, p. 115, under § 22.

[4] It was in force in New York after 1664.

[5] The quantity of an estate relates to its continuance in point of time.

[6] The quality denotes the nature, incidents and collateral qualifications of an interest such as a condition, a collateral limitation, a joint tenancy. 1 Prest. Est. 7, 21; 2 Whart. Conv. 92; Cruise, Dig. tit. 1, §§ 11, 14.

[7] 1 R. S. 727, § 45; The Real Prop. Law, § 71, *infra*.

[8] 1 R. S. 726, §§ 47, 49; The Real Prop. Law, §§ 72, 73.

[9] § 70, *infra*; Eysamen v. Eysamen, 24 Hun, 430; Townsend v. Frommer, 125 N. Y. at p. 457.

Uses Classified. Treated as legal estates, uses were formerly classified, not with reference to the quantity of the estate, but with regard to the character of the limitation contained in the instrument creating the use. Sugden classified uses as "shifting," "springing" and "future;" the last class denoting those uses which took effect as remainders.[1] The section of this act now under consideration takes no note of future, shifting or springing uses as estates, but classifies them all as "future estates," and intends that all prospective estates shall be so designated whether created mediately and only by virtue of our Statute of Uses or by immediate conveyances.

Executory Devises. Estates created by will which cannot consistently, with the rules of the common law, take effect as remainders, were sometimes styled "executory devises,"[3] but more accurately "executory interests."[4] This section of The Real Property Law includes all *quondam* executory devises in "future estates." There is now no such thing as an executory devise.[5]

[1] Sugden's note to Gilbert on Uses & Trusts, 152, 153 (English ed. of 1811).

[2] § 71, The Real Prop. Law; 1 R. S. 727, § 46.

[3] 2 Powell, Devises, 237, and cases there cited.

[4] Challis, 57.

[5] Tilden v. Green, 130 N. Y. at p. 47; *cf.* Booth v. Baptist Church, 126 id. at p. 237. See next section (27), *infra*.

§ 27. **Definition of future estates.**—A future estate, is an estate limited to commence in possession at 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.

Formerly 1 Revised Statutes, 723, section 10:

§ 10. A future estate, is an estate limited to commence in possession at 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.[1]

Comment on Section 27. The defining sections of this act (26, *supra*, and 28, *infra*) are to be read in conjunction. The revisers expressly state in their notes that the object of the above definition was to comprehend every species of expectant estate created by the act of the party, remainders, strictly so called, future uses and executory devises. Strictly, "future uses" were those uses which took effect as remainders after a precedent use or estate limited by the same instrument.[2] But the revisers undoubtedly meant by "future uses" all uses not executed in possession by the Statute of Uses. Thus all former remainders, executed uses and executory devises are future estates.[3] Still, in deference to the older law, the term "executory devise" to denote a future estate is employed at times.[4]

[1] Repealed, chap. 547, Laws of 1896.

[2] Sugden's note (pp. 152, 153) to Gilbert on Uses & Trusts (ed. of 1811), *supra*, pp. 34, 122.

[3] Revisers' note to 1 R. S. 723, § 10; Tilden v. Green, 130 N. Y. at p. 47.

[4] Leonard v. Burr, 18 N. Y. at p. 107; Booth v. Baptist Church, 126 id. at p. 237.

§ 28. **Definition, remainder.**—Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

Formerly 1 Revised Statutes, 723, section 11:

§ 11. Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.[1]

Comment on Section 28. The language of the new section is the same as the Revised Statutes, no change whatever being made. The original revisers of the statutes added no particular note to or comment on section 11. We must, therefore, consider: (1) What was a remainder at common law. (2) The changes made by the Revised Statutes in the law touching remainders.

Remainders at Common Law. A remainder at common law is generally referred by more modern commentators to Lord Coke's definition: "The 'remainder' is a residue of an estate in land, depending upon a particular estate, and created together with the same, and in law *Latine* it is called *remanere*."[2] At common law there could be no remainder without a particular estate created at the same time.[3] In other words, a fee simple was sometimes divided by a conveyance into a "particular estate" (which might be for years,[4] for life,[5] or a fee tail[6]), and the remainder of the fee simple. A "remainder" was originally created by what is called a "legal limitation," that is by some limitation originally allowed by the common law before the Statutes of Uses and Wills. It was the only limitation of an estate to commence *in futuro*, permissible by common law at the time when livery of seisin was essential to a perfect conveyance. Subsequently to the Statute of Uses a remainder might be created by a conveyance to uses, thus taking effect under the Statute of Uses; but even then, in deference to the older law, the limitation was subject to all the rules touching the older law of remainders, and the "use-remainder" was defeated unless it vested at the time, or before, the particular or precedent estate, or use, ceased or determined.

Remainders After the Statute of Uses. After the several Statutes of Uses and Wills, remainders ceased to be the only limita-

[1] Repealed, chap. 547, Laws of 1896.

[2] Co. Litt. 49a; 2 Black. Comm. 164; 4 Kent Comm. 197; and Tomlin's note to his "Lyttleton," p. 248.

[3] Co. Litt. 49a.

[4] Id. *supra*.

[5] 2 Black. Comm. 164.

[6] 10 Rep. 97b. Fees tail were converted into fees simple in New York. Chap. 2, Laws of 1782; chap. 12, Laws of 1786; 1 J. & V. 245.

tions whereby estates *in futuro* could be created. Such estates could be effected also by wills, or "executory devises," or by conveyances to uses, whereby, through the Statute of Uses, a future estate sprang into being or shifted from one tenant to another.[1] Such estates as were thus effected were called "springing" or "shifting" uses; or, if created by way of devise, without the means of the Statute of Uses, "executory interests." But two of these new classes of future estates could be said to be dependent on a precedent estate, viz., a "shifting use," and an "executory interest," which displaced an estate created by the same devise, sometimes called "a shifting devise." Neither a springing use nor a springing devise (which were simply estates to take effect *in futuro*, without displacing any other estates, created at the same time) could be said to be dependent on precedent estates. A remainder might also be limited by way of a will after the Statute of Wills.

Remainders under the Revised Statutes. With this explanation of the state of the law when the Revised Statutes went into effect, it is very obvious that at the present time, under the above sections of the statutes of this State, a "remainder" includes all those estates which now take effect in possession subsequently to some other estate, created at the same time, and upon whose cessation such remainders depend for their enjoyment in possession. If "future estates" are wholly independent of a precedent estate they do not fall under this section. A statutory "remainder," therefore, now embraces only such estates as were (1) remainders by the common law; (2) all former shifting uses and (3) all those executory interests which were called "shifting devises." A statutory remainder, as defined above, cannot embrace such former estates as were effected by springing uses or springing devises, for they were not dependent on precedent estates. Consequently it follows that such springing estates as those mentioned are not now transferable under this section (28) of The Real Property Law. In this aspect a resulting estate is not a precedent estate to support a statutory "remainder." The distinction is important, because, if it is accurate, a "shifting devise" or a shifting use will not now pass under a limitation of a "remainder," although they are both "future estates."[2] That the term "remainder" under the statute is much wider than at common law is not now to be doubted;[3] and

[1] *Supra*, pp. 34, 35, 122.

[2] *Cf.* Pond v. Bergh, 10 Paige, at p. 156.

[3] Hawley v. James, 5 Paige, 318, at p. 466; Pond v. Bergh, 10 id. 140, 156; Beardsley v. Hotchkiss, 96 N. Y. at p. 213.

it is to be observed that Chancellor Kent states that the statutory "remainder" includes all springing uses as well as shifting uses.[1] But if he is accurate in this, the term "remainder" is thus made coextensive with the contrasted term "future estate," and becomes destructive of the statement of the statute, that a statutory remainder *must be dependent on a precedent estate*, for a shifting use is not dependent on a precedent estate, and never was. That the courts now understand that a "remainder" must still be dependent on a precedent estate is obvious from several cases.[2] In Schettler v. Smith it was held that where the limitation of a particular estate fails the remainder also falls.[3] So an estate at will has been held to be an estate of too frail a nature to uphold an estate in remainder.[4] If these decisions have any meaning they must depend on the distinction just pointed out.

Remainders under this Section. At common law the term "remainder" about the time of the enactment of the Revised Statutes, began to have a wider meaning than formerly, and was sometimes used to denote any subsequent interest in lands.[5] But the term never was employed to denote an estate which was to spring into being *in futuro* without any preceding estate to support it. In such cases the *ad interim* estate was not created,[6] but resulted, or, in other words, may be said to have depended on the executory or future estate.[7] It seems clear from the residue of the article of the Revised Statutes on Estates that the revisers intended to embrace in the term "remainder," (1) Estates which regularly succeeded the expiration of some precedent estate created at the same time,[8] and (2) estates which took effect in derogation of some precedent estate created at the same time,[9] and that they intended former springing estates to be classed as "future estates" and not as "remainders."

What Estates Remainders Include. The term "remainder," as employed in the above section, embraces both "contingent" estates and "vested" estates, if in some way dependent upon precedent

[1] 4 Comm. 272.

[2] Dana v. Murray, 122 N. Y. 604, 616, 617; Harty v. Doyle, 49 Hun, 410, 413.

[3] 41 N. Y. 328, 347; *sed vide sub* § 32, *infra*, on this point.

[4] Bigelow v. Finch, 11 Barb. 498; S. C., 17 id. 394; Post v. Post, 14 id. 257.

[5] Smith, Compend. Law Real & Pers. Prop. 231.

[6] Fearne, Conting. Rem. 301, note, 505.

[7] 2 Black. Comm. 173; Cruise, Dig. tit. 28, chap. 18, § 1; Cornish, Uses, 68 *et seq.*

[8] 1 R. S. 724, § 11; The Real Prop. Law, art. II, § 28.

[9] 1 R. S. 726, § 27; The Real Prop. Law, art. II, § 43.

estates created at the same time.[1] By statute such estates by way of remainder are made descendible, devisable and alienable,[2] whether vested or contingent.[3] As this section of the statute provides that certain estates pass under the name of "remainders," it is important for the practitioner to determine whether a *quondam* "springing use," or a "springing devise," would so pass, and the foregoing observations are offered with this view.

Nature of Estate to Support a "Remainder." The nature of this precedent estate to support a remainder is not now confined as at common law to an estate for years, for life, or in tail.[4] A remainder may now depend on or be in derogation of an estate in fee, which can support a statutory remainder.[5] The precedent estate, it is said, may be one to trustees and the remainder to *cestui que trust*,[6] although strictly such a limitation is not of a remainder but of a fee upon a base fee, permissible under the fortieth section of this act.[7] An estate at will has been held of too frail a nature to support a remainder.[8]

Cross-Remainders Limited after Estates not for Life. How far cross remainders, limited after precedent estates which are not estates for life, are permitted, will be considered under a subsequent section.[9]

Cross-Remainders Limited on Estates for Life to Tenants in Common. The Revised Statutes essentially altered the common law touching cross-remainders limited after life estates to tenants in common. By the old law, an estate devised to my sons A., B., C., D. and E. and their heirs, and if all, or any of them, die without issue male, then devise over to another, created estates tail with cross-remainders.[10] Here estates tail were implied, because remainder after an indefinite failure of issue was void,[11] while a remainder after the Statute *De Donis* might be well limited after an estate tail.[12] If at common law remainders in fee were limited after any number of successive life estates to persons in being, the remainder was well limited, for there could be no objection to any number of succes-

[1] Dodge v. Stevens, 105 N. Y. at p. 588.

[2] § 49, *infra*, formerly 1 R. S. 725, § 35.

[3] Goebel v. Wolf, 113 N. Y. 405; *et infra*, § 30.

[4] *Supra*, p. 124.

[5] 1 R. S. 724, § 24; 1 R. S. 725, § 27. The Real Prop. Law, art. II, § 40; Id. § 43.

[6] Cass v. Cass, 15 App. Div. 235.

[7] *Vide infra* under §§ 76, 80, The Real Prop. Law.

[8] Bigelow v. Finch, 11 Barb. 498; S. C., 17 id. 374; Post v. Post, 14 id. 257.

[9] *Infra*, The Real Prop. Law, § 33.

[10] See the authorities cited, Cruise, Dig. tit. 28, chap. 15, §§ 30–33; Lott v. Wykoff, 2 N. Y. 355.

[11] See the authorities cited, *infra*, under § 38, The Real Prop. Law.

[12] Challis, 146, 241; *et vide infra*, under § 32, The Real Prop. Law.

sive vested life estates.[1] The remainder might be to a person not in being.[2] The Revised Statutes, while permitting a remainder in fee to a person not in being,[3] has provided that successive life estates shall be limited only to persons in being, and avoids those beyond two,[4] so that cross-remainders beyond two life estates are now impracticable,[5] estates tail being converted into fees simple.[6]

Cross-Remainders. Cross-remainders are another qualification of expectant estates. These remainders now usually follow particular estates limited to tenants in common. But a limitation may be of one lot to A. and another to B., and if either die without issue the survivor to take. Here A. and B. are not tenants in common but have cross-remainders. Between two persons cross remainders present no difficulty under the existing law.[7] When a similar limitation is made to more than two persons the result is more complex, for as each stock fails its share is directed to be equally divided among the other stocks.[8] It will be remembered that in so far as cross remainders are limited, after life estates, solely to persons *in esse* as tenants in common, they constitute no violation of the rule against perpetuity. The remainders are vested and any number of vested remainders do not offend against that rule.[9] But quite apart from the rule against perpetuities cross remainders can, under the present law relating to estates, be limited only after life estates to persons in being at the date of the settlement, and when a cross-remainder is limited on more than two successive estates for life, all such other life estates are void and the remainder in fee vests in possession after the determination of the first two life estates.[10]

Invalid Limitations of Cross-Remainders. Thus cross-remainders limited after life estates to more than two persons in being, offend the section regarding limitation of estates,[11] and consequently accelerate the remainder in fee.[12] Of course, where the remainder in fee is to persons not *in esse* it is contingent, and if limited after estates for more than two lives in being, it is void as an unlawful perpetuity.[13]

[1] *Vide infra* authorities cited under § 33, The Real Prop. Law.

[2] Cruise, Dig. tit. 32, chap. 24, §§ 32, 34.

[3] Manice v. Manice, 43 N. Y. at p. 374.

[4] 1 R. S. 723, § 17; The Real Prop. Law, § 33.

[5] Purdy v. Hayt, 92 N. Y. 446, 455; *cf.* Chapl. Susp. Alien. §§ 348, 366.

[6] *Vide supra*, § 22, The Real Prop. Law.

[7] Purdy v. Hayt, 92 N. Y. at p. 454.

[8] 1 Prest. Est. 94 *seq.*

[9] *Vide* under § 32, *infra*, and Purdy v. Hayt, 92 N. Y. at p. 451.

[10] The Real Prop. Law, § 33, *infra*.

[11] The Real Prop. Law, § 33, *infra*.

[12] Purdy v. Hayt, 92 N. Y. 446, 455; Chapl. Susp. Alien. § 348.

[13] § 32, *infra*.

§ 29. **Definition, reversion.**— A reversion is 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.

Formerly 1 Revised Statutes, 723, section 12:

§ 12. A reversion is 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.[1]

Comment on Section 29. The definition of the statute conforms to the definition of a reversion by the common law. The term "reversion" is one of those which has undergone no change since the days of tenure.[2] The term "reversion" under the Revised Statutes never included "a possibility of reverter."[3] With this definition of reversion the revisers finished their list of technical terms connected with legal estates. It will be observed that, originally, all these definitions are confined to those terms which relate to the *quantum* of legal estates in lands, and that now, as formerly, "reversion" signifies the part of an estate, or the part of a fee simple retained, or that which is left in a grantor or in his heirs by operation of law, while the term "future estate" denotes the interest or estate created or limited by an act or acts of parties to some instrument of conveyance. Yet a reversion may be a future estate, viewed from the point of view of possession.[4] Some modern writers have classed both "reversions" and "remainders" among incorporeal hereditaments,[5] because they were conveyed by grant and not by livery, as were freehold estates in possession. But this classification is criticised,[6] and it is said with some accuracy that the true test of corporeal hereditaments was not that they lay in livery. The basis of the classification is, however, very inconsequential now that all future interests in lands are, by statute to be conveyed by deed, livery of seisin being abolished.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] Co. Litt. 142b; 1 Prest. Est. 123.

[3] Nicoll v. The N. Y. & Erie Ry. Co. 12 N. Y. at p. 133.

[4] *Cf.* Griffin v. Shepard, 124 N. Y. at p. 75.

[5] 1 Washb. Real Prop. 11; Williams, Real Prop. 241.

[6] Bingham, Descents, 7; Challis, 41 60, 61.

[7] 1 R. S. 738, § 136: The Real Prop. Law, art. VII, § 206.

§ 30. **When future estates are vested; when contingent.**—A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

Formerly 1 Revised Statutes, 723, section 13:

§ 13. Future estates are either vested or contingent. They are vested, 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. They are contingent, whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain.[1]

Object of this Section. The revisers' object in defining "vested" and "contingent" must have had reference to the subsequent section relating to the unlawful suspension of the power of alienation. At common law, a vested estate or interest imports a present interest or seisin, and these in turn conclusively imply the right and power to convey and alienate the interest or estate.[2] Contingent interests and estates were not assignable by the common law;[3] but they might be passed by fine, operating by way of estoppel, so as to bind the interest which should afterward accrue.[4] The revisers do not, however, rely on that distinction, but point out "that an estate is inalienable when there are no persons in being, by whom an absolute fee in possession can be conveyed.[5] A limitation to a person not in being was, however, always contingent.[6]

Vested and Contingent before the Revised Statutes. At common law, as Blackstone said, "vested remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder which nothing can defeat or set aside."[7] "Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect,

[1] Repealed, chap. 547, Laws of 1896.

[2] Lawrence v. Bayard, 7 Paige, 75, 76; Vanderpoel v. Loew, 112 N. Y. 167, 186; Sir Edward Sugden in Cole v. Sewell, 4 Dr. & W. at p. 28; S. C., 2 H. L. Cas. 230, 231.

[3] Cruise, Dig. tit. 16, chap. 8, § 22.

[4] Cruise, Dig. tit. 16, chap. 8, § 20.

[5] 1 R. S. 723, § 15.

[6] See below, under § 32.

[7] 2 Comm. 168.

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."[1]

Early Common Law. By the very early common law the precise distinctions between estates vested and estates contingent could hardly have existed. Before the Statutes of Uses and Wills, remainders were the only estates which took effect *in futuro*. Even remainders were at first rarely limited on contingencies, as it was thought that a remainder must always vest immediately, or otherwise it might be void.[2] Mr. Joshua Williams states that the first instance of a contingent limitation of a remainder, which he found, occurs during the reign of Henry VI (A. D. 1422–1461).[3] Subsequently, contingent remainders became favorite limitations and ultimately were scientifically classified by Mr. Fearne and other writers on the law of the last century.

When the Distinction between "Vested" and "Contingent" became Important. The distinction between estates vested and estates contingent became most important in the law of England only after the rise of executory limitations by way of future uses and devises. It then had particular reference to the rule against perpetuities, as contingent or executory interests were not originally alienable, and could not be barred like remainders, and, therefore, suspended the power of alienation to some extent. Prior to the Revised Statutes, the recognized distinctions between "vested" and "contingent" served here precisely the same purpose as in England, as the law of real property of England was in this particular the law of New York. Had executory interests raised by way of use or devise been held destructible in the same way as contingent remainders, the old rule against perpetuity must have been in some other form, and the distinction between contingent estates and vested estates been of less consequence.[4]

The Revised Statutes. This section, inserted originally in the article on Estates in the Revised Statutes, has led to the inquiry whether the revisers intended thereby to preserve the distinction known to the earlier law, or to raise up a new one, in harmony with the revision. Several writers on the text of the Revised Statutes have been of the opinion that the language employed was

[1] 2 Comm. 169.

[2] *Supra*, p. 21; Williams, Real Prop. 263, 264.

[3] Williams, Real Prop. notes; *cf.* Digby, Hist. Real Prop. chap. 5, § 3.

[4] Lewis, Perpetuity, 128, 132, 134.

only declaratory of pre-existing distinctions,[1] which can only mean that estates vested, or contingent, before the Revised Statutes remained estates vested or contingent after the statutes. The statement thus paraphrased is too broad, and its truth was denied in the case of Moore v. Littel,[2] where a remainder contingent by the common law was adjudged a vested remainder under the Revised Statutes. This decision has been, however, questioned by several text writers,[3] but as we shall attempt to show without good reason, as it appears to many. The term "remainder" in the Revised Statutes is equivalant to the words "estate by way of remainder."[4] A remainder is now a "future estate," or an "estate in expectancy,"[5] although not all expectant estates are remainders.[6]

Classification of Estates. The distinction between estates vested and estates contingent is both a logical and a legal distinction. Mr. Fearne, who has written most profoundly on the legal distinction as it existed in his day, subdivides estates vested into (1) vested in possession or (2) vested in interest,[7] and contrasts both with estates contingent. Mr. Preston thought this classification not sufficiently refined or comprehensive, and adds to it "estates executed" and "estates executory."[8] It is, however, to be observed that Fearne, Blackstone and Kent apply the distinction between vested and contingent mainly to the species of estates called "remainders" at common law,[9] but that Mr. Preston's more minute distinctions will apply also to estates raised by executory limitations, and not solely by legal limitations. As executory limitations, uses and devises permitted estates to arise on a greater variety of contingencies than those permitted by the common law, Mr. Preston's classification is the more comprehensive. But, under the simpler forms employed in this State, it was thought by the revisers of 1828–1830 that the statutory classification of estates into "vested" and "contingent" was sufficiently comprehensive. Mr. Challis, however, points out that executory interests are sometimes likely to be confused with contingent

[1] Lalor, Law Real Prop. 66; Chapl. Susp. Alien. §§ 49–52; note of Austin Abbott in N. Y. Annual Dig. for 1892, 363; Minot v. Minot, 17 App. Div. 521, 525.

[2] 41 N. Y. 66.

[3] 2 Washb. Real Prop. (4th ed.) 229; Chapl. Susp. Alien. §§ 28–53.

[4] 1 R. S. 723, § 10; The Real Prop. Law, § 27.

[5] 1 R. S. 723, §§ 9, 11; The Real Prop. Law, §§ 26, 28; Sheridan v. House, 4 Abb. Ct. App. Dec. 218, 226; Dodge v. Stevens, 105 N. Y. 585.

[6] *Supra*, pp. 123, 125, 126.

[7] Fearne, Conting. Rem. 1.

[8] 1 Prest. Est. 61, 65.

[9] 2 Black. Comm. 169; 4 Kent Comm. 202.

remainders, and it is no doubt the case that there are certain contingent interests and possibilities which are not embraced in the term "*estates.*"[1] As this section of The Real Property Law refers to *estates* only,[2] it can have no reference to interests which are not estates.

Fearne's Classification. Having reference to the distinction already pointed out between common-law remainders and statutory remainders,[3] let us consider in detail, but briefly, Mr. Fearne's celebrated classification, as it is still frequently referred to in the courts of New York, without always noticing certain distinctions which make it wholly or partially irrelevant at times to the existing law. At common law, one of the main uncertainties about estates limited by way of remainder was their liability to be defeated by the destruction or cessation of the particular estate supporting them before the time designated for the vesting of the remainder. If this happened, the contingent remainder could, by the common law, never take effect.[4] Now, this uncertainty entered largely into Mr. Fearne's classification; but the Revised Statutes wholly altered this rule of the common law.[5] Having regard to the contingency of the duration of the particular estate, Mr. Fearne divided all contingent remainders at common law into four classes, which will, in view of the frequent reference still made to them by modern lawyers, be noticed, after the various other systems or principles of classification have been first mentioned.

Preston's Classification. Mr. Preston made only three classes of contingent interests at common law: (I) Those limited to persons not *in esse;* (II) those limited to survivors of a class; (III) those limited on an event which might not happen during the continuance of the particular estate.[6]

Willes' Classification. Lord Chief Justice Willes stated that there were but two classes of remainders which did not vest: (I) Those limited to persons not *in esse* at the time the limitation took its first legal existence as an instrument *de facto;* (II) where the commencement of the remainder depended on some matter collateral to the determination of the particular estate.[7] The first class, it should be observed, must always be contingent under any

[1] *Vide infra*, under § 49, The Real Prop. Law.

[2] § 30, *supra.*

[3] *Supra*, § 28, p. 125.

[4] *Supra*, p. 23.

[5] 1 R. S. 725, §§ 32, 34; §§ 47, 48, chap. 46 (Gen. Laws), The Real Prop. Law.

[6] 1 Estates, 77.

[7] Smith d. Dormer v. Parkhurst, 3 Atk. 135; Willes, 337; Cruise, Dig. tit. 16, chap. 1, § 43; 2 Black. Comm. 169.

system; the second class have in New York now been subjected to statutory changes by the abrogation of the main legal rule which cut off a remainder, if it did not connect continuously with the seisin of the precedent estate.[1] They have, therefore, ceased to be classed as contingent.[2]

Blackstone's Classification. Mr. Fearne's classification of remainders is sometimes thought too refined,[3] and Blackstone's division preferred. Blackstone divides remainders into (1) Such as were limited to take effect to a dubious and uncertain person; or (2) upon a dubious and uncertain event.[4] But of all writers on this subject Mr. Fearne remains the leading authority on the old law as it stood in this State before the Revised Statutes. With this digression we may, therefore, turn our attention again to Mr. Fearne's classification.

Fearne's Classification, Classes 1 and 3. It will be readily observed that Mr. Fearne's first class of contingent remainders,[5]—(1) "where the remainder depends entirely on a contingent determination of the preceding estate itself," and also his third class, (3) "where the condition, upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it,"[6]—are mainly founded on contingencies which the Revised Statutes ceases to take cognizance of. The determination of a precedent estate before the remainder vests, is, by the Revised Statutes, no longer destructive of the remainder in our system; the old rule was a survival of the early feudal law of England,[7] and was utterly destroyed by the reforms first instituted by the Revised Statutes.[8] The only connection which Mr. Fearne's first class of contingent remainders can have with existing law, since the Revised Statutes, relates to the possibility that the event on which the remainder is limited may never take effect,[9] and not that such event may not take effect until the particular estate has determined.[10] In regard to these two classes of remainders, the reader of the present day will notice that Mr. Preston, before the reform of the law of real property, stated that

[1] § 47, *infra*.
[2] Moore v. Littel, 41 N. Y. 66.
[3] Will. Real Est. & Conv. 163.
[4] 2 Black. Comm. 168.
[5] Fearne, Conting. Rem. 5; Wolfe v. Van Nostrand, 2 N. Y. 436.
[6] Fearne, Conting. Rem. 5.
[7] *Supra*, pp. 22, 23.
[8] §§ 47, 48, The Real Prop. Law, being 1 R. S. 725, §§ 32, 34. Revisers' notes to these sections.
[9] Butler v. Butler, 3 Barb. Ch. 304, 308.
[10] 1 R. S. 725, § 34; §§ 47, 48, The Real Prop. Law.

they were not contingent in themselves, and that they were only contingent with reference to the existing law on remainders.[1] As the premature determination of a particular estate since the Revised Statutes produces no legal result upon a remainder limited upon it,[2] the logical consequence of this statutory reform is to turn a large number of former contingent remainders into vested remainders.[3]

Limitation in the Event that a Person Die before Majority. A remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, is called by the revisers "a contingent remainder,"[4] and if such it falls, probably, within Mr. Fearne's first class of contingent remainders; but this is certainly not a contingent remainder which now suspends the power of alienation unlawfully, for it is expressly tolerated by the Revised Statutes.[5]

Mr. Fearne's First and Third Classes of Contingent Remainders. It is quite clear that those contingent remainders which were contingent at common law, because the particular estate might determine before the contingency on which the remainder was to vest, are not such since the Revised Statutes.[6] If the first and third of Mr. Fearne's classes of remainders are thus become wholly irrelevant to present conditions of our law, the integrity of Mr. Fearne's classification, as a whole, is, for present purposes, certainly much impaired.

Fearne's Second and Fourth Classes. But, as Mr. Fearne's classification[7] is still so frequently referred to, let us briefly examine his remaining classes, the second and fourth: "(2) Where the contingency, on which the remainder is to take effect, is independent of the determination of the preceding estate," which involves, as he explains, a case "where some uncertain event, unconnected with, and collateral to, the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder. As if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life; here the event of B.'s dying before 'A.' does not in the least affect the determination of the particular estate, nevertheless it must precede and give

[1] 1 Prest. Abst. 107.

[2] *Cf.* Schettler v. Smith, 41 N. Y. at p. 347; Butler v. Butler, 3 Barb. Ch. at p. 308.

[3] Moore v. Littel, 41 N. Y. 66.

[4] § 32, The Real Prop. Law.

[5] § 32, The Real Prop. Law.

[6] 1 R. S. 725, § 34; The Real Prop. Law, § 48.

[7] The inquirer may find Coleman's Epitome of Fearne a useful abridgement. See, also, Challis, 98, *seq.*

effect to C.'s remainder; but such event is dubious, it may or may not happen, and the remainder depending on it is, therefore, contingent."

Limitations to the Survivors. It is evident that limitations to the survivor or survivors of two or more persons in being, when such survivorship is not to be determined until the expiration of a precedent estate, created at the same time, fall under Mr. Fearne's second class of contingent remainders, even since the Revised Statutes.[1] Several rules of construction should be here noticed in this connection: (I) It is a rule of testamentary construction in regard to devises that the time to determine survivorship must be very clearly fixed at the expiration of the precedent estate, or it will be presumed to be referred to the time of the testator's death, as the ordinary presumption is that the testator, by survivorship, refers to the period of enjoyment in possession and not to the time of vesting.[2] (II) In limitations of a fee on a fee another rule of construction should be noticed: Where a devise is to "A" in fee, and in case of his death to another, the contingency referred to is the death of the first-named devisee during the lifetime of the testator; and if such devisee survive the testator, he takes an absolute fee.[3] But this rule applies only where the context of the will contains nothing to show a contrary intention.[4] (III) The general rules of construction it is also to be observed differ in respect of devises and bequests. In regard to the latter, the rule is that words of survivorship are referable to the period of division and enjoyment unless there is a special

[1] Carmichael v. Carmichael, 4 Keyes, 346; Kelso v. Lorillard, 85 N. Y. 177; Purdy v. Hayt, 92 id. 446, 454; Nellis v. Nellis, 99 id. 505; Townshend v. Frommer, 125 id. 446, 468, 470; U. S. Trust Co. v. Roche, 116 id. 120, 131; Moore v. Littel, 41 id. at p. 80; Goebel v. Wolf, 113 id. 405, 412; Matter of Allen, 151 id. 243; *cf.* Byrnes v. Stilwell, 103 id. 453, 459; Pickert v. Windecker, 73 Hun, 476; Lingsweiler v. Hart, 10 App. Div. 156; Tompkins v. Verplanck, Id. 572; McGillis v. McGillis, 11 id. 359; Geisse v. Bunce, 23 id. 289; Monson v. Paine, 22 Misc. Rep. 639; Paget v. Melcher, 26 App. Div. 12, 18; S. C., 156 N. Y. 399.

[2] Moore v. Lyons, 25 Wend. 119; Livingston v. Greene, 52 N. Y. 118; Embury v. Sheldon, 68 id. 227, 235; Stevenson v. Lesley, 70 id. 512; Matter of The N. Y., L. & W. R. Co., 105 id. 92; Nelson v. Russell, 135 id. 137, 140; Matter of Tienken, 131 id. 391; Washbon v. Cope, 144 id. 287; Stokes v. Weston, 142 id. 433, 436; Sage v. Wheeler, 3 App. Div. 38; Gwyer v. Gwyer, 5 id. 156; Chapman v. Moulton, 8 id. 64; *cf.* Goebel v. Wolf, 113 N. Y. 405, 412.

[3] Matter of N. Y., L. E. & W. R. Co., 105 N. Y. 92; Stokes v. Weston, 142 id. 433, 436.

[4] Chapman v. Hall, 8 App. Div. 64.

intent to the contrary.[1] (IV) Where futurity is annexed to the substance of a gift made by will the vesting is suspended; but if the gift is absolute and the time for payment only is postponed, the gift is vested.[2]

Mr. Fearne's Fourth Class. We come now to Mr. Fearne's last class of contingent remainders: "(4) Where the person to whom the remainder is limited is not yet ascertained or not yet in being," when the limitation is made; "as if a lease be made to one to life, remainder to the right heirs of J. S."[3] Here Mr. Fearne adds: "That, as there can be no such person as the right heir of J. S. until the death of J. S. (for *nemo est haeres viventis*), which may not happen till after the determination of the particular estate by the death of tenant for life, therefore such remainder is contingent."[4] Leaving the consideration of limitations to persons not *in esse* for the present, let us consider, first, whether limitations of remainders to the heirs of a living person as purchasers are still contingent since the Revised Statutes. At common law remainders so limited were, as Mr. Fearne states, contingent, not vested.[5] In Moore v. Littel,[6] under the Revised Statutes, a limitation of a remainder to heirs of a living person was, in so far as living heirs presumptive were concerned, held to create a vested remainder.

Moore v. Littel. Although Moore v. Littel has been questioned by the text writers;[7] it has been since cited with approval many times,[8] and it is the law of this State.[9] It is, however, claimed that

[1] Teed v. Morton, 60 id. 502; Vincent v. Newhouse, 83 id. 505; Carr v. Smith, 25 App. Div. 214; *cf.* Goebel v. Wolf, 113 N. Y. 405, 412; Matter of Seebeck, 140 id. 241, 246; Matter of Baer, 147 id. 348; Delafield v. Shipman, 18 Abb. N. C. 291, and note, p. 297; Shangle v. Hallock, 6 App. Div. 55; Matter of Embree, 9 id. 602; Clark v. Camman, 14 id. 127; Monson v. Paine, 22 Misc. Rep. 639; Geisse v. Bunce, 23 App. Div. 289.

[2] Smith v. Edwards, 88 N. Y. 103; Miller v. Gilbert, 144 id. 73; Matter of Baer, 147 id. 348; Matter of Embree, 9 App. Div. 602; Hersee v. Simpson, 20 id. 100; Weston v. Goodrich, 12 id. 250; Geisse v. Bunce, 23 id. 289; Paget v. Melcher, 26 id. 12, 18.

[3] Fearne, Conting. Rem. 5.

[4] Id. 9.

[5] Sheridan v. House, 4 Abb. Ct. App. Dec. 218, 224; Fearne, Conting. Rem. 9.

[6] 41 N. Y. 66; *et cf.* Du Bois v. Ray, 35 id. 162.

[7] *Supra*, p. 132.

[8] Byrnes v. Stilwell, 103 N. Y. 453; Surdam v. Cornell, 116 id. 305, 309; Losey v. Stanley, 147 id. 560, 567; Campbell v. Stokes, 142 id. 23, 30; Van Nostrand v. Marvin, 16 App. Div. 28, 34.

[9] Chinn v. Keith, 4 T. & C. 126.

Hennessy v. Patterson[1] distinguishes or limits Moore v. Littel,[2] but on what ground is not apparent, as we shall attempt to show below, in discussing the rules of vested remainders.

Moore v. Littel Rightly Decided. Moore v. Littel was rightly decided for the following reasons peculiar to the modern law of New York: In that case, one Samuel Jackson, an owner in fee simple, conveyed by deed in 1832 certain freehold premises to John Jackson "for and during his natural life, and, after his decease, to his heirs and their assigns forever," *habendum* in nearly the same words. John Jackson then had living children. The Revised Statutes had then abolished the rule in Shelley's case, and the heirs of John Jackson, as it was held, took as purchasers. The court held, in substance, that the living heirs presumptive of John Jackson, during his life, took vested remainders (under the section above), subject to open and let in his after-born children, and that the Revised Statutes had taken away the reasons which made such remainder contingent by the common law, making it now vested.[3] Under this section of the statute this decision seems inevitable. Even at common law the term "heirs" of a living person was sometimes *descriptio personæ*, so as to enable them to take as purchasers and to vest a remainder,[4] while a remainder to the *heir* of B. (a living person) was always vested; the heir presumptive took by purchase, as "heir" in the singular number was a word of purchase.[5] But even if the common-law rule was inflexible, that a remainder to the heirs of a living person was contingent, yet the rule was changed by the revisers of the Statutes of New York in 1830 (I), because of the abolition of the rule in Shelley's case, where an estate was limited to the ancestor with remainder to his heirs;[6] (II) because the rule no longer obtains that the cessation of the precedent estate before the vesting of a remainder destroys the latter.[7]

Moore v. Littel. Mr. Fearne attributes the former contingent character, of such a limitation to the heirs of a living person, to the fact that the *particular estate might cease* before the heirs of a

[1] 85 N. Y. 91.

[2] Chapl. Susp. Alien. § 49; Minot v. Minot, 17 App. Div. 521.

[3] *Cf.* Hawley v. James, 16 Wend. at p. 121.

[4] 1 Prest. Est. 349, 369, 370; Heard v. Horton, 1 Den. 163, and see note to Shelley's Case, Tudor, Lead. Cas. R. P. 615.

[5] Sug. Gilb. Uses, 40, 46.

[6] 1 R. S. 725, § 28; The Real Prop. Law, art. II, § 44.

[7] 1 R. S. 724, §§ 32, 34; The Real Prop. Law, art. II, §§ 47, 48.

living person were ascertained.[1] Under the Revised Statutes this cessation would be inconsequential, or, in other words, not a legal contingency; and even by the common law, if a remainder was so limited as to depend on the regular determination of the particular estate, irrespective of a contingency expressed in the limitatation, the remainder was vested.[2] In Moore v. Littel the remainder was to take effect on the death of John Jackson, a certain event, as there was no longer, under the Revised Statutes, any contingency about the regular expiration of the particular life estate of John Jackson, he could not bar it or defeat it. Therefore, even according to Fearne, the remainder to the living children of Jackson had become, under the Revised Statutes, vested, if "heirs of a living person" was ever *descriptio personæ*.[3] Again, another reason for the decision in Moore v. Littel: After the abolition of primogeniture in this State, "heirs" became the equivalent of "heir" at common law[4] by our Statute of Descents; and, for the same reason, denoted heirs presumptive, both male and female. The term thus became descriptive of the living persons, such as children, issue and the like, intended to take the estate or inheritance, and ceased to refer wholly to an indefinite succession of persons, even although the unborn issue might be let into the succession as we shall see below. It is, however, to be observed that the limitation to the heirs of a living person in Moore v. Littel was contained in a deed and not in a devise. In Campbell v. Rawdon[5] it had been intimated that a grant of an estate to the heirs of a living person was *descriptio personæ* in a devise, but not in a deed, but this distinction exists no longer in this State.[6]

Preston and the Revised Statutes. The revisers of the statutes in drawing section 13 (1 R. S. 723),[7] defining the terms "vested" and "contingent," had particular reference to Mr. Preston's writings.[8] He had said: "Every interest which is limited to commence, and is capable of commencing on the regular determination of the prior particular estate, at whatever time the particular

[1] *Supra*, p. 137.

[2] Fearne, Conting. Rem. 19, 215, 216, 217, 223.

[3] When "heirs" now *descriptio personæ: vide* Heath v. Hewitt, 127 N. Y. 166; Hillen v. Iselin, 144 id. at pp. 374, 375, and *cf.* Illman v. Davis, 95 id. 17; Montignani v. Blade, 145 id. 111.

[4] At common law remainder to the heir (singular) of B. was vested; *supra*, p. 138.

[5] 17 N. Y. 412, 416, 417.

[6] Heath v. Hewitt, 127 N. Y. 166; Browne v. Murdock, 12 Abb. N. C. 360; Matter of Embree, 9 App. Div. 602.

[7] *Supra*, p. 130.

[8] Before that time reprinted in New York and Philadelphia.

estate may determine, is in point of law a vested estate; and the universal criterion for distinguishing a contingent interest from a vested estate, is that a contingent interest cannot take effect immediately, even though the former estate were determined; while a vested estate may take effect immediately, whenever the particular estate shall determine."[1] In the light of this distinction, after the abolition of the rule in Shelley's case, and the other reforms instituted by the Revised Statutes, the decision in Moore v. Littel seems inevitable.

Real Distinction between Vested and Contingent. In Moore v. Littel the living children of John Jackson might die without issue before their father, and they might never enjoy the remainder in possession, but such is not the uncertainty which makes a remainder contingent. It is the capacity of taking effect in possession if the particular estate determine which always distinguishes a vested from a contingent remainder.[2] So the vested remainder in the living children of John Jackson might open and let in after-born children without disturbing the vested quality of the estate,[3] for, once vested, the same remainder, as a partible whole, could not become contingent.[4] The right of the after-born issue to so take was not a contingent estate at all, but a mere possibility not disturbing the vested quality of the inheritance.

Construction Favors Vesting. It may be argued that this construction makes nearly all remainders vested, but as it was said in Moore v. Littel,[5] this is no objection, for courts always prefer to construe estates as vested rather than contingent,[6] and such was the rule by the common law.[7] One reason that animated the courts formerly to declare estates vested was that vested estates could be alienated more freely than contingent estates, which could

[1] 1 Prest. Abst. 108.

[2] Fearne, Conting. Rem. 216; 1 Prest. Est. 77; 1 R. S. 723, § 13; The Real Prop. Law, art. II, § 30; Van Axte v. Fisher, 117 N. Y. 401, 403; Matter of Embree, 9 App. Div. 602.

[3] Fearne, Conting. Rem. 313, 314; Nodine v. Greenfield, 7 Paige, 544.

[4] 1 Prest. Est. § 66.

[5] At p. 79.

[6] Moore v. Lyons, 25 Wend. at p. 126; Moore v. Littel, 41 N. Y. at p. 79; Manice v. Manice, 43 id. at p. 368; Livingston v. Greene, 52 id. 118, 123; McKinstry v. Sanders, 2 S. C. 181; 58 N. Y. 662; Embury v. Sheldon, 68 id. 227, 236; Smith v. Edwards, 88 id. at p. 109; Byrnes v. Stilwell, 103 id. 453, 460; Stokes v. Weston, 142 id. 433; Matter of Merriman, 91 Hun, 120; Bunyan v. Pearson, 8 App. Div. 84; Sage v. Wheeler, 3 App. 38; Minot v. Minot, 17 App. Div. 521, 526.

[7] *Vide* Smith's Edition of Fearne, Conting. Rem. vol. 2, p. 73, § 200; sometimes cited "Smith's Ex. Int."

be alienated only in equity by way of estoppel.[1] So estates vested could be more readily barred.[2] Both of these reasons for holding remainders vested have, however, now disappeared by the reforms instituted by the Revised Statutes,[3] but the courts still adhere to the rule of construction which favors vesting.[4]

A Rule of Property. It is now the established doctrine in this State, and a rule of property, that under a limitation of a life estate to "A.," remainder to his heirs, the living heirs presumptive of "A.," if not aliens,[5] take in his lifetime a vested remainder, but defeasible[6] and subject to open and let in after-born children,[7] including those posthumous;[8] but this is not equivalent to the statement that such vested remainders do not now tend to a perpetuity under the Revised Statutes.

Moore v. Littel not Questioned. It has been intimated[9] that Hennessy v. Patterson[10] shakes the authority of Moore v. Littel.[11] It is not easy to see why. There is in the case of Hennessy v. Patterson a purely hypothetical construction of a devise adjudged by those rules of the common law then entirely superseded, but as such hypothetical construction is based on the common law without the application of the rule in Shelley's case (a very difficult resolution), this construction is purely *obiter*.[12] In Hennessy v. Patterson, the real case was this: A person presumably *inops*

[1] Hennessy v. Patterson, 85 N. Y. 99; *Vide infra*, under § 49, The Real Prop. Law.

[2] Livingston v. Greene, 52 N. Y. at p. 123, but observe that contingent remainders could also be destroyed by the tenant of the freehold. *Supra*, p. 38; *infra*, p. 152.

[3] §§ 47, 48, The Real Prop. Law.

[4] Livingston v. Greene, 52 N. Y. at p. 123; Moore v. Littel, 41 id. at p. 79; Stokes v. Weston, 142 id. 433, *et ut supra*.

[5] McGillis v. McGillis, 11 App. Div. 359, 362.

[6] Van Nostrand v. Marvin, 10 App. Div. 28, 34.

[7] Moore v. Littel, 41 N. Y. 66; House v. Jackson, 50 id. 161; Monarque v. Monarque, 80 id. 320; Byrnes v. Stilwell, 103 id. 453; Surdam v. Cornell, 116 id. 305; Nelson v. Russell, 135 id. 137; Campbell v. Stokes, 142 id. 23; Tompkins v. Verplanck, 10 App. Div. 572; Minot v. Minot, 17 id. 521; Paget v. Melcher, 26 id. 12; Townsend v. Frommer, 125 N. Y. 446, 468.

[8] 1 R. S. 725, § 30; The Real Prop. Law, § 46, and see below under this section.

[9] Chapl. Susp. Alien. § 51; Minot v. Minot, 17 App. Div. 521, 526.

[10] 85 N. Y. 91.

[11] 41 N. Y. 66.

[12] *E. g.*, it is by no means settled at common law that a remainder could not be limited on a determinable fee (as said at p. 98 by Finch, J.); see case of Bagshaw in Hargrave's *Collectanea Juridica*, I, 383. Finch, J., quotes Lalor, but the latter took his statement from the opinion, 5 Paige, at pp. 465, 466.

consilii, as the will is most inartificial, devised to his wife for life (in lieu of dower) for her own benefit and that of their unmarried daughter, and in case the wife married a second time, or acted contrary to the executor's wishes, then the executors "to have power to have the control of the property." If the daughter married and died leaving issue, the property to be theirs, "share and share alike," and not to go to her husband. If the daughter died without leaving any issue, remainder to testator's nephew. The widow died in 1874; the daughter then married H. The nephew died in 1876, and the daughter died in 1878, leaving no issue her surviving. In an action of partition between the heirs of the nephew H., it was adjudged that the nephew H. took a contingent remainder descendible, and that on the death of the daughter, his heirs were vested in possession. The case is a very different one from Moore v. Littel, which would have been "life estate to the wife, remainder to her heirs," some of whom were *in esse*. Here the remainder was to heirs of a second life tenant, *non in esse*, and failing heirs, remainder to the testator's nephew in fee simple. Now, here was a remainder substituted for a contingent remainder, which never took effect, a limitation permissible under the Revised Statutes.[1] Since the Revised Statutes, such a future estate is descendible.[2] The adjudication does not seem to be in conflict with Moore v. Littel, nor is it so regarded, for, as shown above, Moore v. Littel has been since frequently cited with approval by the Court of Appeals.[3] It may be observed that at common law a remainder might be vested, although a contingent remainder to persons *non in esse* intervened.[4] This principle does not, however, shake the authority of Moore v. Littel. If Hennessy v. Patterson shakes the authority of any part of the opinion in Moore v. Littel, it must be that part which refers to the descent of a vested estate in remainder in a case where the vested remainderman dies before the determination of the precedent estate, but the discrepancy is on that point only.[5]

All Vested Remainders not Alienable. The wisdom of the determination, that a remainder to the heirs of a living person is vested as to those heirs presumptive *in esse*, is somewhat questioned by the anomaly that, as it is subject to open[6] and let in "after-born issue," it is not like other vested remainders, freely alienable.

[1] 1 R. S. 723, § 16.
[2] 1 R. S. 725, § 35.
[3] *Supra*, p. 137.
[4] Fearne, Conting. Rem. 222 *et seq.*
[5] See below under section 49.
[6] Herriot v. Prime, 155 N. Y. 5.

Those who are living of the remaindermen cannot cut off or affect the title to the land of the unborn by any conveyance *in pais*,[1] although, in a litigation, the living remaindermen may stand for and represent the inheritance as a whole.[2] To some extent these cases last cited, therefore, contradict the adjudications that all vested estates are alienable.[3]

Seisin of Vested Remainder for Purposes of Dower and Descent. So, although a remainder expectant on an estate for life is vested, it does not give such seisin to a remainderman as entitles his widow to dower, if he die before the estate for life expires.[4] But yet it confers sufficient seisin to serve for the purposes of descent under existing law.[5]

Mr. Fearne's Fourth Class Again. Let us now consider the residue of Mr. Fearne's fourth class of contingent remainders, or those remainders limited solely to persons not in being;[6] for such remainders are permissible under the statutes of this State.[7] There can be no doubt that such remain contingent, for no more doubtful contingency can exist than that a person not conceived may yet be born. Under the terms of any statute they should remain contingent,[8] as at common law.[9] In the case of Moore v. Littel, if John Jackson had had *no children* whatever then living, and the limitation had been to the heirs of his body only, or to his issue only, the remainder would have been unquestionably contingent, although the instant he had heirs of his body the remainder would

[1] Kilpatrick v. Barron, 125 N. Y. 751; Harris v. Strodl, 132 id. 392; Kent v. Church of St. Michael, 136 id. 10, 17; *cf.* Tompkins v. Verplanck, 10 App. Div. p. 578.

[2] Kent v. Church of St. Michael, 136 N. Y. 10, 17; Ebling v. Dreyer, 149 id. 460; *cf.* Boskowitz v. Held, 15 App. Div. 306, 312.

[3] *Infra*, pp. 158, 159.

[4] Bushman v. Hudson, 20 Wend. 53; Durando v. Durando, 23 N. Y. 331; House v. Jackson, 50 id. 161, 165.

[5] Hennessy v. Patterson, 85 N. Y. 91, 99; *sed. cf.* Moore v. Littel, 41 id. 66 (where it is said a vested remainder may divest by the death of remainderman), and Bingham, Descents ("of vested remainders"), 70, 115. The distinction between the facts necessary to constitute succession by descent and by purchase was often very marked in the common law. *Cf.* Challis, 111, 126, as to posthumous children.

[6] *Supra*, p. 137.

[7] Manice v. Manice, 43 N. Y. 303, 374; Purdy v. Hayt, 92 id. 446, 455; McGillis v. McGillis, 11 App. Div. 359, 362.

[8] *Supra*, § 30; Hennessy v. Patterson, 85 N. Y. 91; Purdy v. Hayt, 92 id. 446, 454; Axte v. Fisher, 117 id. at p. 403; Losey v. Stanley, 147 id. 560, 567; McGillis v. McGillis, 11 App. Div. 359, 362.

[9] Fearne, Conting. Rem. 217; 1 Prest. Abst. 112.

have been vested,[1] especially since the conversion of estates tail into fees simple, the abolition of the rule in Shelley's case and our statutes of partible inheritance.[2]

Present Application of Mr. Fearne's Classification. From this present examination we may perceive that only Mr. Fearne's second and fourth classes of contingent remainders remain contingent estates under the Revised Statutes and the present statute, and that of his fourth class one-half, or those limitations after a life estate of remainders to the presumptive "heirs" of a living person, have ceased to be contingent.

Revisers' Object in Preserving the Distinction. The object of the revisers in making the distinction between vested and contingent must again be noticed, for, unless it had some definite purpose, it better not have been put in the statute.[3] But, in addition to the rule against perpetuities, the definition has another relation. Contingencies were not originally the basis of limitations;[4] afterwards they were recognized within certain limits;[5] the classes of contingencies were fully grouped, and the nature of the contingencies tolerated by law were defined in cases. They could not be illegal events, too remote, repugnant to a rule of law, contrariant in themselves or inconsistent with the quality or nature of the preceding estates.[6] But most contingent remainders at common law had little tendency to create perpetuities,[7] for the rules touching legal limitations in themselves restrained remainders within reasonable limits, and contingent remainders could be freely barred. The Revised Statutes, however, made remainders take effect contrary to the common law and rendered contingent estates indestructible and unbarrable by the immediate tenant, although they made all future or contingent estates descendible, devisable and alienable wherever possible.[8] Nevertheless, some contingent remainders were inalienable. There was every reason, therefore, why the revisers should define "contingent," for such contingent remainders as were inalienable certainly tended to a perpetuity under the Revised Statutes. In addition to this reason, the terms

[1] Fearne, Conting. Rem. 314.

[2] *Ut supra*, this section.

[3] The revisers in their notes announce the distinction between vested and contingent has reference to their rule against perpetuities. See note to 1 R. S. 723, § 15, Appendix II, *infra*.

[4] *Supra*, pp. 21, 131.

[5] *Supra*, p. 21.

[6] Fearne, Conting. Rem. chap. 2.

[7] *Supra*, and see notes on § 32, "The Real Prop. Law," *infra*.

[8] 1 R. S. 725, § 35; "The Real Prop. Law," art. II, § 49; Dodge v. Stevens, 105 N. Y. 585, 588.

"vested" and "contingent" were applied to those estates raised formerly by way of use or devise,[1] and future uses and executory devises were always conceded to tend to perpetuities. As under the Revised Statutes "future" or "expectant" estates involved all such future and contingent estates as were called uses and executory devises, the terms "vested" and "contingent" remained desirable; for, such contingent estates still tended to perpetuities.[2]

Reference to the Rule against Perpetuities, or Suspending the Power of Alienation. As under the Revised Statutes[3] and "The Real Property Law,"[4] every contingent estate (except those to persons not in being) is made alienable, it follows that only those contingent limitations which suspend the power of alienation now tend to perpetuities.[5] Whenever the contingent estate is limited on such contingencies as may be immediately "released" or extinguished by persons in being, and an absolute fee in possession thus conveyed, it would seem to follow that such contingent estate cannot be said any longer to tend to a perpetuity. We have seen that, by the common law, contingent remainders were not within the "rule against a perpetuity," and yet, at common law, contingent remainders could be assigned only in equity by way of estoppel;[6] they were, however, devisable finally[7] and descendible.[8] But the principal reason that contingent remainders did not, at common law, fall within the rule against a perpetuity, was that they might be freely barred.[9] As under the Revised Statutes contingent remainders cannot be barred by the action of the tenant of the particular estate, it would seem that such estates as are not able immediately to be barred by the contingent remaindermen themselves, must be within the spirit of the existing rule against a perpetuity.[10]

[1] Fearne, Conting. Rem. 1; 1 Prest. Est. 65, 66.

[2] Lawrence v. Bayard, 7 Paige, 75, 76; Vanderpoel v. Loew, 112 N. Y. 167, 186; Williams v. Montgomery, 148 id. at p. 526; Sir Edward Sugden in Cole v. Sewell, 4 Dr. & W. at p. 28.

[3] 1 R. S. 725, § 35.

[4] The Real Prop. Law, § 49, *infra*.

[5] Moore v. Littel, 41 N. Y. at p. 85; McGillis v. McGillis, 11 App. Div. at p. 362.

[6] Fearne, Conting. Rem. 365, 366; Cruise, Dig. tit. 16, chap. 8, §§ 20, 22; Hennessy v. Patterson, 85 N. Y. 91, 99.

[7] Cruise, Dig. tit. 16, chap. 8, § 23; Fearne, Conting. Rem. 366.

[8] Cruise, Dig. tit. 16, chap. 8, §§ 14, 15, 16; Fearne, Conting. Rem. 364.

[9] Lewis, Perp. 128, 132, 134; see notes on § 32, *infra;* 2 Washb. Real Prop. (1st ed.) 235; 2 Prest. Abst. 114, 148; Hawley v. James, 16 Wend. at p. 121.

[10] Du Bois v. Ray, 35 N. Y. 162, 164; Radley v. Kuhn, 97 id. at p. 35; *cf.* Challis, 161, as to contingent re-

What Contingent Remainders Suspend the Power of Alienation. It remains to consider, briefly, what contingent remainders now fall within the rule. Is it not alone that class of contingent remainders which are dubious, not because of the events upon which they are limited, but because of the uncertainty of the persons to whom the remainder is limited?[1] This, stated affirmatively, would then be equivalent to the proposition that those contingent remainders which cannot be released, assigned at law or inherited, alone tend to a perpetuity under the Revised Statutes and "The Real Property Law" of this State. In that event, strictly, only remainders to persons not *in esse*, or to aliens, now tend to a perpetuity.[2] But the entire subject of perpetuities belongs to the remarks on the thirty-second section of this act, and need not be pursued at this point.

Vested Remainders May be Sold on Execution. Vested remainders and estates may be reached and sold by judgment creditors by simple execution,[3] or by an assignee in bankruptcy,[4] but not so the estates called contingent remainders.[5] But those vested remainders which are so limited as to open and let in "after-born issue" may not be sold on execution so as to cut off the "after-born."[6] To some extent, therefore, a vested remainder subject to open and let in after-born children now suspends alienation.[7]

Vested Remainders Open to Let in. At common law, a remainder once vested in interest could not be divested except by the act of the remainderman himself.[8] A distinction was, however, made between the cases where the remainder was acquired by purchase and by descent. If acquired by purchase, the remainder never divested on the birth and entry of a nearer heir during the continuance of a particular estate. It was otherwise where the remainder vested in some one by descent.[9] Posthumous children

mainders protected by statute, being within the old rule.

[1] Moore v. Littel, 41 N. Y. at pp. 83, 84.

[2] *Cf.* Chapl. Exp. Trusts & Powers, § 386; Booth *v.* Baptist Church, 126 N. Y. 215, 236; Cruikshank v. Home for the Friendless, 113 id. 337; McGillis v. McGillis, 11 App. Div. 359, 362; S. C. reversed, 154 N. Y. 532.

[3] Nichols v. Levy, 5 Wall. 433; Sheridan v. House, 4 Abb. Ct. App. Dec. 218; *cf.* Monarque v. Monarque, 80 N. Y. 320, 326, as to partition sale.

[4] Smith *v.* Scholtz, 68 N. Y. 41.

[5] Jackson v. Middleton, 52 Barb. 9; Striker v. Mott, 28 N. Y. 82; *cf.* Woodgate v. Fleet, 44 id. 1, as to contingent reversion.

[6] Monarque v. Monarque, 80 N. Y. 320; Sheridan v. House, 43 id. 569; Kent v. Church of St. Michael, 136 id. 10.

[7] *Cf.* Hawley v. James, 16 Wend. at p. 120.

[8] Booth, Desc. 134, 137.

[9] Booth, Desc. 133, 137, and cases cited.

could not take by way of contingent remainder if the particular estate determined before the birth of such child.[1] These common-law rules seem to have been first broken in on in the case of limitations of uses; it being held that a vested remainder limited by way of use could be divested by the birth of issue during the existence of the particular estate.[2] The strict rule of the feudal or common law was also broken in on in the case of a devise of a remainder;[3] it being construed in favor of a posthumous child as an executory devise and the remainder allowed to vest in the person next entitled until the birth of such child, when the remainder divested and vested in the child.[4] The statute 10 and 11 William III, chapter 16, finally allowed posthumous children to take by way of remainder, even where the limitation was by deed. This statute was re-enacted in New York in 1774,[5] and revised in 1786.[6] It was also put in the Revised Statutes and this act.[7] At the present day in New York vested remainders frequently open to let in after-born issue during the continuance of the particular estate,[8] and it is even said that a vested remainder may now be wholly divested by the death of the remainderman before the termination of the precedent estate.[9] It seems obvious that this decision depends on the particular language of the limitation of the remainder. It refers to those statutory remainders which would formerly have taken effect as devises or as uses, and not to the common-law remainders; for at common law a vested remainder did not divest by the death of remainderman during the continuation of the particular or precedent estate.[10] Once vested, a remainder could not be divested unless there be a clear intention to be collected from the language of the instrument limiting the remainder.[11]

Analogy between Gifts to a Class and Vested Remainders which Open. The analogy between vested remainders which divest themselves and gifts to a class (where those competent to take at

[1] Challis, 111, 126, 159.

[2] Cruise, Dig. tit. 16, chap. 5, §§ 16, 17, and cases cited.

[3] Reeve v. Long, 1 Salk. 228.

[4] Steadfast ex dem., etc., v. H. Nicoll, 3 Johns. Cas. 18.

[5] Chap. 2, Laws of 1774.

[6] 1 J. & V. 247.

[7] 1 R. S. 725, § 30; The Real Prop. Law, § 46.

[8] *Supra*, this section, p. 140.

[9] Moore v. Littel, 41 N. Y. 66; House v. Jackson, 50 id. 161, 165; Lingsweiler v. Hart, 10 App. Div. at p. 165; Herriot v. Prime, 155 N. Y. 5; *cf.* Hennessy v. Patterson, 85 id. at p. 99; Bing. Desc. chap. 4, § 2, concerning the descendibility of a vested remainder.

[10] Booth, Desc. 10; Fearne, Conting. Rem. (3d ed.) 286.

[11] Driver v. Frank, 3 M. & S. 25; 6 Price, 41.

the period of distribution succeed to the shares of those incompetent to take by reason of death, alienage or other disability[1]) is apparent.

Remainders Limited on Estates which Never Arise. Where a remainder is limited on a life estate and the life estate fails, it is said that the remainder fails also.[2] Yet, as a rule, at common law, if a preceding estate never arose, the next limitation took effect, the prior estate being regarded only as a limitation, and not as a condition.[3] Because a remainder is limited on an estate in trust, which fails, the remainder need not fail in every case.[4]

[1] Van Courtland v. Nevers, 11 N. Y. Supp. 148, 153, citing Downing v. Marshall, 23 N. Y. 366.

[2] This was so at common law (2 Black. Comm. 167), and the same statement is made generally of remainders under the Revised Statutes by Daniels, J., in Schettler v. Smith, 41 N. Y. at p. 347; *cf.* Purdy v. Hayt, 92 id. at p. 458; Woodruff v. Cook, 61 id. 638; Downing v. Marshall, 23 id. 366; Bailey v. Bailey, 28 Hun, 603, 614; McLean v. Freeman, 70 N. Y. 81, 85. It is, however, apprehended that this rule applies only to contingent remainders, not to vested remainders. *Vide* note 6 to 2 Black. Comm. 167.

[3] Norris v. Beyea, 13 N. Y. at p. 287; Mowatt v. Carew, 7 Paige, 328; Manice v. Manice, 43 N. Y. at p. 383; McLean v. Freeman, 70 id. 81, 85; *cf.* Banker v. Janes, 1 App. Div. 272.

[4] McLean v. Freeman, 70 N. Y. 81; *cf.* Irving v. De Kay, 9 Paige, 523; Amory v. Lord, 9 N. Y. 403, 419.

§ 31. **Power of appointment not to prevent vesting.**— The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power.

Comment on Section 31. This section is new.[1] It can refer only to powers which have not been extinguished or merged. It will be readily observed that the language of this section does not conform to the scheme of the Revised Statutes, which took no note of powers of appointment. All powers were declared by that revision to be "general" or "special," and "beneficial" or "in trust."[2] The above section[3] now recurs to a common-law classification. Nevertheless, as nearly all powers, even at the present day, must be either powers to appoint new uses and estates, or else powers to revoke subsisting uses and estates, this section is not wholly inapt. But powers of sale in trust were not powers of appointment.[4]

This Section Declaratory. It will be also observed that the language of the principal section is declaratory and negative where it is to the effect that "the existence of the power does not prevent the vesting." The real question before the enactment of this section was whether interests limited subject to the operation of a power of appointment, or in default of an appointment, are vested or contingent, until the execution or determination of the power. At common law this was a question of difficulty much discussed from Lovie's case[5] down.[6] The opinion intimated by Mr. Fearne, "that where estates are subjected to a general power of appointment in the first taker, with remainders over in default of such appointment, the power does not suspend the remainder from vesting, is confirmed by the opinions, first of the Master of the Rolls, and afterwards of the Lord Chancellor in Manndrell v. Manndrell,[7] and in Sugden's Treatise on Powers.[8] The Commissioners of Statutory Revision say of this section,[9] "New. It has seemed to the revisers that the doubts on this subject which have

[1] Report of the Commissioners of Statutory Revision, Appendix I.

[2] 1 R. S. 732, § 76; The Real Prop. Law, § 113, *infra*.

[3] § 31, *supra*.

[4] *Vide infra*, this section.

[5] 10 Rep. 78a.

[6] 2 Chance, Pow. chap. 22, § 2; Fearne, Conting. Rem. 226, *seq*.

[7] 7 Ves. Jr. 567; 10 id. 246.

[8] Chap. 2, § 4; referred to in Mr. Butler's note to Fearne, Conting. Rem. 233.

[9] Report of Commissioners of Statutory Revision under this section, Appendix I, *infra*.

occasionally been referred to since 1830 should be settled by the Legislature. The proposed section is in harmony with the weight of authority and with the rest of the law on this subject. See 2 Smith's Fearne, 193; Root v. Stuyvesant, 18 Wend. 268; Hawley v. James, 5 Paige, 467." In view of this note in their Report to the Legislature it is obvious that this section[1] leaves the law just where it was, unless the power called in the Revised Statutes "a power in trust," is a power of appointment. According to Sugden, by the old law, "powers to appoint were powers taking effect under the Statute of Uses;[2] a power in trust was a trust, rather than a power deriving its effect from the Statute of Uses.[3] The Revised Statutes destroyed the former law of powers and substituted the article on Powers.[4] It is, therefore, a question to be determined, not by the common law, but by the article on Powers, whether or not an estate subject to a power is vested or contingent.

Effect of this Section. Before this act[5] a power given by a will to executors to sell real estate and divide the proceeds among specified persons living at the time of division, was a power in trust under the Revised Statutes, and it is so classed by this act. Such a power is imperative and operative to suspend vesting.[6] A power in trust, or of sale, might, under the article on Powers, prevent vesting.[7] It is, therefore, probable that this section (31) has no reference to such powers, and that it does not apply to any powers except *quondam* "powers of appointment," when not in trust. The law is, therefore, undisturbed by this enactment.

[1] § 31, The Real Prop. Law.

[2] Powers, I, 1.

[3] Id. II, 158.

[4] Coster v. Lorillard, 14 Wend. 265, 314; Root v. Stuyvesant, 18 id. at p. 271; Jennings v. Conboy, 73 N. Y. 230, 233; Cutting v. Cutting, 86 id. 522, 530, 537; Delaney v. McCormack, 88 id. 174, 180.

[5] The Real Prop. Law.

[6] Matter of Will of Butterfield, 133 N. Y. 473; Dana v. Murray, 122 id. 604, 613, citing Delafield v. Shipman, 103 id. 463; Delaney v. McCormack, 88 id. 174.

[7] Matter of Will of Butterfield, 133 N. Y. 473; Dana v. Murray, 122 id. 604; Booth v. Baptist Church, 126 id. 215, 239, 240; *cf.* Hobson v. Hale, 98 id. 588; Van Vechten v. Van Veghten, 8 Paige, 104, 120, 121, 124, as to effect of power of sale on trust limitations.

§ 32. **Suspension of power of alienation.**— The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, 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 that a contingent remainder in fee 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, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority.

Formerly 1 Revised Statutes, 723, sections 14, 15 and 16, with the following words added: "For the purposes of this section, a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority."

§ 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.[1]

§ 15. The absolute power of alienation, shall 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 mentioned in the next section.[2]

§ 16. A contingent remainder in fee, 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 their full age.[3]

The following words in the last portion of the section (32) are new: "For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority."

Comment on Section 32. The 32d section of the Law of Real Property, now under consideration, it will be observed, transposes sentences of the Revised Statutes and alters the language in some respects. The effect of those transpositions and alterations, it is thought, ought not to be considered as instituting changes in the

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] Repealed, chap. 547, Laws of 1896.

law, for the Commissioners of Statutory Revision expressly stated to the Legislature that the Revised Statutes were thereby "unchanged in substance, except that the last sentence, which is declaratory of existing law, is new. See Lang v. Ropke, 3 Sandford, 369."[1] In view of this statement, and even of the apparent meaning of the new section, it would seem undesirable to regard the Revised Statutes as changed in any particular in so far as the lawful suspense of the power of alienation is concerned.[2] Section 32 then simply consolidated 1 Revised Statutes, 723, sections 14, 15 and 16,[3] and added a new sentence intended to be declaratory of pre-existing construction.[4] The present section, now under consideration, states the "new rule directed against perpetuities," or the unlawful suspension of the power of alienation.

The Old Rule against Perpetuities. In order to comprehend the changes instituted by the Revised Statutes in the rule against perpetuities, as it stood by the common law, it is necessary to recall not only the language of the old rule, but its precise extent and application. At common law, and long before the old rule against perpetuities was precisely determined by the judges of England, (it received its final form only in 1833[5]), there were certain doctrines relating to seisin and to the creation of estates by way of remainder which served the purpose of a "rule against perpetuities," although the rule itself was an independent one, not formulated until long subsequent to the Statutes of Uses and of Wills.[6]

Old Rule Did not Apply to Legal Limitations. It has been said by a writer of the highest authority that the former rule against perpetuities had no application to legal limitations, by which is meant those limitations of estates contained in the assurances recognized by the common law and existing independently of the Statute of Uses and Wills.[7] Thus it had no application to estates

[1] Report of Commissioners of Statutory Revision, Appendix I, *infra*.

[2] *Cf.* Chapl. Express Trusts & Powers, § 386.

[3] *Supra*.

[4] There was no great harm in such consolidation, as sections 14 and 15 of the Revised Statutes were to be read together without consolidation. Lorrilard v. Coster, 5 Paige, at pp. 189, 190.

[5] Cadell v. Palmer, 1 Cl. & Fin. 372. The commencement of the rule itself postdates the reign of Henry VIII. *Vide infra*, under this section.

[6] Challis, 80, 143, 207.

[7] Challis, 152, 153, 158; *et vide* 2 Prest. Abst. 114, 148; Mr. Hargrave in Thelluson v. Woodford, 4 Ves. 242, 250; 1 Powell, Dev. 389, Mr. Jarman's note.

limited as remainders[1] or to estates limited on common-law conditions of defeasance contained in conveyances operating by common-law assurances.[2] The unquestionable doctrine that the rule against perpetuities had originally no reference to estates created by way of remainder at common law has, however, been combatted by Mr. Lewis in his celebrated Treatise on the Law of Perpetuity.[3] His opinion has been adopted by several other writers, but without sufficient reason.[4] Cole v. Sewell was affirmed in the House of Lords,[5] and it has been lately said by the greatest writer on the law of real property since Lord St. Leonards that the notion "that the rule against perpetuities applies (apart from express statutory enactment) to legal limitations made by way of remainder is one of those questions which ought never to have arisen. It implies an anachronism which may be said to trench on absurdity."[6]

New York Rule Does Apply to Remainders. While this final opinion is unquestionably accurate, it is predicated of the common-law doctrines relating to remainders, viz., that every remainder must vest during the continuance of the particular estate or at the moment when it determines, and that all remainders could be barred by the tenant of the immediate freehold.[7] It of course followed that when the Revised Statutes of New York took away this power of barring the remainder, and did not require the remainder to vest during or at the termination of the precedent estate, the revisers would subject all limitations by way of remainders to the statutory rule against perpetuities, especially as the statutory remainder embraced former shifting and contingent uses and future interests created by executory devise.[8]

Object of the Old Rule. Having pointed out that the former rule against perpetuities had no relation to estates limited by common-law assurances or by way of remainder, it will suffice to indicate

[1] Challis, 159; 2 Washb. Real Prop. 235 (1st ed.); Sir E. Sugden in Cole v. Sewell, 4 Dr. & W. at p. 28.

[2] Challis, 152, 153, 207; Gray, Rest. 30; *cf.* Giberts v. Peteler, 38 N. Y. at pp. 168, 169, as to relief in equity on covenants in the nature of conditions, and 1 Sanders, Uses, 213.

[3] Chap. XVI (1st ed.) and supplement thereto in 1849, pp. 97 *et seq.*, *et vide* 2 Sharsw. & Budd, Lead. Cas. Real Prop. 333, 334.

[4] Tudor, Lead. Cas. Real Prop., note, pp. 470 *et seq.*; 2 Jarm. Wills, 727 *et seq.*, being comments on Cole v. Sewell.

[5] 2 H. L. Cas. 186.

[6] Challis, 159.

[7] Including a remainder limited on an estate tail. Wilkes v. Lyon, 2 Cow. 333.

[8] Leonard v. Burr, 18 N. Y. at p. 107; *cf.* Challis, 161.

generally that it was invented to meet the new forms of conveyance which arose after the Statute of Uses and Wills, and that it applied only to conveyances operating under the Statutes of Uses and Wills (except where certain uses were construed to be common-law remainders when they fell under the rules regulating remainders at common law).[1] Thus all executory estates except remainders (not vested in interest), whether arising by executory devises under the Statute of Wills or by shifting and springing uses under the Statute of Uses (including powers of appointment), were subject to the rule against perpetuities. Such uses and executory limitations were in derogation of the principles of the common law, and the rules regulating assurances at common law were consequently inadequate to prevent a perpetuity, for under those statutes an estate might be limited to commence *in futuro* and might take effect upon the happening of some contingency other than the determination of a precedent estate of freehold, and it could not be barred.

How the Old Rule Arose in England. The rule against perpetuities, as finally fixed in the nineteenth century by the judges of England, though referable only to estates created by way of use or by executory devise, was resolved on a precise analogy to the period allowed by the common law for ordinary settlements by way of particular estates and remainders.[2] At common law there could be no remainder of inheritance except one in fee simple; and such a remainder could subsist in expectancy only upon an estate for life or *pur autre vie*. After the Statute *De Donis*, a remainder of inheritance became possible in the shape of a fee tail. But all limitations permissible by the old common law did not tolerate a suspension of the power of alienation beyond a life in being and the infancy of issue of tenant in tail.[3] The period finally fixed for the lawful suspense of the power of alienation in the case of executory limitations was not fixed without protest.[4] It was just stated that the rule against perpetuity was formulated upon precise analogy to the common-law rule allowing settlements by way of particular estates and remainders.[5] It would not have been

[1] Lewis, Perp. 56, 109; Cruise, Dig. tit. 16, chap. V, and see Chudleigh's case, that a use limited by way of remainder should take effect before or at the determination of the particular estate.

[2] Lewis, Perp. 165.

[3] This is beautifully stated in language so precise, technical and elegant as to be incomparable, Challis, 158, 160.

[4] Cole v. Sewell, 2 H. L. Cas. 186, at p. 233.

[5] *Supra*.

competent for the common-law judges to invent a new rule, or to amend the common law,[1] any more than it would for them to alter or abrogate it. Parliament alone had that authority;[2] a principle we find often recognized in this State, especially in cases declaring that statutes changing the common law must be construed strictly.[3] Therefore, the judges of England simply applied an older set of rules concerning legal limitations to the new or executory forms of limitations.

Old Rule Did Not Apply to Limitations Subsequent to Estate Tail. The old rule against perpetuities had no reference to limitations subsequent to an estate tail, because such limitations had at all times (even subsequent to the rise of executory limitations, in the shape of uses and devises) been liable to destruction by means of a common recovery. Such limitations were, therefore, not obnoxious to the mischief which the rule was designed to prevent.[4] Nor did the rule import that the limitation must vest within the prescribed time, but only that, if it ever vested, it must vest within that time.[5]

Statement of the Old Rule. The rule against perpetuities received its final form in England in the case of Cadell v. Palmer only in 1833, and while this decision is not binding on the courts of this country as authority, its reasoning is conclusive and establishes the rule, at common law, to be as follows: *Property could not be rendered inalienable beyond a life or lives in being and twenty-one years afterwards, without reference to the infancy of any person whatever;* a person *en ventre sa mere* was for the purposes of the rule considered as in existence.[6] The fact that the period of gestation was allowed to enter into the lawful period at all has given rise to the erroneous impression that the period of gestation might be added to the term in gross of twenty-one years, but this was not the case.[7] We find this period of gestation often referred to as part of the lawful term in gross, in both early and late cases in New York.[8] But

[1] Cunliffe v. Brancker, 3 Ch. Div. at p. 410; Challis, 152.

[2] Co. Litt. 115b.

[3] Fitzgerald v. Quann, 109 N. Y. 441; Dean v. M. E. R. Co., 119 id. 540.

[4] Challis, 146, citing Nicolls v. Sheffield, 2 Bro. C. C. 215; Heasman v. Pearse, L. R. (7 Ch. Div.) 275.

[5] Challis, 164.

[6] Armitage v. Coates, 35 Beav. 1; Cadell v. Palmer, 1 Cl. & Fin. 372; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 114.

[7] See note to Cadell v. Palmer, Tudor, Lead. Cas. Real Prop. & Conv. 464; Challis, 159.

[8] Coster v. Lorillard, 14 Wend. 265, 295; Williams v. Williams, 8 N. Y. at p. 554; Chwatal v. Schreiner, 148 id. 683, 690; *cf.* 1 Sanders, Uses & Trusts, 201; and see my note to Essay on Law of Char. Uses in N. Y. 148, 149.

it cannot be that the term in gross by the common law was longer in New York than in England. The fact is that the duration of the lawful term in gross was long undecided. We find even Sir Edward Sugden very uncertain about it on different occasions in his life. In his notes to Gilbert on Uses he states that a shifting use cannot be made to take effect on an event "*beyond the period of a life or lives in being and twenty-one years afterwards, and a few months allowing for gestation and the birth of a child; nor can the twenty-one years, there is great reason to contend, be taken as an absolute term, but only as depending on the infancy of the person intended to be benefited.*"[1] In Cadell v. Palmer he again traced the growth of the rule with historical accuracy, and while forced to admit that the twenty-one years was then a lawful term in gross, he contended successfully that the addition of the period of gestation to the term of twenty-one years was unauthorized by valid precedents, and the court finally so decided.[2] Many of the American cases were decided while this point of law was undecided or "*in nubibus.*" But since it was finally decided in England no cause in America has ever been adjudicated to the contrary, at least after a full and proper discussion of the common law. The period of gestation, therefore, cannot by the common law be added to the term in gross as decided in Cadell v. Palmer.[3]

New Rule in New York. The revisers of the statutes of New York took up their consideration of the rule against perpetuities before the decision of Cadell v. Palmer, and revised it so as to reduce the common-law period from any number of lives in being to two; at the same time restoring the term in gross to the period of actual minority,[4] contended for by Sir Edward Sugden as the true interpretation of the rule by the common law.[5]

Lives in Being the Lawful Measure. Lives in being alone thus became the sole standard of the lawful period during which the power of alienation might be suspended in this State.[6] But after

[1] Sugden's Gilbert on Uses, 156 (Ed. London, 1811).

[2] And see to the same effect Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 114.

[3] *Ut supra.*

[4] Revisers' Notes to the Article on Legal Estates; Manice v. Manice, 43 N. Y. 303, 374.

[5] *Ut supra.*

[6] Hone's Exrs. v. Van Schaick, 20 Wend. 564; Yates v. Yates, 9 Barb. at p. 346; Tucker v. Tucker, 5 N.Y. at p. 417; Beekman v. Bonsor, 23 id. at p. 316; Hobson v. Hale, 95 id. at p. 611; Rice v. Barrett, 102 id. 161, 164; Cruikshank v. Home for the Friendless, 113 id. at p. 351; Greene v. Greene, 125 id. 506, 510; Booth v. Baptist Church, 126 id. 215, 236; Underwood v. Curtis, 127 id. 523, 541; Durfee v. Pomeroy, 7 App. Div. 431.

the period of two lives in being, the statutes tolerate a limitation of a remainder in fee to a person not in being at the time the estate is created, and if such person die under the age of twenty-one, then a contingent remainder to another in fee. This permissible contingency adds the period of actual infancy to the term of two lives in being.[1]

Section 32, Supra. It will be observed that section 32 of this act has added the words, "*For the purposes of this section a minority is deemed part of a life, and not an absolute term equal to the possible duration of such a life.*" Had this amendment read "part of a life in being," it might have been a very serious interference with the provisions of the Revised Statutes. The added words were intended to assert the existing rule of law, viz., that, for the purposes of the section, a minority is not part of a term in gross.[2] With this construction superadded, the new words add nothing and take away nothing from the rule prescribed by the Revised Statutes.

When Measured by Minority. An actual minority is not an improper measure for a trust term. The trust terminates on the death of *cestui que vie* at any time before attaining his majority. The trust term is not one for twenty-one years in gross.[3]

Abeyance of Seisin. How far, in addition to this section, the common-law prohibition against an abeyance of the seisin, by act of the parties, may still[4] operate to invalidate limitations now putting the seisin in abeyance, may be a question which the original revisers may not have contemplated.[5] Yet, as permitting an estate of freehold to commence *in futuro* may place the seisin in abeyance, as it is conceived,[6] the only statutory prohibition against that result is probably intended to be stated in this section. It would be strange if a feudal rule of the common law still operated to prevent perpetuities here, when the intention was to consolidate all such rules in this single section.[7]

[1] 1 R. S. 723, § 15; Manice v. Manice, 43 N. Y. 303, 374; Harriot v. Harriot, 25 App. Div. 245, 248; The Real Prop. Law, art. II, § 32; Purdy v. Hayt, 92 N. Y. 446, 456. See *infra*, under this section, pp. .

[2] Report of the Commissioners of Statutory Revision, Appendix I.

[3] Becker v. Becker, 13 App. Div. 342; Lang v. Ropke, 5 Sandf. 363; Eells v. Lynch, 8 Bosw. 465, 475.

[4] Challis, 77, 78; Watkins, Descents, 131; 1 Prest. Est. 216; *et vide infra*, under § 40, The Real Prop. Law.

[5] Wood v. Taylor, 9 Misc. Rep. 640; Van Nostrand v. Marvin, 16 App. Div. 28, 32; Heeney v. Brooklyn Benev. Society, 33 Barb. 360.

[6] The Real Prop. Law, § 40.

[7] Mason v. Jones, 2 Barb. at p. 252, where the court says, in substance, that, by law, there may be an abeyance of the seisin.

What a "Perpetuity" Is and Was. Having now referred to the period prescribed by the Revised Statutes for the lawful suspension of the power of alienation, let us next consider briefly what formerly constituted a perpetuity, with a view of determining more precisely the extent which this section has changed the common law. Any rule directed against a perpetuity must, in the nature of things, refer to the suspension of the power of alienation. A perpetuity has been declared to be "an estate inalienable, though all mankind join in the conveyance;"[1] and, again, "a perpetuity is, when all that have interest join, yet they cannot bar or pass the estate."[2] The Revised Statutes, as it will be remembered, defined a perpetuity as existing "when there are no persons in being by whom an absolute fee in possession can be conveyed,"[3] and this definition is maintained by this section of the present law.[4] The statutory definition of a perpetuity is better adapted to the nature of existing estates in lands, and while not essentially different from that formerly recognized, it has very precise relations to the contingent legal estates now tolerated; for not all contingent legal estates (which are necessarily "future estates") now tend to create a perpetuity, but only those it is apprehended which have persons not *in esse* connected with the legal title.[5] Neither by the common law nor by the existing law of New York is there any objection to estates granted in perpetuity, provided they are able to be barred by persons *in esse* of *their* own motion and without the aid of courts, for, as Sir Edward Sugden said, "the old law raised no objection to estates granted in perpetuity, provided there was a power to bar them or destroy them so as to render them alienable."[6] The same principle is admitted in New York under the existing statutes relating to real property, and the test of alienability is still, whether or not, there are persons in being who can give a perfect title.[7] Where there are living persons who have unitedly the entire power of disposition, free and untram-

[1] Scattergood v. Edge, 1 Salk. 229.

[2] Washbourne v. Donnes, 1 Ch. Cas. 23, cited by Lewis, Perp. chap. 12.

[3] 1 R. S. 723, § 14.

[4] The Real Prop. Law, § 32.

[5] *Infra.*

[6] Argument in Cadell v. Palmer, 1 Cl. & F. 372; same point, Hawley v. James, 16 Wend. 121.

[7] Gott v. Cook, 7 Paige, at pp. 542, 543; Maurice v. Graham, 8 id. at p. 486; Lawrence v. Bayard, 7 id. 75, 76; Hawley v. James, 16 Wend. at p. 121; Griffen v. Ford, 1 Bosw. 123; Vanderpoel v. Loew, 112 N. Y. 167, 186; Purdy v. Hayt, 92 id. 446, 451; Beardsley v. Hotchkiss, 96 id. 201, 214; Rice v. Barrett, 102 id. 161; Genet v. Hunt, 113 id. 172, 526; Williams v. Montgomery, 148 id. 519, 526; Deegan v. Wade, 144 id. 573, 576; Sawyer v. Cubby, 146 id. 192.

meled, the statutory rule of perpetuities has no application.[1] A perpetuity then still is not so much an invalidity for remoteness as an invalidity because the estate is not susceptible of being alienated by persons in being.[2] It is hardly necessary to say that when an estate in fee is immediately alienable the limitation of such an estate has not suspended the power of alienation. The statement admits of no doubt. But the power to alienate or bar the estate must be a present power at the time the limitation takes effect, and not a power to arise in the future; otherwise the limitation tends to a perpetuity.

Limitations Formerly Tending to a Perpetuity. The nature of the limitations which formerly tended to a perpetuity may next be considered again for a moment. They were only the executory limitations known as springing and shifting uses and executory devises.[3] In Cadell v. Palmer,[4] Sir Edward Sugden said: "Every executory devise" [is] "as far as it goes, a perpetuity;" and this is generally stated in the cases.

What Limitations Now Tend to a Perpetuity. The Revised Statutes, having consolidated and made uniform all the old principles relating to such interests as were formerly denominated "remainders," "uses" or "executory devises," it is necessary to determine anew what limitations of estates now tend to a perpetuity in New York. There is some confusion in the *dicta* of the courts upon this point. At least some of the general statements require at times certain modifications, or they are essentially misleading, and even untrue. In Leonard v. Burr it was said: "There are two methods by which the absolute ownership and power of alienation may be suspended; one is by creating a future estate by way of executory devise or contingent remainder."[5] But since contingent estates are now alienable, devisable and descendible by statute,[6] not all contingent remainders tend

[1] Hawley v. James, 16 Wend. at p. 121; Norris v. Beyea, 13 N. Y. 273, 289; Robert v. Corning, 89 id. 225, 235; Nellis v. Nellis, 99 id. 505, 516.

[2] Sawyer v. Cubby, 146 N. Y. 192.

[3] Mr. Lewis points out, in substance, that had executory interests, created by future uses and executory devises, been destructible, as were contingent remainders, the rule against perpetuity would have been unnecessary. Lewis, Perp. 128, 132, 134; *cf.* Hawley v. James, 16 Wend. at p. 121.

[4] Tudor, Lead. Cas. Real Prop. 435, and see Williams v. Williams, 8 N. Y. at p. 504.

[5] 18 N. Y. 96, 107, and see Hawley v. James, 16 Wend. at p. 121.

[6] 1 R. S. 725, § 35; The Real Prop. Law, art. II, § 49; Ham v. Van Orden, 84 N. Y. 257, 270.

to a perpetuity, but only those (as the revisers properly intimated) which are limited to persons not *in esse*, or aliens. Thus it is too general to intimate that all contingent remainders tend to create a perpetuity. Rapallo, J., with greater precision, has pointed out that, under our present system of conveyancing, a perpetuity can arise in two ways only, "by means of an express trust or power in trust, or by a *contingent limitation*."[1] It will be observed that this learned judge does not use the term "contingent remainder," but "*contingent limitation*," a modification tending to greater accuracy of analysis. The point is of consequence in connection with statements to the effect that contingent remainders are inalienable;[2] statements obviously too general, for, again, only those contingent remainders are inalienable (as the revisers said) which are limited to persons not in being, or *non in esse*.[3] Many of the adjudged cases, involving contingent remainders, are, therefore, in reality, of small consequence to the rule against perpetuity, for they turn upon the point whether or not such remainders were alienable by contingent remaindermen *in esse*,[4] a point not now to be doubted.[5]

Limitations of Estates in Trust. It is conceded by all the authorities that the Revised Statutes first made estates limited on express trusts inalienable,[6] and that this class of limitations, therefore, now fall within the rule against perpetuities prescribed by the statute.[7] The trust term must, therefore, expire at the expiration of two lives in being, when the inheritance passes to the trustees or the limitation in trust first takes legal effect.[8] The con-

[1] Radley v. Kuhn, 97 N. Y. at p. 34, quoted inaccurately in Dana v. Murray, 122 id. at p. 617; Smith v. Edwards, 88 id. at p. 102; Murphy v. Whitney, 140 id. at p. 546. *Sed. cf.* Booth v. Baptist Church, 126 id. at p. 237; Hawley v. James, 16 Wend. at p. 121.

[2] Dana v. Murray, 122 N. Y. at p. 617.

[3] Kenyon v. See, 94 N. Y. 563; Griffin v. Shepard, 124 id. 70, 76; Dodge v. Stevens, 105 id. 585, 588; Booth v. Baptist Church, 126 id. 215, 237; Sawyer v. Cubby, 146 id. 192, 196.

[4] Chapl. Susp. Alien. 20, 36.

[5] Moore v. Littel, 41 N. Y. 66; Ham v. Van Orden, 84 id. 257, 270; Kenyon v. See, 94 id. 563; Beardsley v. Hotchkiss, 96 id. 201, 213; Dodge v. Stevens, 105 id. 585, 588; *cf.* Radley v. Kuhn, 97 id. at p. 35.

[6] Hawley v. James, 16 Wend. 121; Leonard v. Burr, 18 N. Y. at p. 107; Hillen v. Iselin, 144 id. at p. 379; Robert v. Corning, 89 id. 225. The only trust estate tending to a perpetuity at common law was a trust to accumulate. *Cf.* Ram, Wills, 6, 16; Lewis, Trusts, 138; Everitt v. Everitt, 29 N. Y. at p. 90; *et vide infra*, under § 76, The Real Prop. Law.

[7] Id. *supra*.

[8] *Vide infra*, article on Trusts. The insertion of a mere power of sale or exchange may not relieve a limitation

sideration of valid limitations in trust belongs to the subsequent article on Uses and Trusts and need not be pursued here, as this article deals only with limitations of the legal estate. The same course will be pursued in respect of powers which suspend alienation; they will be reserved for consideration under the article on Powers.

Contingent Limitations of Legal Estates. The contingent limitations of legal estates which now tend to contravene the rule against a perpetuity must be now, as formerly, purely futuritive contingent limitations where vesting is suspended. Formerly, such limitations were mainly those limitations called "executory devises" and "shifting" or "springing uses."[1] It is properly said that there is under the Revised Statutes now no such thing as an "executory devise."[2] By statute, all estates in expectancy are become either "future estates" or "reversions."[3] But future estates may be again (I) "future estates" proper; (II) remainders; for as pointed out, *quondam* springing devises and springing uses are not strictly embraced in the statutory definition of a remainder,[4] although the former shifting uses and devises are doubtlessly become statutory "remainders."[5] It will be, however, readily observed that while "executory devises" and "future uses" are not, as formerly, strictly accurate technical terms under the Revised Statutes, estates executory are still tolerated and may be created by devise. So under the old Statute of Uses now embodied in the Revised Statutes, future estates may and do arise and take effect as uses by force of the statute. Certainly such estates are not improperly denominated "shifting" or future uses.[6] Yet all such executory devises and future uses as are now tolerated are subjected to statutory regulations. The construction of all limitations of expectant estates, whether such as are

in trust from tending to a perpetuity. Van Vechten v. Van Veghten, 8 Paige, 120, 121, 124; Allen v. Allen, 149 N. Y. 280; *cf.* Crooke v. County of Kings, 97 id. 421; Belmont v. O'Brien, 12 id. 394; Heerman v. Robertson, 64 id. 332, 353.

[1] *Cf.* Williams v. Williams, 8 N. Y. at p. 554.

[2] Beardsley v. Hotchkiss, 96 N. Y. at p. 213; Tilden v. Green, 130 id. at p. 47; *cf.* the language of the court in Van Horne v. Campbell, 100 id. 287.

[3] 1 R. S. 723, §§ 9, 10, 11; The Real Prop. Law, §§ 26, 27, 28, *supra*.

[4] § 28, *supra*, p. 123.

[5] *Cf.* 2 Sharsw. & Budd, Lead. Cas. Real Prop. 467; Beardsley v. Hotchkiss, 96 N. Y. at p. 213.

[6] As in Gilman v. Reddington, 24 N. Y. 9; Harrison v. Harrison, 36 id. 543.

created by deed or devise is now the same. Not so when future estates are to be created by virtue of a power; for a power granted by deed must be more formal than one granted by a will.[1] The principles of the former law and those of the existing law of estates are, however, often not widely separated. At times again the difference is very marked — the tendency being to treat the real property statute not as in derogation of the common law, and to be construed strictly, but as part of a general reformatory scheme which is to be regarded in its entirety, and with reference to its motive and ultimate design.

What Contingent Limitations now Tend to a Perpetuity. We shall further consider what particular "contingent limitations" of legal estates tend to create, or do create, a perpetuity. The revisers, in their "Notes" on the article on "Legal" Estates, expressed the opinion that no such estate is inalienable unless there is a "contingent remainder."[2] This opinion, on its face, doubtlessly intended to refer to limitations of purely legal estates, the revisers having in mind the great difference then existing between legal and equitable estates; for the distinction was still in full force in the revisers' day, by reason of the existence of the Court of Chancery and the separate courts of law. The revisers, in their statement in the note in question, had no reference to estates still cognizable in Chancery as express trusts, or to powers, both of which limitations they dealt with in separate and subsequent articles.[3] From what has been already said, it is perhaps apparent that by "contingent remainders" the revisers, in their note to the article on Estates, possibly — nay probably — referred not altogether to common-law "contingent remainders," but to the new statutory contingent "remainder," compounded of former uses and devises.[4] The Revised Statutes defined all the cases where future legal estates are invalid because of remoteness, and prescribed as the test of invalidity — a suspension of the power of alienation,— which exists, they say, "when there are no persons in being by whom an absolute fee in possession can be conveyed."[5] It will be found that the only limitations of legal estates which now tend to transgress this rule are those (1) which give future interests, or estates, to

[1] Jennings v. Conboy, 73 N. Y. at p. 234.

[2] *Cf.* Lorillard v. Coster, 5 Paige, 191, 219; Booth v. Baptist Church, 126 N. Y. at p. 237; Dana v. Murray, 122 id. at p. 617.

[3] R. S. arts. 2, 3, chap. 1, part 2.

[4] The Real Prop. Law, § 28, *supra*.

[5] § 32, *supra*, formerly 1 R. S. 723, § 14.

persons not in being,[1] or to aliens;[2] and (2) those which are limited to trustees for some executory express trust purpose, which limitation renders the estate inalienable by force of the statute;[3] (3) where a future estate is subject to an unexecuted power.[4] The instances embraced in the second and third class of limitations will be considered at length in connection with the Article on Trusts and the Article on Powers. The discussion under this section is limited wholly to limitations of legal estates, or those estates formerly cognizable in courts of law.

Contingent Remainder in Fee. In this connection it is to be remembered that successive life estates can be now limited only to persons in being,[5] but a contingent remainder in fee may be limited after such life estate, to persons not in being at the creation thereof,[6] and so an alternative contingent remainder in fee may be limited to take effect in the event that the first remainder in fee is defeated before the majority of the remainderman.[7] In every such instance the ultimate contingent remainder in fee must vest either during the two lives in being at the date of the settlement, or else during the actual minority of the first contingent remainderman, otherwise the limitation transcends the statute and is void, because too remote.[8]

Meaning of Revisers' Statement that Contingent Remainders Render Estates Inalienable. If we confine the revisers' statement, "that an estate is never inalienable unless there is a contingent remainder, and the contingency has not occurred," to such legal estates as now depend on precedent estates, and have reference to the distinction pointed out under section 30,[9] between vested estates and contingent estates, we shall perceive that under the present statutory law of estates in New York, a perpetuity now exists in reference to legal estates in the following instances: (I)

[1] Hawley v. James, 16 Wend. at p. 121; Mott v. Ackerman, 92 N. Y. at p. 550; Chapl. Ex. Trusts & Pow. § 386; Booth v. Bap. Church, 126 N. Y. at p. 237.

[2] McGillis v. McGillis, 11 App. Div. 362.

[3] *Vide infra*, under § 85, The Real Prop. Law.

[4] *Vide infra*, under § 159, The Real Prop. Law.

[5] 1 R. S. 723, § 17; § 33, The Real Prop. Law. At common law a life estate could be given to a person not born, but no estate to the issue of such person. See under § 33, *infra; cf.* § 28, *supra*, on cross remainders.

[6] Purdy v. Hayt, 92 N. Y. at p. 456; Durfee v. Pomeroy, 154 id. 583.

[7] § 32, *supra*.

[8] Hawley v. James, 16 Wend. at p. 121; Du Bois v. Ray, 35 N. Y. 162; Manice v. Manice, 43 id. at p. 374; Purdy v. Hayt, 92 id. 446, 456; Dana v. Murray, 122 id. 604, 617.

[9] *Supra*, p. 130 *seq.*

Where there is a limitation of an estate for life to one in being, remainder to his remote descendants, such as his grandchildren or great-grandchildren, not in being in fee. It is always possible that even great-grandchildren may be born during this precedent life estate, but it is also possible that they may not be born in the lifetime of the life tenant or that of his son, or even in that of his grandson (a period embracing three successive lives).[1] Thus, such a limitation may not vest in fee until three successive lives are exhausted in the natural course, or before a great-grandchild of the life tenant may be born. Obviously such a limitation of a legal estate is a contingent limitation of a remainder, being one to a person not *in esse*, and contravenes the existing rule against a perpetuity, for the law of perpetuities always regards possibilities, in limitations of estates, not probabilities,[2] and a limitation of a future estate to be valid, must necessarily vest within the time allowed by the rule. Such a limitation to remote descendants as a class is not now in actual contravention of any other section of the existing statutes.[3] The remainder is in fee, and is to take effect after a single life estate. At common law such a remainder would have been wholly void, unless it vested during, or at, the expiration of the precedent estate. But this rule was abrogated by the Revised Statutes,[4] and the only rule now existing in regard to contingent remainders is that they must vest within the statutory period. This rule is inflexible, and should so be, in any well-regulated State. The invalidity of such a limitation as that last supposed is apparent, as it falls within the condemnation of the note of the revisers, just mentioned, and within their definition of a perpetuity.[5] (II) The revisers' statement also applies to a limitation of a life estate to a person not in being, remainder in fee to the issue of such life tenant as purchasers. This limitation will be considered in the next paragraph.

Meaning of Revisers' Statement that Contingent Remainders Render an Estate Inalienable. A perpetuity now exists also in a limitation of an estate, if an estate for the life of an unborn person is followed by a successive estate in fee to the issue of such life

[1] The great-grandchild might be posthumous.

[2] Amory v. Lord, 9 N. Y. 403, 415; Schettler v. Smith, 41 id. 328; Knox v. Jones, 47 id. at p. 397; Purdy v. Hayt, 92 id. at p. 457; Dana v. Murray, 122 id. at p. 617; Haynes v. Sherman, 117 id. at p. 437.

[3] 1 R. S. 724, § 18; The Real Prop. Law, art. II, § 34.

[4] 1 R. S. 725, § 34; The Real Prop. Law, art. II, § 48.

[5] 1 R. S. 723, § 14, now § 32, The Real Prop. Law.

tenant as purchasers: *e. g.*, "An estate to the oldest child (unborn) of my son John, during the life of such oldest child, remainder in fee to the lawful issue of the body of such oldest child."[1] Here no rule of the statute is contravened except that against perpetuities.[2] An estate for life to a designated person *in posse* is followed by an estate in fee.[3] The remainder in fee, as it is limited to persons not in being, is contingent and now suspends alienation. It is obvious that this remainder may not vest within the statutory period. Such a limitation is, therefore, void under the existing law. At common law a particular estate could not be an estate for the life of a person not *in esse*.[4] There is now no express rule of the statute preventing a devise of a particular or precedent estate to a person unborn, and no other rule preventing it, unless it be that every present devise must vest in possession at testator's death, or not at all,[5] excepting the existing statutory rule against a perpetuity.[6] Under the last rule the limitation in question is obviously void. How in practice a freehold estate to commence *in futuro* can be effected by deed, unless the deed is delivered *in escrow*, or some trust or intermediate estate created, it may be difficult to determine, but the point of this illustration is to emphasize that the abolition of the rule that a freehold cannot at common law be created to commence *in futuro*, permits all manner of future estates, provided only they do not contravene the new rule against a perpetuity. At common law such a limitation as that last mentioned would have been void as to the precedent estate, because no estate of freehold could be limited so as to commence *in futuro*, except by way of remainder.[7] Consequently the limitation of a present

[1] Since the abolition of estates tail in New York, issue of the body is a proper and precise expression to carry a fee simple to lineal descendants.

[2] It is no objection to a remainder in fee that it begins *in futuro*, or that it is limited to persons not in being when the limitation is created. Purdy v. Hayt, 92 N. Y. at p. 456; Durfee v. Pomeroy, 154 id. 583.

[3] 1 R. S. 724, § 18; The Real Prop. Law, art. II, § 34.

[4] 2 Black. Comm. 167; but this was because a freehold estate could not commence *in futuro* or *seisin* be in abeyance.

[5] Campbell v. Rawdon, 18 N. Y. 412, 418; Lougheed v. The D. B. Church, 129 id. at p. 215. See below, under this section, on devises to corporations to be formed.

[6] *Supra*, this section. How far abeyance of the *seisin* in itself operates to suspend the power of alienation is still a question. *Cf.* Wood v. Taylor, 9 Misc. Rep. 640; Heeney v. Brooklyn Benev. Society, 33 Barb. 360; 2 Black. Comm. 107.

[7] *Supra*, p. 23. The particular estate must always have been limited to a person *in esse*. 2 Prest. Abst. 148.

precedent estate for the life of an unborn person would have been impracticable and void under the rules just denoted.[1] At common law the remainder also would have been void if contained in a deed, because no estate to an unborn person could be followed by an estate to the issue of such unborn person as purchasers.[2] But the revisers of the statutes took away both these rules of the common law,[3] and avoided such a limitation solely because it conflicted with the statutory rule against perpetuities; such contingent remainders, as future estates, being now within that rule.

What Other Contingencies can Enter into Limitations. Besides the contingencies referable at common law to the future birth of issue, the happening of other future events might lawfully be made the basis of limitations of future estates by way of remainder.[4] But it is to be recalled in this connection that by the common law no limitation of a remainder might abridge the regular determination of a precedent or particular estate.[5] A limitation which did serve to abridge a prior estate, limited at the same time, was not a remainder but a "conditional limitation" and valid only under the Statute of Uses, or as an executory devise, but not valid by the common law. Yet at the common law the contingent termination of a particular estate might, according to Mr. Fearne, make a contingent remainder.[6] Thus, conveyance to A. to the use of B. till C. returns from Rome, then remainder over to D. in fee. This limitation is cited by Mr. Fearne[7] as affording an example of a common-law remainder, contingent because the end of the prec-

[1] 2 Black. Comm. 167.

[2] Fearne, Conting. Rem. 502; Hay v. Earl of Coventry, 3 T. R. 83, 86. If contained in a will the limitation would have been supported as an estate tail at common law. Fearne, Conting. Rem. 204, Butler's note. But under the Revised Statutes the remaindermen take as purchasers. 1 R. S. 725, § 28. The same result would be attained by our statute turning estates in tail into fee simple. 1 R. S. 722, § 3. In either event the limitation of the remainder would be void as too remote under the rule now in force.

[3] 1 R. S. 724, § 24; The Real Prop. Law, art. II, § 40.

[4] *Cf.* Williams, Principles Real Prop. p. 272. This elementary English book, intended in England for young students, is hardly entitled to the consideration it receives from the highest courts in this country. But the chapter just cited is very admirably written and the authority just cited apposite.

[5] 1 Prest. Abst. 114.

[6] *Cf.* 1 Prest. Est. 71, who insists that the contingency is not in the particular estate but in the remainder.

[7] Fearne, Conting. Rem. 5. Mr. Preston insists that such a remainder is contingent because the beginning of the remainder is uncertain. But this seems a very trifling distinction. 1 Prest. Est. 71.

edent estate was uncertain. It will, however, be observed that Mr. Fearne's first example of a common-law limitation is one dependent upon the Statute of Uses, thus showing the comparatively late origin of many of even the so-called doctrines of the common law, and corroborating Mr. Justice Story's statement that at least one-half of the common law had arisen since the reign of Queen Elizabeth.[1] No one can understand the modern law regarding real estates unless he clearly distinguishes legal or common-law limitations from those limitations valid as uses or devises, for such principles are singular in their mutual relations in a composite and historical jurisprudence. At the present day, under the Revised Statutes, a so-called "remainder" may take effect in derogation or abridgement of a precedent estate created at the same time,[2] and need no longer, as formerly, await the regular determination of a precedent estate.[3] This new rule was necessitated by the express application by the revisers of the former rules relating to uses and executory devises to the creation of estates called "remainders." Thus, the events which now may be made the basis of contingent limitations are in theory broader than the events discussed by Mr. Fearne in his work on Contingent Remainders,[4] for they embrace all the future events formerly tolerated in connection with shifting or springing uses or devises. It may be stated generally that no illegal act or event may now be the basis of a limitation of a future estate, and that the event must not be too remote. Thus, the birth of illegitimate issue, contracts for concubinage, the commission of treason or any other act either *malum in se* or *malum prohibitum* cannot enter into the limitation of a future estate. We may next consider affirmatively what events may be the basis of contingent limitations.

Contingent Estates may now be Limited on what Events. Mr. Fearne's celebrated instance of a contingent estate, the return of C. from Rome terminating B.'s estate and vesting D. in fee,[5] is still, no doubt, such an event as may be lawfully utilized by conveyancers, because it is one depending upon the act of a living person, C., and must happen in C.'s lifetime if at all. Any limitations of estates in remainder, depending upon the happening of an event to be caused by the will of a single living or natural person, may still be the basis of a valid limitation, as the event must happen, if at all, within the life of a single known and definite agent or

[1] 1 Eq. Juris. § 646.

[2] 1 R. S. 725, § 27; The Real Prop. Law, art. II, § 43.

[3] *Cf.* 1 Prest. Abst. 114.

[4] Chap. II.

[5] It is not original with Mr. Fearne.

actor. Events thus contingent are quite incapable of causing a perpetuity under the Revised Statutes, for living and known persons have always complete power of disposition. If a limitation of an estate by way of remainder is made to vest in possession on the return from Rome of four living persons, it is not necessarily void under this section. The invalidity depends on the persons entitled in remainder. If the limitation in remainder is to persons unborn it would be, of course, contingent and invalid.[1] But if the remainder is to a person in being, it is now vested in interest, and the uncertainty of the time when such remainders may vest in possession is wholly inconsequential under the existing rule against a perpetuity, stated in the section under consideration (32).[2]

Contingency Limited on Impersonal Events. When the uncertainty or contingency then of a limitation resides in an impersonal event, and not in the dubiousness of the person to whom a remainder is limited, it cannot now contravene the rule against perpetuities,[3] especially as contingent remainders are now by statute made alienable, devisable and descendible, both at law and in equity.[4]

No Perpetuity when there are Persons in Being who can Alien a Fee. Such illustrations as those just given serve to show the accuracy of the statement of the revisers, that the power of alienation is now suspended only when there are no persons in being by whom an absolute fee in possession can be conveyed.[5] They throw considerable doubt on their note mentioned above, "that no estate is inalienable unless there is a contingent remainder,"[6] for only those contingent remainders which limit estates to persons not in being now tend to a perpetuity.

Remainder to Aliens. A limitation by deed of a remainder to an alien would seem to form an exception to the rule that remain-

[1] Hobson v. Hale, 95 N. Y. at p. 612; Radley v. Kuhn, 97 id. at pp. 35, 36.

[2] Moore v. Littel, 41 N. Y. 66; Purdy v. Hayt, 92 id. 446, 451; Genet v. Hunt, 113 id. at p. 172; Dana v. Murray, 122 id. 604, 618; Williams v. Montgomery, 148 id. 519, 526; Maurice v. Graham, 8 Paige, at p. 486.

[3] 2 Washb. Real Prop. 237, 238; 1 Prest. Est. 75, 76; *cf.* Moore v. Littel, 41 N. Y. at p. 84; Mott v. Ackerman, 92 id. at p. 550; Booth v. Baptist Church, 126 id. at p. 237; Chapl. Ex. Trusts & Pow. § 386.

[4] 1 R. S. 725, § 35; The Real Prop. Law, § 49; Ham v. Van Orden, 84 N. Y. 257, 270; Mott v. Ackerman, 92 id. 539, 550; Sawyer v. Cubby, 146 id. at p. 196.

[5] 1 R. S. 723, § 15; § 32, *supra*. *Sed. cf.* (contingent remainder to alien *in esse*) McGillis v. McGillis, 11 App. Div. 359, 360.

[6] *Supra*, p. 162.

ders to persons in being are not contingent, and do not tend to a perpetuity. The alien cannot convey, and yet he may choose to become a citizen, but whether he will or not is uncertain.[1] Yet, strictly, such a limitation is limited on a contingent event, and falls within Mr. Fearne's second class.[2]

Limitations to Corporations to be Formed. Within the rule stated in this section of this act fall also such contingent limitations as those of a remainder to a corporation to be formed.[3] For a corporation to be formed is a person *non in esse*, for the purposes of the rule, and consequently, a remainder to a corporation to be formed must be made to vest during or at the expiration of two lives in being or it is void.[4] Yet it is to be observed that a remainder (created by will) to a corporation to be formed after testator's death, is necessarily contingent. A precedent estate must either be limited or else an estate must result somewhere until the corporation be formed and entitled to take. This incorporation may never happen; therefore, the remainder must be contingent. An estate to "A." for life, or any shorter time, remainder to "B.," a living person not an alien, is always a vested remainder,[6] taking effect in interest as of the creation of the precedent or supporting estate. But, obviously, a limitation of a remainder to a corporation to be formed after a testator's death, cannot vest until the corporation be formed. The presumption on any devise should always be that the testator did not intend such a remainder to vest until the corporation shall be formed.[7] It would be inconsistent for the law to allow devises to charitable or other corporations to be formed, and then to invalidate such devises because the corporations were not formed and irrespective of the rule against perpetuities. Yet a distinction seems to be made between the validity of a present devise to a corporation not *in esse* and a

[1] McGillis v. McGillis, 11 App. Div. 359, 362.

[2] *Supra*, p. 135.

[3] At common law a remainder limited to a corporation, not in being, was void. 1 Prest. Abst. of Tit. 128; Challis, 91. This rule is quite changed now, when the limitation is *future* and not present. See below under § 42, The Real Prop. Law.

[4] Burril v. Boardman, 43 N. Y. 254; Shipman v. Rollins, 98 id. 311, 328; Cruikshank v. Home for the Friendless, 113 id. 337, 351; Booth v. Baptist Church, 126 id. 215; Lougheed v. The Dykeman's Baptist Church, 129 id. 211, 215; People v. Simonson, 126 id. 299; Tilden v. Green, 130 id. 29; Bigelow v. Tilden, 18 Misc. Rep. 689.

[5] Leslie v. Marshall, 31 Barb. 560.

[6] *Supra*, § 30; pp. 130, 137.

[7] Shipman v. Rollins, 98 N. Y. 311, at p. 328; Lougheed v. The Dykeman's Baptist Church, 129 id. 211, 216.

future devise to a corporation not *in esse.* A present devise, vesting at testator's death, seems, by the cases, to require present capacity to take on the part of the corporation.[1] But by the limitation of a remainder, the distinction denoted ought to be obviated. Indeed, it may be said, in this connection, that it would seem that even a present devise to a charitable corporation, not *in esse*, ought to be sustained now, as a devise in the nature of a springing use or a springing devise, provided such devise must vest, if at all, within the statutory rule.[2]

Limitation of a Fee upon a Fee. The Revised Statutes first enacted that a fee might be limited on a fee, provided the posterior limitation did not violate the statutory rule against perpetuities.[3] This was an innovation on the rules of the common law which did not tolerate such a limitation of estates; for no remainder existed after an estate in fee simple.[4] Yet, even at common law, several fees might have been limited in the alternative by way of remainder upon the same particular estate, but upon such contingencies that not more than one of them can by possibility happen.[5]

Minority Added to Two Lives, when. Under the section now under consideration, it is expressly provided that a contingent remainder in fee may be limited on a prior remainder in fee to take effect in the event that the first remainder in fee is defeated before the majority of the first remainderman in fee.[6] This provision of the statute added the period of an actual minority[7] to the term of two lives in being, during which the power of alienation may be lawfully suspended. This addition was not, however, a term in gross of twenty-one years, but an actual infancy of a designated person, entitled defeasibly in remainder. The added term is of limited application, and the normal period for suspension in every other case is two lives in being.[8]

[1] Campbell v. Rawdon, 18 N. Y. at p. 417; Leslie v. Marshall, 31 Barb. 560; Lougheed v. The Dykeman's Baptist Church, 129 id. 211, 215; Ould v. Washington Hospital, 95 U. S. at p. 313; Wyman v. Woodbury, 86 Hun, 277; Heeney v. Brooklyn Benevolent Soc., 33 Barb. 360.

[2] See *infra*, under § 42, The Real Prop. Law; People v. Simonson, 126 N. Y. at p. 307.

[3] 1 R. S. 724, § 24; Id. 723, § 16, now § 32, *supra*, and § 40, *infra*, The Real Prop. Law.

[4] Co. Litt. 18a; 1 Prest. Abst. 126.

[5] Challis, 61; Loddington v. Kime, 1 Salk. 224; Fearne, Conting. Rem. 373; Hennessy v. Patterson, 85 N. Y. at p. 99; 1 Prest. Abst. 126; The Real Prop. Law, § 41.

[6] 1 R. S. 723, § 16; § 32, *supra*; Mott v. Ackerman, 92 N. Y. 539, 549; Temple v. Hawley, 1 Sandf. Ch. 153, 178.

[7] Radley v. Kuhn, 97 N. Y. at p. 35.

[8] Temple v. Hawley, 1 Sandf. Ch. 153, 178; see, *infra*, next paragraph.

Intention of Revisers in Allowing Period of Actual Infancy after Two Lives in Being. The original revisers, in their notes to the last-noticed section,[1] permitting a contingent remainder to be limited after a term of two lives in being, lawfully suspending the power of alienation, appended the following very explanatory note to the section, with their report to the Legislature: "It may be useful to illustrate by examples the effect of section 16, as its meaning may not be immediately obvious. Suppose an estate devised to A. for life, *and upon his death* to his issue then living, but in case such issue shall die under the age of twenty-one years and without lawful issue, then to B. in fee. Here, in both cases, the remainder to B. would be valid as embraced by the terms of the section, but if the devise were to *A. for life and after his death to B. for the term of twenty-one years, and upon the expiration of such term, to the oldest male descendant of A. then living, and if there be no such male descendant then living, to C. in fee.* Here, the period of twenty-one years being an absolute term wholly unconnected with the infancy of any person entitled, both the term and all the remainders upon it would be void, and, on the determination of the life estate, the fee would descend to the heirs of the testator." This note makes it very clear that the intention of the section[2] was to change the rule of the common law which permitted a term in gross of twenty-one years to be added to any number of lives in being as the lawful period of suspension.[3] The revisers substituted for the term in gross an actual infancy, and cut down the lives to two. This was the entire statutory reform in the old rule against perpetuities.[4]

Contingent Remainders in Fee after Two Lives in Being. The first remainder in fee, permitted to be limited by this section on a term of two existing lives (during which term the power of alienation may be lawfully suspended), may be a remainder to a person not in being[5] at the time the settlement becomes operative.[6] A remainder to a person not in being is of course contingent.[7] In addition to this first contingent remainder in fee,

[1] 1 R. S. 723, § 16.

[2] 1 R. S. 723, § 16.

[3] *Supra*, pp. 157, 107.

[4] Per NELSON, Ch. J., in Hawley v. James, 16 Wend. 123, 124; Manice v. Manice, 43 N. Y. at p. 374.

[5] Manice v. Manice, 43 N. Y. at p. 374; Purdy v. Hayt, 92 id. at p. 456; Du Bois v. Ray, 35 id. at p. 164; McGillis v. McGillis, 11 App. Div. 359.

[6] Delivery of a deed or death of a testator. See § 54, The Real Prop. Law.

[7] *Supra*, p. 143.

expressly permitted under this section, there may be superadded a second contingent remainder in fee to take effect in the event that the person to whom the first remainder in fee is limited shall die under the age of twenty-one years or his estate be otherwise determined before his majority.[1]

Fee Limited in Double Aspect. The first remainder in fee permitted under this section is not a fee limited in a double aspect which was good by the common law,[2] but a defeasible, base or determinable fee.[3]

Conditional Limitation on a Base Fee. It is, however, the rule of this State that a conditional limitation to take effect in derogation of a base, qualified or determinable fee, must vest in possession within the rule or it is void, even if the limitation is charitable in its nature.[4]

What Remainders Violate the Rule against a Perpetuity. Whenever there is an ulterior limitation after a precedent estate created at the same time, such ulterior limitation is now a "remainder" under the statute.[5] Whenever such remainder is [or may be] limited to a person or persons not in being, it suspends the power of alienation.[6] At the present day all limitations of remainders are within the statutory rule against perpetuities, and no such limitation may transcend the rule.[7] Indeed, whenever an ulterior or an intermediate limitation suspends the power of alienation beyond two lives in being and an actual minority of a remainderman in existence at the end of the second life, such limitation of the fee is void under the statute.[8] The section, relating to the acceleration of remainders,[9] applies only to vested remainders and not to contingent remainders.[10] The rule against perpetuities is violated when more than two vested life estates precede a limitation to a person not in being, except in the single case provided for in the above section whereby there may be a substitution for a remainder in fee in case a prior remainderman die under age.[11]

[1] 1 R. S. 723, § 16; Manice v. Manice, 43 N. Y. 303, 374.

[2] *Supra*, p. 170; § 41, The Real Prop. Law.

[3] Radley v. Kuhn, 97 N. Y. at p. 35; Matter of Miller, 11 App. Div. 337.

[4] Leonard v. Burr, 18 N. Y. 96, 107.

[5] See under § 28, *supra*, p. 124.

[6] Pp. 133, 143, 158, 160, *supra*; *et vide* Art. Powers, *infra*.

[7] *Supra*, pp. 153, 159.

[8] The Real Prop. Law, § 32.

[9] 1 R. S. 723, § 17; *infra*, The Real Prop. Law, § 33.

[10] Purdy v. Hayt, 92 N. Y. 446; Dana v. Murray, 122 id. at p. 618.

[11] Radley v. Kuhn, 97 N. Y. at p. 35; § 32, The Real Prop. Law.

Thus a limitation to J. & C. during their respective lives, and at their death to E., and at her death to her issue (unborn), is an ulterior, contingent limitation on more than two lives and void under the statute.[1]

Ulterior Limitation on Cross-Remainders. An ulterior limitation to persons not *in esse*, or other contingent limitation, preceded by cross-remainders, sometimes violates the statute against perpetuities as to some shares, without violating it as to others so limited.[2]

What Vested Estates Contravene the Rule against Perpetuity. The sole test of a limitation tending to a perpetuity under this statute has been repeatedly pointed out: the existence of persons immediately able to bar or convey an estate in fee simple absolute.[3] This state of facts cannot depend altogether on whether the estates limited are vested or contingent; for, those vested estates which are subject to open and let in "after-born issue" involve persons not *in esse*, and, consequently, in some aspects such limitations render the estate inalienable, at least, until the particular or precedent estates terminates, so as to shut out the residue of the class.[4] It is not a test of alienability that the rights of such unborn persons may under some statute be cut off in a judicial proceeding.[5] An estate which requires an application to a judge or court before it may be sold, is not alienable within the meaning of the statutory rule against perpetuities.[6] While a vested remainder of this kind is properly termed vested, *quoad* the living, the interest of those who may be let in as after-born is not a contingent remainder, but a mere contingent possibility.

Vested Remainders which Open. A limitation, therefore, of a vested remainder, subject to open and let in after-born issue, is not improperly designated a "contingent limitation," and this fact, as before pointed out, confirms the accuracy of the language of Rapallo, J., to the effect that trusts and contingent limitations (under the Revised Statutes), and not contingent remainders, embrace the exclusive *media* of perpetuities.[7]

[1] Purdy v. Hayt, 92 N. Y. 446.

[2] Purdy v. Hayt, 92 N. Y. 446; Dana v. Murray, 122 id. 604; *Vide supra*, § 28, The Real Prop. Law, pp. 127, 128 "cross-remainders."

[3] *Supra*, pp. 158, 168.

[4] Kilpatrick v. Barron, 125 N. Y. 751; Harris v. Strodl, 132 id. 392; Kent v. Church of St. Michael, 136 id. 10, 16; *cf.* Kirk v. Kirk, 137 id. 510.

[5] Kent v. Church of St. Michael, 136 N. Y. 10; Kirk v. Kirk, 137 id. 510; Ebling v. Dreyer, 149 id. 460; Boskowitz v. Held, 15 App. Div. 306, 312.

[6] Genet v. Hunt, 113 N. Y. at p. 172.

[7] *Supra*, p. 160, this section.

Conditions. The rule against perpetuities does not apply to a common-law condition subsequent in defeasance of an estate of freehold.[1] But covenants, in the nature of conditions, running with the land sometimes wear out with lapse of time, and no relief will then be afforded on them even by a court of equity.[2] The Revised Statutes expressly provided that the power of alienation should not be suspended by any condition beyond two lives in being.[3] Therefore, wherever a condition may suspend the power of alienation it is expressly condemned by this Act. But as a condition subsequent may always be released, it has been said not to suspend the power of alienation.[4] There is a great difference in this respect between conditions precedent and conditions subsequent. The latter never prevent the vesting of estates,[5] and are, therefore, as stated above, without the reason of the rule against perpetuities. But conditions precedent do prevent vesting, and are, therefore, within the rule.[6]

Covenants for Perpetual Renewal of Leases. Covenants for perpetual renewal of demises have been held to create a perpetuity,[7] although perpetual demises of urban lands are valid in this State.[8]

Trusts and Powers. We have already pointed out that by virtue of the statutes of this State a perpetuity might be created by the limitation of an express trust.[9] So it may arise by virtue of a power under the Article concerning Powers, which now regulates all powers to limit estates in lands; all such powers relate back to the date of the instrument in which they are granted.[10] No estate limited, or to be limited, by virtue of a power may help to contravene the section of the statute under review. If it does

[1] 1 Sharsw. & Budd, Lead. Cas. Real Prop. 132, 189; Challis, 152, 206; Gray, Restraints on Alienation (2d ed.), 30, note; *cf.* 1 Sanders, Uses & Trusts, 207, 213. This point is, to some extent, open in several aspects, particularly as to possibilities of reverter on conditions subsequent.

[2] Gibert v. Peteler, 38 N. Y. 165, 169; Trustees of Columbia College v. Thacher, 87 id. 311.

[3] 1 R. S. 723, § 15; § 32, *supra.*

[4] 1 Sharsw. & Budd, Lead. Cas. Real Prop. 132; Challis, 152, 207.

[5] Shannon v. Pentz, 1 App. Div. 331, 335.

[6] Rose v. Rose, 4 Abb. Ct. App. Dec. 108; Challis, 157; Cruikshank v. Home for the Friendless, 113 N. Y. 337; Bigelow v. Tilden, 18 Misc. Rep. 689.

[7] Syms v. Mayor, etc., 105 N. Y. 153; Banker v. Braker, 9 Abb. N. C. 411; Piggott v. Mason, 1 Paige, 412, 415.

[8] *Supra*, p. 88, under § 20, The Real Prop. Law.

[9] *Supra.*

[10] 1 R. S. 737, § 128; The Real Prop. Law, art. IV, § 158.

contravene it, the power is void.[1] Further comments on this subject of powers creating perpetuities will be reserved for the Article on Powers.[2]

Annuities. As land charged with the payment yearly of a certain sum is often confused with the law touching "annuities,"[3] let us consider the distinction between an annual charge on land and an annuity. An "annuity" at common law was a yearly sum charged on the person of the grantor. A rent charge, on the other hand, was something reserved out of an estate in land and charged on the land.[4] It was said formerly that no limitation of an annuity *in esse* tends to a perpetuity.[5] The act now under consideration makes any conveyance in trust to sell, mortgage, or lease lands for the benefit of annuitants an express trust.[6] This provision is new in terms.[7] Formerly, unless the entire income of an estate was ransacked by the trust for annuitants, the section of the Revised Statutes relating to express trusts might not apply, and the sum payable was a charge on land and not a trust. What annuities create trusts and what are simple charges on land may be considered hereafter under the Article on Trusts.[9] It is, however, the rule that a mere charge on land, payable annually in the nature of a rent charge, does not *per se* suspend the power of alienation. The so-called "annuity" may be alienated, anticipated or released, and the fee is not tied up or restricted by the charge on land.[10] Where a contingent remainder to persons unborn is limited to take effect after the death of the survivor of twelve so-called

[1] Belmont v. O'Brien, 12 N. Y. 394, 403; Everitt v. Everitt, 29 id. 39, 78; Booth v. Baptist Church, 126 id. at p. 239; Eels v. Lynch, 8 Bosw. 465.

[2] *Infra*, art. IV.

[3] Bulkley v. De Peyster, 26 Wend. 23; Tucker v. Tucker, 5 N. Y. 408, 415; see Vernon v. Vernon, 53 id. p. 359, where a *cestui que trust* of an express trust is called an annuitant, and Mason v. Mason's Exrs., 2 Sandf. Ch. at p. 525.

[4] Co. Litt. 144b; 2 Black. Comm. 40.

[5] 2 Prest. Est. 348.

[6] The Real Prop. Law, art. III, § 76.

[7] 1 R. S. 728, § 55; *cf.* Hawley v. James, 16 Wend. 60, 117; Lang v. Ropke, 5 Sandf. 363, 370, 371; De Kay v. Irving, 5 Den. 646, 651.

[8] McGowan v. McGowan, 2 Duer, 57; *cf.* Buchanan v. Little, 6 App. Div. 527; Cochrane v. Schell, 140 N. Y. 516.

[9] The Real Prop. Law, §§ 76, 83.

[10] *Vide supra*, under sections 20 and 21, terms of years and rents in fee, and also Hobson v. Hale, 95 N. Y. 588, 612; Matthews v. Studley, 17 App. Div. 303; Eels v. Lynch, 8 Bosw. 465; Lang v. Ropke, 5 Sandf. at p. 371, Hunter v. Hunter, 17 Barb. 25; Killam v. Allen, 52 id. 605; O'Brien v. Mooney, 5 Duer, 51; *cf.* Booth v. Baptist Church, 126 N. Y. 215, 246, on bequest to corporation subject to annuities, and *vide infra* under sections 76 and 83, The Real Prop. Law.

"annuitants," the power of alienation is unlawfully suspended. But not because of the "annuities." Where an annuity is charged on a trust estate, and the trust scheme is entire, the annuity may fall with a trust.[2] But it is otherwise where the bequest of the annuity is independent of the trust.

Devises and Limitations Partly Void under this Section and Partly Valid. Where devises of legal estates not in trust are partly void and partly valid under the rules stated in this section of the act, courts will sustain the estates well limited and declare void only those estates which transgress the rule.[3] So if the settlement is by deed, unless the deed itself is void.[4]

Construction of Limitations Tending to a Perpetuity. To render limitations of future estates valid they must be so limited that they will not contravene the rule against a perpetuity.[5] It is not enough that the limitation may not violate the rule; it must be apparent that it cannot.[6] The law regards possibilities, not probabilities.[7]

[1] Hobson v. Hale, 95 N. Y. at p. 612.

[2] Harris v. Clark, 7 N. Y. 242, 257.

[3] Salmon v. Stuyvesant, 16 Wend. 321, 327; Kane v. Gott, 24 id. at p. 666; Woodruff v. Cook, 61 N. Y. 638; Tiers v. Tiers, 98 id. 568, 573; Henderson v. Henderson, 113 id. 1; Haynes v. Sherman, 117 id. 433, 437. The same principle is applicable to trust settlements if the scheme is susceptible of severance without violating the testator's intention. Dekay v. Irving, 5 Den. 646; Harrison v. Harrison, 36 N. Y. 543; Smith v. Edwards, 88 id. 92, 104; Kennedy v. Hoy, 105 id. 134; *et infra*, under article on Trusts, § 76.

[4] Darling v. Rogers, 22 Wend. 483; People v. Van Rensselaer, 9 N. Y. at p. 339; Curtis v. Leavitt, 15 id. at p. 124; Savage v. Burnham, 17 id. at p. 576.

[5] Fowler v. Ingersoll, 127 N. Y. 472, 477.

[6] Purdy v. Hayt, 92 N. Y. 446, 457.

[7] Amory v. Lord, 9 N. Y. 403, 415; Schettler v. Smith, 41 id. 328; Dana v. Murray, 122 id. 604, 617.

§ 33. **Limitations of successive estates for life.**— Successive estates for life 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 on the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created.

Formerly 1 Revised Statutes, 723, section 17:

§ 17. Successive estates for life shall not 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.[1]

Section Applies to both Vested and Contingent Life Estates. The provision that successive estates for life shall not be limited except to persons in being applies to both vested and contingent future estates, but not so the part of the section directing acceleration.[2]

Common Law and Law before the Revised Statutes. At common law any number of successive life estates might be limited to persons *in esse*.[3] The only mode of limiting successive or future legal estates at common law, as it will be remembered, was by way of remainder.[4] A future estate for life could be limited at common law to an unborn person; but not another estate for life to the issue of such unborn persons in succession.[5] If, however, a settlement was, before the Revised Statutes, made, not by a legal limitation, but by way of use or executory devise, then the rule was that successive estates for life could be limited, provided that the power of alienation was not suspended by any limitations to persons not *in esse*, beyond lives in being and a term in gross of twenty-one years.[6] Within that period, successive limitations of life estates to persons not in being could be freely effected by springing or shifting uses or executory devises.

Acceleration of Remainders. The part of the foregoing section relative to acceleration of remainders had reference exclusively

[1] Repealed, chap. 547, Laws of 1896.

[2] Purdy v. Hayt, 92 N. Y. at p. 451.

[3] Cruise, Dig. tit. 32, chap. 24, § 8; *cf.* Purdy v. Hayt, 92 N. Y. at p. 451; Jackson ex dem. Nicoll v. Brown, 13 Wend. 437, 441.

[4] *Supra*, p. 23. Later on they might be limited by way of use or executory devise, *supra*, pp. 34, 35, 124, 125.

[5] Cruise, Dig. tit. 32, chap. 24, §§ 31–34; Challis, 90; 2 Black. Comm. 170.

[6] *Supra*, p. 155.

to legal vested remainders, limited on life estates,[1] then cognizable in courts of law.[2] In analogy to the statutory rule reducing the period of suspension from any number of lives in being to two, the original revisers deemed it obviously proper to circumscribe all legal limitations of life estates, precedent to remainders in fee, to two successive life estates, and to cut off all other estates for life limited before the remainder which then vested. This was termed "accelerating the remainder."[3] The two life estates first successively limited are not destroyed by virtue of this section.[4] But a vested remainder is executed in possession (immediately after the two life estates first limited) in favor of such ascertained persons as are then entitled to immediate possession.[5]

Remainders Limited on One or Two Life Estates not Accelerated. This section has not reference to limitations involving remainders limited on one or two successive life estates. By its terms it accelerates only those remainders limited on *more than two* successive life estates.[6] But this section does apply to cross-remainders limited after more than two life estates.[7]

Cross-remainders. Where cross-remainders are limited after a defeasible estate of inheritance or fee simple (such as in the case of a limitation of an estate "to A., B., C., D. and E. and their heirs, and if any one or more die without issue, remainder to the survivor), it is thought that this section of the Real Property Law can have no strict application. The precedent estate is not then a life estate, but a base or determinable fee.[8] Under the statute, A., B., C., D. and E. are tenants in common.[9] The death without issue denotes the death of the ancestor, and no longer an estate tail.[10] But as this estate of the ancestor is a fee and not a life estate, this section cannot apply to such limitations of estates as that given above, unless in cases of this character a fee is cut down by implication to an estate for life. Now fees are never cut down if another construction is possible.[11] It is true that at com-

[1] Matter of Moore, 152 N. Y. 602; Purdy v. Hayt, 92 id. 446; Dana v. Murray, 122 id. at p. 618; *cf.* Woodruff v. Cook, 47 Barb. 304; 61 N. Y. 638.

[2] Gilman v. Reddington, 24 N. Y. 9, 14.

[3] Gott v. Cook, 7 Paige, 542.

[4] Woodruff v. Cook, 61 N. Y. 638; S. C., 47 Barb. 304.

[5] Purdy v. Hayt, 92 N. Y. at p. 452.

[6] Gott v. Cook, 7 Paige, 521, 542; Schettler v. Smith, 41 N. Y. 328, 347.

[7] The Real Prop. Law, § 28; *supra*, pp. 127, 128.

[8] *Vide supra*, pp. 94, 96, 100, under § 20, The Real Prop. Law.

[9] The Real Prop. Law, § 56, *infra*.

[10] The Real Prop. Law, § 38, *infra*.

[11] Benson v. Corbin, 145 N. Y. 351; Byrnes v. Stilwell, 103 id. 453, 460; Campbell v. Beaumont, 91 id. 464,

mon law a fee could not be thus limited on a fee, although fees could be limited by way of remainder in the alternative so that only one could vest.[1] But the Revised Statutes distinctly tolerate a limitation of a fee upon a fee,[2] simply subjecting the validity of all such limitations to the single section against perpetuities.[3]

No Acceleration of Contingent Remainders. At common law, the effect of the destruction, or failure, of a contingent remainder was to accelerate the next vested estate.[4] The section of the act now under consideration has, however, been decided to have no reference to the acceleration of contingent remainders; it applies only to vested remainders.[5]

467; Matter of Miller, 11 App. Div. 337, 340, *et supra*, p. 170.

[1] Co. Litt. 18a; Challis, 61, 64.

[2] 1 R. S. 724, § 24; The Real Prop. Law, § 40.

[3] The Real Prop. Law, § 32.

[4] Goodright v. Cornish, 1 Salk. 226.

[5] Purdy v. Hayt, 92 N. Y. at p. 451; Dana v. Murray, 122 id. at p. 618; *cf.* Woodruff v. Cook, 47 Barb. 304.

§ 34. **Remainders on estates for life of third person.**— A remainder shall not be created on an estate for the life of any other person 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.

Formerly 1 Revised Statutes, 724, section 18:

§ 18. 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 upon such an estate in a term for years, unless it be for the whole residue of such term.[1]

Remainder Limited on an Estate pur autre vie. Whenever a remainder is now limited on an estate *pur autre vie*, it clearly must be in fee, under this section. Thus an estate to A. (and his heirs) so long as B. shall live, remainder to C. for life, remainder to D. in fee, is prohibited by this section. In other words, where an estate is limited to A. (and his heirs) for the life of B., remainder to C., C.'s remainder must now be in fee. At common law the former limitation was good.[2] The revisers, however, desired to restrict all limitations of legal estates holden on lives of nominees unconnected with the title.[3] They, therefore, restricted limitations of estates, holden *pur autre vie*, by a series of sections of the Revised Statutes, that under consideration being one.

Remainder Limited on Joint Lives of Grantee and Another. Where a remainder is now limited on an estate for the joint lives of the grantee and one or more persons, the life estate would, no doubt, fall under this section, and be in effect an estate *pur autre vie*, requiring a remainder limited thereon to be in fee.[4]

Estate to Trustee for the Life of Beneficiaries not an Estate pur autre vie. An estate to trustees of an express trust for the lives of A. and B. as *cestuis* is not now, however, an estate for lives or *pur autre vie*,[5] but by provisions of the Revised Statutes it would seem to be a *quasi inheritance*, or a "base qualified fee."[6] Trustees take and hold such an estate in fee simple as joint tenants,

[1] Repealed, chap. 547, Laws of 1896.

[2] Watkins, Conveyancing, 36.

[3] See their note with 1 R. S. § 15; Appendix II, *infra*.

[4] Co. Litt. 41b; *cf.* Chapl. Susp. Alien. § 362.

[5] See old law, 1 Jarman's Powell on Devises (1st ed.), 221, note. The estate of trustees to preserve contingent remainders was formerly an estate *pur autre vie*. Challis, 115; Lewin on Trusts, 217; 2 Jarman, Wills, 221.

[6] A qualified fee is one prescribing a rule of descents not normal; *e. g.*, as to heirs *ex parte paterna*.

while a sole surviving trustee has a particular qualified fee, or one where the estate on his death devolves on the Supreme Court instead of on his heirs.[1] Their estate in such a trust would seem none the less a fee and not now an estate *pur autre vie*.[2] The fee is not, however, a fee simple absolute, but, by virtue of the statute,[3] a determinable or base fee.[4] Therefore, if the trustees' estate is not an estate *pur autre vie*, a limitation to trustees to hold, etc., during life of A., remainder to B. for life, remainder to B.'s heirs in fee, is apparently not prohibited by this section. A remainder in fee after devise on express trust to trustees is, therefore, always a fee mounted on a fee permissible by the statute,[5] when the contingency upon which the second fee vests must happen if at all within the Rule.[6] Such a limitation after an estate to trustees is distinctly permitted by the statute.[7] The argument that an estate of a trustee of an express trust is now always a base fee and never an estate *pur autre vie* is, of course, founded on the language of the statute.[8]

Remainder in Terms of Years. This section[9] also prohibited a remainder for life on an estate *pur autre vie* in a term of years. We have seen, under section 20 of this act, that long terms of years might be made in the revisers' day, and at the present time,

[1] 1 R. S. 729, § 60; The Real Prop. Law, § 80, *infra*; 1 R. S. 730, § 68; The Real Prop. Law, § 91, *infra*.

[2] See under §§ 80, 91, *infra*, The Real Prop. Law, and Leggett v. Perkins, 2 N. Y. 297; Craig v. Hone, 2 Edw. Ch. 554; Howland v. Clendenin, 134 N. Y. 305, 308; Crooke v. County of Kings, 97 id. 421, 446; Duval v. Eng. Luth. Church, 53 id. 500; Marvin v. Smith, 46 id. 571; Briggs v. Davis, 21 id. 574, 577; Tobias v. Ketchum, 32 id. 319; Gilman v. Reddington, 24 id. 9, 15; Savage v. Burnham, 17 id. 561, 569; Amory v. Lord, 9 id. 403; Noyes v. Blakeman, 6 id. 567; Coster v. Lorillard, 14 Wend. 265, 304; *cf.* Embury v. Sheldon, 68 N. Y. 227, 234; Moore v. Appleby, 36 Hun, 365, 371; Losey v. Stanley, 147 N. Y. at p. 568; Matter of Tienken, 131 id. 391, 401; Provost v. Provost, 70 id. 141, 145; Matter of McCaffrey, 50 Hun, 371; Gomez v. Gomez, 147 N. Y. 195, 200; Stevens v. Melcher, 152 id. 551, 556; Geisse v. Bunce, 23 App. Div. 289; Brown v. Richter, 25 id. 239, 244; Matter of Tompkins, 154 N. Y. 634.

[3] § 89, *infra*, The Real Prop. Law.

[4] *Cf.* Radley v. Kuhn, 97 N. Y. at p. 35; Crook v. County of Kings, Id. 421, 446; Lorillard v. Coster, 5 Paige, at pp. 226, 227; revd., 14 Wend. 265.

[5] *Vide sub* § 40, The Real Prop. Law; Craver v. Jermain, 17 Misc. Rep. 244; *sed cf.* Chapl. Ex. Trusts & Pow. § 458.

[6] *Supra*, § 32, pp. 163, 170; Mott v. Ackerman, 92 N. Y. at p. 549.

[7] *Infra*, § 81, The Real Prop. Law; Stevenson v. Lesley, 70 N. Y. 512; Losey v. Stanley, 147 id. 560; *cf.* Amory v. Lord, 9 id. 403, 413.

[8] 1 R. S. 729, § 60; *sed vide infra*, under § 80, The Real Prop. Law.

[9] § 34, *supra*.

to the extent not actually prohibited by the Constitution.[1] A term of years being only a chattel real,[2] the interest of the termor still goes to his executors, or else passes with his personal estate;[3] yet, as in long terms the interest of the termor may represent the entire value of land, the legal title to the fee being worthless, limitations of executory interests in terms of years could not be left to the common law. They were accordingly regulated by the revisers of the statutes in 1829[4] consistently with the rules regulating estates of freehold.[5] By the old common law a termor could assign his whole interest, but not create subsidiary executory interests out of the term. This was soon altered, and a term could be limited to A. for life, with a limitation over to any number of persons *in esse* for life.[6] So it could be limited for persons *in esse* by way of trust, or to persons not *in esse*.[7] But no limitations were allowable which would render the term inalienable beyond the old rule against a perpetuity;[8] viz., lives in being and twenty-one years in gross.[9] Terms of years were not within the Statute *De Donis*, and could not be entailed. Interests in the nature of remainders could be limited in a term only by assigning it to trustees, or donating it by will,[10] but not by deed.[11]

Remainder Created in Assignment of Term. By the present section it is now provided that where a termor desires to limit an interest to one *pur autre vie*, the remainder of the term is indivisible; the whole residue must be limited or no part of it. How far this section prohibits actual assignments of the term, by way of a remainder for life, when such assignments are made for a valuable consideration, is a question not decided. But the prohibition of the statute seems explicit.

[1] The Constitution only prohibits demises or farm leases, reserving rent out of agricultural lands. *Supra*, pp. 45, 87.

[2] § 23, *supra*, The Real Prop. Law.

[3] § 2712, Code Civ. Proc.

[4] 1 R. S. 724, § 18; § 34, *supra;* § 39, *infra*.

[5] *Vide* § 39, *infra*.

[6] Cruise, Dig. tit. 8, chap. 2, § 21; id. tit. 38, chap. 19; Challis, 138, 139.

[7] Cruise, Dig. tit. 8, chap. 2, § 20; id. tit. 38, chap. 19, § 6; Challis, 139.

[8] Id. *supra;* Watk. Conv. 23.

[9] *Supra*, § 32, p. 155.

[10] Cruise, Dig. tit. 8, chap. 2, § 20; *cf.* id. tit. 38, chap. 19, § 3.

[11] Challis, 139.

§ 35. **When remainders to take effect if estate be for lives of more than two persons.**—When a remainder is created on any such life estate, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder shall take effect on the death of the two persons first named, as if no other lives had been introduced.

Formerly 1 Revised Statutes, 724, section 19:

§ 19. When a remainder shall be created upon any such 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.[1]

Remainders Limited on Joint Life Estates. This section is thought not to have any connection with a limitation of a remainder after an estate to any number of persons for their joint lives, but to apply to those cases only where the estate is given to one for the life or lives of persons unconnected with the legal estate,[2] and such is, no doubt, an accurate construction of the section, for where a vested remainder in fee is limited after an estate to A. for the joint lives of B., C., D., E. and F., the remainder takes effect in possession on the death of the shortest life of such persons in being.

Estates pur autre vie, how Limited at Common Law. At common law an estate *per autre vie* might have been limited to endure (1) during the life of a single person; (2) during the joint lives of several persons; (3) during the life of the longest liver of several persons.[3] By the rules of the common law, these lives might be those of any number of persons *in esse*.

Section 35, The Real Property Law. The section under review is the complement of the preceding section relating to limitations on estates *pur autre vie*. It provides for a case where a remainder is limited on an estate for the longest life of more than two persons, and accelerates the remainder.[4]

No Acceleration where a Limitation is Void as a Perpetuity. As remainders to persons not in being are contingent[5] and suspend the power of alienation,[6] it is obvious that a remainder to persons

[1] Repealed, chap. 547, Laws of 1896.
[2] Chapl. Susp. Alien. § 362.
[3] Challis, 286.
[4] *Cf.* Chapl. Susp. Alien. §§ 360–366, to the contrariwise.
[5] *Supra*, pp. 143, 165, 171.
[6] *Supra*, p. 162, 163, 169.

not *in esse* limited on an estate for the life of the longest liver of three or more persons would fall under the condemnation of section 32 of this act and not be saved by the provisions of this section, which provides for the acceleration of vested remainders only, and is not intended to save a limitation which suspends the power of alienation unduly.[1]

[1] *Cf.* Purdy v. Hayt, 92 N. Y. 446; Woodruff v. Cook, 47 Barb. 304.

§ 36. **Contingent remainder on term of years.**—A contingent remainder shall not 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 on the termination thereof.

Formerly 1 Revised Statutes, 724, section 20:

§ 20. A contingent remainder shall not 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.[1]

Comment on Section 36, Supra. This section has reference to the 40th section of this act,[2] which permits, contrary to the common law, a contingent remainder of freehold to be limited upon a term of years.[3] An estate of freehold could not at common law be created to commence *in futuro*, and as tenant for years had not a freehold estate, the effect of permitting a contingent freehold to be limited in remainder on a term of years would have been to put the feudal seisin in abeyance, where it would hang until the future solved the contingency and determined where it should vest.[4] But a contingent remainder of freehold could be limited on an estate for life,[5] as this did not interrupt the continuity of the seisin.[6] At common law the seisin never could be in abeyance,[7] consequently no estate of freehold could be limited to commence *in futuro*.[8] This old rule of the common law the revisers of 1829 entirely abrogated and permitted contingent estates of freehold to be limited to commence *in futuro* and on terms of years, livery of seisin being also abrogated.[9] But, in fact, before the Revised Statutes, contingent remainders of freehold expectant on terms of years could be lim-

Repealed, chap. 547, Laws of 1896.

[2] *Infra;* formerly 1 R. S. 724, § 24.

[3] *Cf. supra*, pp. 36, 38.

[4] Willard in his Treatise on Real Estate and Conveyancing, at p. 163, gives a wrong reason for this rule of the common law.

[5] Challis, 93; Fearne, Conting. Rem. 281; 2 Black. Comm. 171.

[6] An estate for life was an estate of freehold; *supra*, p. 117.

[7] *Supra*, pp. 22, 23.

[8] *Supra*, pp. 23, 165.

[9] 1 R. S. 724, § 24 (now § 40, The Real Prop. Law), and 1 R. S. 738, § 136 (now § 206, The Real Prop. Law), and see Revisers' notes with § 24, 1 R. S. 724, *infra*, Appendix II.

ited as a use or in a will,[1] because then the legal estate resulted when not actually disposed of, or else was in feoffee to uses, and consequently the feudal seisin was not in abeyance. Thus, indirectly after the Statutes of Uses and Wills, a contingent freehold could be limited to take effect on the expiration of a term of years. But it will be remembered that all executory limitations of uses and all executory devises were subject to the former rule against perpetuities.[2]

Contingent Remainders. The revisers of the statutes intended to obliterate all distinctions between conveyances operating as uses or devises and at common law.[3] They also intended to subject the creation of all expectant estates to the single revised rule against perpetuity.[4] This section of the statute has a relation to both of these projected reforms; but by its terms it expressly relates only to contingent remainders and not to vested remainders.

Vested Remainders. At common law a vested remainder could be limited expectant on a term of years, or, to speak more precisely, there was no objection to a limitation of an estate to a person *in esse* subject to a term of years.[5] An estate to A. for ten years, remainder to B., was really a conveyance of the whole fee to B., subject to A.'s term.[6] If the term on the other hand was created before the reversioner parted with the residue of his fee, the act of transferring the reversion was not a transfer of a remainder, but an assignment or grant of a reversion. It was not a limitation of a remainder on a term of years.[7] Where a vested remainder was limited on a term of years, livery of seisin could be made to termor,[8] although livery of seisin in its old sense[9] was inappropriate to the creation of an estate for years, and indeed, if made, it would be *prima facie* a tortious feoffment.

Object of this Section 36. As the revisers distinctly permitted a contingent remainder of freehold (*e. g.*, an estate to persons unborn)

[1] Challis, 93.

[2] *Supra*, p. 155.

[3] See the Revisers' notes to the sections of the article relating to the creation and diversion of estates. Part II, R. S. chap. 1, tit. 2, art. I.

[4] *Cf.* Henderson v. Henderson, 46 Hun, 509.

[5] Burt. Real Prop. § 833.

[6] *Cf.* Challis, 60, 61; Smith, Exec. Int. chap. 4, §§ 245–257.

[7] To constitute a remainder the particular estate and the remainder must be limited at the same time. See § 28, *supra*.

[8] Litt. § 60; 2 Black. Comm. 167.

[9] In the old law seisin related solely to estates of freehold. Challis, 47; 2 Black. Comm. 314; Cruise, Dig. tit. 1, § 22; Id. tit. 8, chap. 1, §§ 10, 12.

to be limited on a term of years,[1] by any conveyance, it was deemed necessary to expressly subject such a limitation to the rule against a perpetuity. An estate to A. for fifty years, if B. or C. (two living persons) shall so long live, and if not, then for the life of B. and C., or the survivor of them, remainder to the right heirs of D. (D. then being without heirs of her body), would be a valid limitation under this section.

[1] § 40, *infra;* 1 R. S. 724, § 24; Butler v. Butler, 3 Barb. Ch. 304, 310.

§ 37. **Estate for life as remainder on term of years.**— No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

Formerly 1 Revised Statutes, 724, section 21:

§ 21. No estate for life, shall be limited as a remainder on a term of years, except to a person in being, at the creation of such estate.[1]

Comment on this Section. This section amplifies the preceding section, and was intended to provide that in case the remainder limited on a term of years is contingent, because it is to persons not *in esse*, then such remainder must be limited in fee, and not for the life of any person. This section does not preclude the limitation of a freehold remainder on a term to persons not in being when the remainder is created. Such freehold remainder must not, however, be a life estate, but a fee.

[1] Repealed, chap. 547, Laws of 1896.

§ 38. **Meaning of heirs and issue in certain remainders.**— Where 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.

Formerly 1 Revised Statutes, 724, section 22:

§ 22. Where 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.[1]

Comment on this Enactment. The original revisers in their note to this section say: " * * * With respect to estates tail by implication, the effect of this provision is already attained by those sections,[2] but it is still necessary, as a distinct enactment, in order to embrace limitations of chattel interests, and those cases in which the remainder is limited on the death of a person to whom no estate is given."[3] In a note to sections 3 and 4, 1 Revised Statutes, 722, the original revisers had already explained the application of the principle, with reference to the decisions of our courts on the statutes of 1782 and 1786, converting entails into fees simple in this State. Prior to the statutes converting estates tail into fees simple, a limitation to A. and his heirs, and, if he die without issue (or without heirs, etc.), then to B. in fee, gave A. an estate tail. This estate tail the New York statutes regarding entails converted into a fee simple, with the effect of cutting off B.'s remainder in case A. died without issue. The courts of New York, after the statutes in question, endeavored to support B.'s remainder as an "executory devise,"[4] although formerly it had been well settled by the common law that the words in question did create an "estate tail."[5]

"Dying without Issue." In respect of limitations of interests in personal property, the words "dying without issue" were, at common law, construed to mean issue living at the death of the ancestor.[6] In England, in respect of limitations of real estate, the decisions were to the effect that the same words (where the

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 R. S. 722, §§ 3, 4.

[3] Revisers' note to § 22, 1 R. S. 724; Appendix II, *infra*.

[4] Fosdick v. Cornell, 1 Johns. 440; Jackson v. Staats, 11 id. 337.

[5] Rathbone v. Dyckman, 3 Paige, 9, 30.

[6] Rathbone v. Dyckman, 3 Paige, 9, 30.

precedent estate was capable of supporting a remainder) implied an indefinite failure of issue.[1] As the former rule against a perpetuity did not permit an executory limitation after an indefinite failure of issue, unless such limitations were subsequent to an estate tail, the courts, in an effort to sustain devises or limitations over, finally held, in respect of limitations of real property, that the words "dying without issue," indicated an intention to create an estate tail.[2] When estates tail were, by the statutes of New York, converted into fees simple, the effect was to cut off a remainder limited thereon.[3] This hardship was remedied by the Revised Statutes, so as to vest a remainder on the death of a first taker without issue.[4] The present section of this act (38) gives the words "dying without issue" the same meaning in limitations of both real and personal estates.[5]

This Section has no Reference to Wills before 1830. This section of the Revised Statutes has no reference to wills of persons dying prior to 1830, although it does control wills made before 1830, when they are published after that time.[6]

[1] Rathbone v. Dyckman, 3 Paige, 9, 30.

[2] Pells v. Brown, Cro. Jac. 450; Gardner v. Sheldon, Vaughan, 259; S. C., Tudor, Lead. Cas. R. P. 625, 639.

[3] Lott v. Wyckoff, 2 N. Y. 355; Barlow v. Barlow, Id. 386.

[4] 1 R. S. 722, § 4, now § 22, The Real Prop. Law.

[5] Norris v. Beyea, 13 N. Y. 273; Matter of N. Y., Lackawanna, etc., R. R. Co., 105 id. 89, 96; Matter of Moore, 152 id. 602.

[6] De Peyster v. Clendining, 8 Paige, 295; affd., 26 Wend. 23; Bishop v. Bishop, 4 Hill, 138; Emmons v. Cairns, 3 Barb. 247; Lytle v. Beveridge, 58 N. Y. 592, 601; Maurice v. Graham, 8 Paige, 484.

§ 39. **Limitations of chattels real.**— All the provisions contained in this article, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, 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.

Formerly 1 Revised Statutes, 724, section 23:

§ 23. All the provisions contained in this Article, relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, 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.[1]

Chattels Real. At common law chattels real were such interests in land as were not estates of freehold.[2] Thus, terms of years, from the precarious nature of termor's legal interest until he was finally protected by statute, were at an early time classed among chattels, even though the term might endure for a thousand years.[3] Other chattels real were the interests of tenants by statutes staple and merchant.[4] Of chattels real at common law terms of years alone remain of importance in the law of New York.[5]

Object of this Section 39. The manifest object of this section was to control the limitations of executory interests in long terms of years, otherwise owners of property might have granted a term of a thousand years at a nominal rent,[6] with the design that termor should so limit the term that it became inalienable beyond two lives in being and an actual minority. In this manner real property might, in fact, have been rendered inalienable beyond the statutory period.[7]

Chattels Real not within Chattel Mortgage Acts. Notwithstanding terms of years are classed among chattels for many juridical purposes, they are not within the purview of the Chattel Mortgage Act, requiring immediate change of possession or record, etc.[8]

Chattels Real Bound by Judgments. Chattels real are now bound by the docketing of judgments and decrees.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] Challis, 47; Co. Litt. 118b; Whart. Conv. 69; Putnam v. Westcott, 19 Johns. 73, 76; see under § 23, *supra*.

[3] Challis, 46; *supra*, pp. 86, 117.

[4] Co. Litt. 118a; 2 Black. Comm. 386; Burt. Real Prop. chap. 5; Challis, 48.

[5] The Real Prop. Law, § 23, *supra*; People ex rel. Higgins v. McAdam, 84 N. Y. 287, 295; Bennett v. Crain, 41 Hun, 183.

[6] *Supra*, pp. 86, 117, 181.

[7] See under § 34, *supra* (The Real Prop. Law), how far executory interests in terms could be rendered inalienable at common law.

[8] Chap. 279, Laws of 1833; 2 R. S. 136, § 5; State Trust Co. v. Casino Co., 18 Misc. Rep. 327; Booth v. Kehoe, 71 N. Y. 341.

[9] 2 R. S. 182, § 96 (repealed, chap. 417, Laws of 1877); 2 R. S. 359, § 3

§ 40. **Creation of future and contingent estates.**—Subject to the provisions 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 or other less estate, may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article.

Formerly 1 Revised Statutes, 724, section 24:

§ 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 contingency, which, if it should occur, must happen within the period prescribed in this Article.[1]

Object of Section 40. The object of this section is apparent. At common law, owing to the necessity of an immediate livery of seisin, freehold estates could not be created to commence in possession at a future day. In more modern times the rule was, however, in effect abolished, since an estate *in futuro* might be created by devise or by any conveyance operating under the Statute of Uses.[2] The revisers' plan was to validate estates created by any type of conveyance provided only that the estate vested within the time allowed for the vesting of contingent or future estates.[3]

Abeyance of the Seisin. Abeyance of the seisin by act of the parties was not tolerated by the common law,[4] and to a certain extent this operated as a rule against perpetuities. Blackstone's statement, that a fee might be in abeyance,[5] has been, even lately, criticised,[6] and it is still sometimes said that a fee may not be in abeyance.[7]

Terms of Years. A term of years (which is the chattel real referred to in this section) could at common law be created to

(repealed by chap. 245, Laws of 1880), now in § 1251, Code Civ. Proc.

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 Black. Comm. 166, and see Revisers' note to 1 R. S. 723, § 10; also pp. 34, 35, *supra*.

[3] *Supra*, pp. 43, 120.

[4] Challis, 77, 78; 1 Prest. Est. 216; *supra*, pp. 22, 29, 185.

[5] 2 Black. Comm. 107.

[6] Van Nostrand v. Marvin, 16 App. Div. 28, 32.

[7] Wood v. Taylor, 9 Misc. Rep. 640; Heeney v. Brooklyn Benevolent So-

commence *in futuro*, although a term for life which was a freehold estate could not commence *in futuro*.[1] We have seen under section 34,[2] that originally it was held that termor could not limit an estate for life and a remainder over in a term of years, and that this was soon changed by permitting executory bequests and trusts of terms.

Contingent Remainder May be now Limited on a Term of Years. A contingent remainder of a freehold could not, at common law, be created expectant on a term of years.[3] A vested remainder of freehold expectant on a term of years is ambiguous, for such a remainder may be the estate itself subject to the term.[4] Yet it is very apparent what is meant by limiting a vested remainder on a term of years, as it has become customary to regard the reversion as a remainder expectant on a term on account of the postponement of physical possession.[5]

Fee May be Mounted on a Fee. At common law a fee could not be mounted on a fee, as it was said;[6] that is, when a grantor had once disposed of a fee simple the nature of the estate granted precluded any further limitation of the fee.[7] The grantor had, in legal theory, disposed of all that he possessed, and, therefore, could dispose of nothing more. But in equity the rule was otherwise,[8] and, after the Statute of Uses had fastened the nature of the former use to the legal possession or title, a fee might be mounted on a fee by the contrivance of uses,[9] and, after the Statute of Wills, by executory devises,[10] always provided these executory limitations were within the rule against a perpetuity.[11] Where an ulterior limitation is now to take effect upon a contingency, such as will not happen in the life of a living grantee, the precedent estate will naturally be a base fee and the ulterior limitation a substituted fee and not a remainder. This section now tolerates in practice such limitations. The object of this section was to abrogate the fundamental difference between conveyances bad at common law, but good under the Statutes of Uses and Wills; and

ciety, 33 Barb. 360; *cf. supra*, under § 32, The Real Prop. Law.

[1] 2 Black. Comm. 143; Young v. Dake, 5 N. Y. 463; Taggard v. Roosevelt, 2 E. D. Smith, 100; *supra*, p. 23.

[2] The Real Prop. Law, § 34.

[3] See *supra*, under § 36, The Real Prop. Law.

[4] Challis, 61.

[5] *Cf.* Durando v. Durando, 23 N. Y. at p. 332.

[6] *Supra*, pp. 22, 42.

[7] Co. Litt. 18a.

[8] *Supra*, pp. 23, 35.

[9] *Supra*, p. 26.

[10] *Supra*, p. 35.

[11] See under § 32, *supra*, pp. 37, 154, 161.

to permit a fee to be mounted on a fee[1] by deed or grant, which took the place of the former feoffment with livery of seisin as a legal conveyance. In this way a limitation could be directly made by deed, whereas it must formerly have been made as a use or devise in order to be valid. But the limitation of a fee upon a fee must now conform to the rule against perpetuities.[2]

[1] Sherman v. Sherman, 3 Barb. 385, 387; Mott v. Ackerman, 92 N. Y. at p. 549; Matter of Dodge, 40 Hun, at p. 449; Matter of McCaffery, 50 id. at p. 374; Matter of Moore, 152 N. Y. 602; Chapman v. Moulton, 8 App. Div. 64; Matter of Martens, 16 Misc. Rep. 245. So, after a fee to trustees, Stevenson v. Lesley, 70 N. Y. 512; Losey v. Stanley, 147 id. 560; Van Nostrand v. Marvin, 16 App. Div. 28; *cf.* Amory v. Lord, 9 N. Y. 403, 413.

[2] Mott v. Ackerman, 92 N. Y. at p. 549; § 32, The Real Prop. Law.

§ 41. **Future estates in the alternative.**— Two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

Formerly 1 Revised Statutes, 724, section 25

§ 25. Two or more future estates, may also 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.[1]

Limitations with a Double Aspect. This section refers to limitations with a double aspect.[2] Even by the common law several fees might be limited in the alternative by way of remainder upon the same particular estate upon such contingencies that not more than one of them could by possibility happen.[3] From the revisers' note to the original section, citing Loddington v. Kime, it is apparent that they intended to preserve the principle and to distinguish the instance from one where some interest vested, and was then displaced by reason of the happening of a contingency specified in the limitation.[4] Such a contingent limitation did not necessarily prolong the restraint upon alienation beyond the period allowed by the Revised Statutes.[5]

When Valid within the Rule against Perpetuities. Where, however, a limitation is made to take effect on two alternative events, one of which is too remote and the other valid as within the prescribed limits, although the gift is void so far as it depends on the remote event, it will be allowed to take effect on the happening of the alternative one.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] Called in Revisers' note to the substituted section "contingencies in a double aspect."

[3] Challis, 61, citing Loddington v. Kime, 1 Salk. 224; 1 Ld. Raym. 203; Fearne, Conting. Rem. 373; Hennessy v. Patterson, 85 N. Y. 91, 99.

[4] The Real Prop. Law, § 40.

[5] Hennessy v. Patterson, 85 N. Y. at p. 99.

[6] Schettler v. Smith, 41 N. Y. 328, 336, citing Lewis, Perp. 501, 502.

§ 42. **Future estate valid though contingency improbable.**— A future estate, otherwise valid, shall not be void on the ground of the improbability of the contingency on which it is limited to take effect.

Formerly 1 Revised Statutes, 724, section 26:

§ 26. 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.[1]

Object of this Section. The note of the revisers on the original of this section shows that they intended to abolish a very curious subtlety of the common law: "That the law will not contemplate a double possibility, or a possibility upon a possibility."[2] Challis states that this doctrine was applied with very little consistency, and that it was questioned by Lord Nottingham.[3] The revisers termed it "a metaphysical distinction worthy only of the schoolmen with whom it originated."[4] In the foregoing section the doctrine itself was swept away, as the revisers deemed it to be still applicable to certain contingencies upon which remainders were limited.[5] The comment of the revisers on this section is significant of their whole reform when they say: "If a remainder does not restrain the alienation of the estate beyond the period allowed by law, but if it take effect at all, must happen within the limits prescribed, of what consequence is it or can it be, whether the contingency on which it is limited be near or remote? probable or improbable?"

Application of this Section to a Limitation of a Remainder to a Corporation to be Formed. The favorite instance of an illegal possibility upon a possibility at common law was a remainder to a corporation not in being at the time of the limitation.[6] Yet, in equity, a devise to a charitable corporation to be formed was good.[7] By virtue of this section of the Revised Statutes a devise to a corporation to be formed is now good by way of remainder,[8] as it was by way of executory devise before the Revised Statutes.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] Co. Litt. 25b; Id. 184a; 1 Rep. 156a; 10 id. 50b.

[3] Challis, 92, citing Duke of Norfolk's Case, 3 Ch. Cas. 1, at p. 29.

[4] Note to 1 R. S. 724, § 26; *infra*, Appendix II.

[5] Citing Fearne, Conting. Rem. 378; 2 Rep. 51b; Cruise, Dig, tit. 16, chap. 2, §§ 4–8; Jackson ex dem. Nicoll v. Brown, 13 Wend. 437, 442.

[6] Fearne, 250; 2 Co. 51b; 10 id. 31b; Challis, 91; 1 Prest. Abst. 128.

[7] Wilmot's Opinion, 16; Burrill v. Boardman, 43 N. Y. at p. 260.

[8] Booth v. Baptist Church, 126 N. Y. at p. 237.

[9] Inglis v. Sailors' Snug Harbor, 3 Pet. 99.

It is, however, to be observed that the cases make a distinction between a present devise to a corporation not yet formed and a devise to such a corporation to take effect *in futuro*.[1] A present devise is still said to be void,[2] whereas a devise to vest *in futuro* is valid.[3] But, as a devise to a corporation not yet formed ought never to be held a present or vested devise,[4] the distinction between a "future" and a "present" devise does not seem very important, now that there may be a legal limitation to a corporation to be formed, provided that the devise vest within the time prescribed by the rule against a perpetuity.[5]

[1] Ould v. Washington Hospital, 95 U. S. at p. 313; *supra* under § 32, The Real Prop. Law, pp. 169, 170.

[2] Campbell v. Rawdon, 18 N. Y. 412, 417; Lougheed v. The D. B. Church, 129 id. 211, 215; Leslie v. Marshall, 31 Barb. 560; *supra*, p. 170, under § 32, The Real Prop. Law.

[3] The Real Prop. Law, § 32, *supra*, p. 170.

[4] Shipman v. Rollins, 98 N. Y. 311, 328; Lougheed v. The D. B. Church, 129 id. 211, 216.

[5] People v. Simonson, 126 N. Y. at p. 307; Tilden v. Green, 130 id. at p. 47; Cruikshank v. Home for the Friendless, 113 id. 337, 350, 352.

§ 43. **Conditional limitations.**— A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation.

Formerly 1 Revised Statutes, 725, section 27:

§ 27. A remainder may be limited on a contingency, which, in case it should happen, will 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 a limitation would have by law.[1]

Comment on this Section. In the observations on a prior section of "The Real Property Law," the confused use of the term "conditional limitation" has been adverted to and it has been pointed out that the revisers by this section expressly confined the future employment of the term "conditional limitation" to such limitations of estates as serve at once to define the event or contingency abridging a precedent estate created at the same time, and to substitute a posterior estate for the estate thus abridged or determined,[2] thereby intending to avoid confusion in the future.[3]

The Old Law. At common law a remainder could not be limited on a contingency which would abridge the precedent estate. It must await the regular and orderly termination of such precedent estate.[4] Subsequently to the Statute of Uses and Wills, a future estate might be limited to take effect in derogation of a precedent estate created at the same time by means of a "shifting use," or by means of an "executory devise."[5]

Object of this Section 43. As the distinction between common-law remainders and shifting uses and executory devises has been annihilated by the Revised Statutes,[6] it was deemed expedient to abrogate expressly the old rule relating to estates in remainder and to define "conditional limitations" in such a way as to make it relevant to all limitations which take effect in derogation of some precedent estate created at the same time.[7] Thus a "conditional limitation" now involves all those limitations formerly

[1] Repealed, chap. 547, Laws of 1896.

[2] § 21, p. 97, *supra*.

[3] *Cf.* Challis, 199; Smith, Exec. Int. § 148; Gray, Rest. note a to § 22.

[4] See *supra*, Introductory Chapter, p. 23; and the Revisers' note to 1 R. S. 725, § 27; 1 Prest. Est. 91; Fearne, Conting. Rem. 270; Challis, 62; Cruise, Dig. tit. 16, chap. 2, §§ 16, 17; Smith, Exec. Int. § 149a.

[5] Revisers' note, Id.; *supra*; 1 Prest. Est. 92; Smith, Exec. Int. § 149a; *supra*, p. 122.

[6] *Supra*, pp. 98, 198.

[7] Crooke v. County of Kings, 97 N. Y. at p. 449; *cf.* Gray, Rest. § 22, note a; Smith, Exec. Int. § 148.

termed "shifting uses" and "shifting devises."[1] It is evident, *first*, that all such "conditional limitations" are, therefore, within the reason of the rule against a perpetuity quite as much as were their prototypes "shifting uses" and "devises."

Application of this Section 43. It is also obvious that this section has reference to the sections of the statute defining remainders,[2] and that the words "precedent estate" refer to an estate limited in the same instrument as the remainder, and not to an estate previously limited. Otherwise estates already subsisting might be limited over to a third person in violation of the principle, that no one but the grantor and his heirs may enforce conditions subsequent contained in grants in fee.[3] Formerly a possibility of reverter on such limitations was not devisable,[4] and it is not now otherwise under our Statute of Wills. It is apparent, therefore, that by "conditional limitations" the revisers in this section had in view only such limitations on condition as were theretofore usual in conveyances to uses, or in executory devises, and which were known sometimes as "conditions in deed" or in law, but more accurately as "conditional limitations."[5]

Contingencies. The contingencies upon which a conditional limitation may be based are then determined by the old law relating to shifting uses and devises, in so far as that law is not modified inferentially by particular provisions of the Revised Statutes.[6] Contingencies as the basis of limitations were not favored by the common law.[7] It was not until after the Statutes of Uses and Wills had made the doctrines of equity the basis of the law of legal estates that even contingent remainders flourished on a sound basis. Long subsequently the nature of contingencies, which might be the basis of legal limitations, was discussed by Mr. Fearne.[8] But as "conditional limitations," referred to in this section, were former shifting uses and devises, and not remainders,[9]

[1] It is doubtful whether it includes any former remainders limited on contingencies. *Cf.* Challis, 62, 63.

[2] The Real Prop. Law, §§ 27, 28.

[3] Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. 121, 131; Towle v. Remsen, 70 id. 303, 313; Countryman v. Deck, 13 Abb. N. C. 110, 112.

[4] Challis, 153; Prest. Shep. Touch. 120; 2 Black. Comm. 156; *supra*, p. 101; *infra*, p. 211.

[5] *Vide* p. 97, *supra*, under § 21, The Real Prop. Law; 2 Black. Comm. 155; Challis, 199; Gray, Rest. on Alien. note a to § 22; Smith Exec. Int. § 148.

[6] *E. g.*, 1 R. S. 724, § 26; The Real Prop. Law, § 42, which strictly applied to the old common law "remainders. See the observations on the section preceding.

[7] Williams, Real Prop. 263, *seq.*

[8] Chap. 2, Conting. Rem.

[9] *Cf.* Challis, 58.

it is to the old law of "uses" and "devises" that we still must look for allowable contingencies in limitations of future estates. These contingencies are discussed only negatively by writers, as they are as wide as the entire range of possibilities in human affairs. (I) The contingencies always arise by the terms of the limitation. (II) They must not be an illegal act or event. (III) They must not be too remote.[1] Generally in practice no executory or conditional limitations are of more frequent occurrence than those which are limited in defeasance of a prior estate created at the same time.

[1] A conditional limitation, as it creates a future estate in derogation of a precedent estate, must provide for vesting within the rule (§ 32, *supra*). It is otherwise with common-law conditions in conveyances, which do not provide for limitations over on breach of condition. *Supra*, pp. 100, 174.

§ 44. **When heirs of life tenant take as purchasers.**—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 is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body, of such tenant for life, shall take as purchasers, by virtue of the remainder so limited to them.

Formerly 1 Revised Statutes, 725, section 28:

§ 28. 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.[1]

Rule in Shelley's Case. This section abolished the rule of construction known as the rule in Shelley's case.[2] But as that rule is still applicable to devises and conveyances taking effect before January 1, 1830,[3] some knowledge of the rule and its limitation is indispensable to conveyancers. Shelley's case[4] is said to be more often talked of than read,[5] and yet it probably occupies the most important place in the common law relating to conveyances. Very briefly stated, the main issue was whether Nicholas Wolfe, the tenant of Richard Shelley had, under a demise, a better right to possession of the close than Henry Shelley (2d), for the case was one in ejectment. It appears that one Henry Shelley, the father of two sons, Henry Shelley (1st) and Richard Shelley, being tenant in tail, suffered a recovery under a covenant,[6] that the recovery should be to *the use of himself for life*, and after his decease to the use of certain persons for twenty-four years, and thereafter *to the use of the heirs male of the body of himself lawfully begotten, and of the heirs male of the body of such heirs male lawfully begotten, remainder over.* The recovery was adjudged. At the time of the recovery, Henry Shelley (1st), the elder son of Edward, was dead, leaving a daughter Mary, and a son afterwards Henry (2d) *en ventre sa mère.* Laying aside several nice practice questions under the old

[1] Repealed, chap. 547, Laws of 1896.

[2] See Revisers' note to this section, 1 R. S. 725, § 28; see 32 App. Div. 423.

[3] Edwards v. Bishop, 4 N. Y. 61; Brown v. Lyon, 6 id. 412, 420; Olmstead v. Olmstead, 4 id. 56; Spader v. Powers, 56 Hun, 153.

[4] This case is properly entitled, "Wolfe ex dem. R. Shelley v. Henry Shelley (2d)," 1 Rep. 93; Serj. Moore's Rep. 136; Dyer, 373b, pl. 15; Tudor's Lead. Cas. Real Prop. 589.

[5] Challis, 132.

[6] The covenant controls the assurance made or effected by a recovery.

law (for Edward Shelley, the old tenant in tail, had himself died after judgment, but before execution), the main question of law involved in the case was whether, as Edward Shelley had an estate of freehold, and by the same assurance an estate was limited to his heirs male, the heirs male took as purchasers. If so, his second surviving son, Richard Shelley, claimed the estate as a vested remainder against the unborn son of his elder brother.[1] On the other hand, counsel for Henry Shelley (2d) claimed that, as a proposition of law, whenever an ancestor took an estate of freehold, and by the same instrument an estate is limited by way of remainder (mediately or immediately) to his heirs in fee or in tail, the heirs take nothing as the words *are words of limitation and not of purchase.* The court so held, and Henry Shelley's (2d) right to enter was, therefore, held good, he being both heir general and heir male to his grandfather, Edward Shelley, who suffered the recovery.

Former Application of the Rule in Shelley's Case. The application of the rule at common law required that the ancestor take an estate of freehold,[2] that the subsequent limitation be to heirs general or special, and that both estates arise by the same instrument. But the interposition of one or more intermediate estates did not prevent the application of the rule.[3] The rule was also applied in the construction of equitable estates before the Revised Statutes,[4] but not where the ancestor had an equitable estate and the remainder was a legal estate.[5] The rule in Shelley's case was applied in the construction of limitations of estates in New York prior to the Revised Statutes.[6] The rule was, however, subject to certain restrictions: it was held not to apply where the remainder was limited to "sons" or children of the person taking the prece-

[1] At common law, independently of Stat. 10, 11 William III, chapter 16, a posthumous child could not take a remainder limited on the death of the father. See Revisers' note to 1 R. S. 725, § 31; Steadfast ex dem. Nicoll v. Nicoll, 3 Johns. Cas. 18. The Stat. 10, 11 William III was repealed in 1788 in New York, and until the Revised Statutes there was no similar re-enactment; *cf.* Willard, Real Est. & Conv. 171, and see under section 46, The Real Prop. Law, *infra.*

[2] Campbell v. Rawdon, 18 N. Y. 412, 420; Moore v. Littel, 41 id. 66, 71; Spader v. Powers, 56 Hun, 153.

[3] Challis, 133, 134, and cases there cited.

[4] *Vide infra* under article III of The Real Prop. Law.

[5] Striker v. Mott, 28 N. Y. 82, 91; Smith v. Scholtz, 68 id. 41, 61; Seaman v. Harvey, 16 Hun, 71.

[6] Seaman v. Harvey, 16 Hun, 71, 74; Brant v. Gelston, 2 Johns. Cas. 384; Schoonmaker v. Sheely, 3 Den. 485, affg. 3 Hill, 165, and cases *supra* in New York.

dent freehold,[1] or when limited to the "issue" of such person,[2] or to "*their male heirs that they now have or may hereafter have.*"[3]

Reasons for the Rule in Shelley's Case. The reasons assigned for the foundation of the rule in Shelley's case are various: (1) That it prevented heirs from taking as purchasers and thus preserved the rights of the feudal superiors over successions to estates; (2) that it prevented an abeyance of the seisin;[4] (3) the interest of heirs themselves, as otherwise the ancestor might bar their contingent remainder to their prejudice,[5] for if it was barred they could not claim the estate. But the real reason for the rule is conjectural.[6] Mr. Tudor, following Mr. Butler,[7] states that the rule itself was not even adjudicated in Shelley's case. But Fearne, Preston and Challis[8] state that this case is an express authority for the rule, and they are undoubtedly in the right. In the great case of Perrin v. Blake[9] Mr. Justice Blackstone discussed the reasons for the rule and its application to devises.

Abolition of the Rule in New York. The revisers of the statutes of New York, deeming the rule not to be well founded or of universal application,[10] determined to abolish it as artificial and unnecessary. Consequently, in the section above, they precisely reversed the rule in Shelley's case as a rule of future construction.[11] After January 1, 1830, in this State, a limitation of a life estate to one, remainder to his heirs (or to the "heirs of his body" or "issue"), gave the ancestor a life estate and the heirs presumptive a vested remainder.[12] The words were now become words of purchase; no longer words of limitation.

[1] Matter of Sanders, 4 Paige, 293, 296; Rogers v. Rogers, 3 Wend. 503; Chrystie v. Phyfe, 19 N. Y. 344.

[2] Cushney v. Henry, 4 Paige, 345; *cf.* Kingsland v. Rapelye, 3 Edw. Ch. 1; Smith, Exec. Int. 248, chap. XIII; Daniel v. Whartenby, 17 Wall. 639; Brown v. Lyon, 6 N. Y. 419.

[3] Conklin v. Conklin, 3 Sandf. Ch. 64.

[4] Revisers' note to 1 R. S. 725, § 28; Chrystie v. Mackaness, 19 N. Y. 344, 353.

[5] Fearne, Conting. Rem. 84, citing authorities.

[6] Challis, 135; Tudor, Lead. Cas. Real Prop. 599; Daniel v. Whartenby, 17 Wall. 639, 642.

[7] Tudor, Lead. Cas. Real Prop. 599; Butler note on Fearne, Conting. Rem. 28; Hargraves' Law Tracts, "Observations on the Rule."

[8] Fearne, Conting. Rem. 181, 182; 1 Prest. Est. 347; Challis, 132; Daniel v. Whartenby, 17 Wall. p. 642.

[9] Hargraves, Collect. Juridica and Law Tracts, No. X, 487.

[10] Revisers' note to this section. Lytle v. Beveridge, 58 N. Y. 592, 601.

[11] Brown v. Lyon, 6 N. Y. 412; Barker v. Cary, 11 id. 397, 401; Campbell v. Rawdon, 18 id. 412, 417; Moak v. Moak, 8 App. Div. 197.

[12] Moore v. Littel, 41 N. Y. 66. See this case discussed under § 30, The Real Prop. Law, *supra*, pp. 137, 141.

§ 45. **When remainder not limited on contingency defeating precedent estate, takes effect.**— When a remainder on an estate for life or for years is not 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.

Formerly 1 Revised Statutes, 725, section 29:

§ 29. When a remainder on an estate for life, or for 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.[1]

Comment on this Enactment. This section is one of a group (sections 43, 44 and 45 of this act) regulating limitations of the so-called or statutory "remainders." It is intended to intimate that a limitation which would formerly have been by the common law a remainder (unlike conditional limitations), continues to take effect on the regular expiration of the precedent estate; whereas conditional limitations take effect in derogation of the precedent estate. This is a mere rule of construction stated out of superabundant caution.

[1] Repealed, chap. 547, Laws of 1896.

§ 46. **Posthumous children.**— Where a future estate is limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parents; and a future estate, dependent on the contingency of the death of any person without heirs, or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent.

Formerly 1 Revised Statutes, 725, sections 30 and 31:

§ 30. Where a future estate shall be limited to heirs or issue, or children, posthumous children shall be entitled to take, in the same manner as if living at the death of their parent.

§ 31. A future estate depending on the contingency of the death of any person without heirs or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent.[1]

Common-law Rule and Reason for this Enactment. At common law, posthumous children could take by descent,[2] but not take under a devise or by a limitation by way of contingent remainder.[3] Although the decision in Reeve v. Long was reversed in the House of Lords contrary to the opinion of all the judges,[4] it led to the statute 10 and 11 William III, chapter 16, enabling posthumous children to take by way of remainder. The revisers of the statutes said that this statute, 10 and 11 William III, chapter 16, was not re-enacted in New York.[5] But this statement is in error; it was re-enacted in New York in 1774,[6] but expressly repealed in 1788.[7] From that time the common law was, by reason of the reversal of Reeve v. Long,[8] presumed to authorize posthumous children to take by way of contingent remainder in this State.[9] But the revisers said they did not think that point clear; a doubt often concurred in by eminent lawyers.[10] Hence, this provision,[11] and in order to prevent the vesting of a limitation to take effect in lieu

[1] Repealed, chap. 547, Laws of 1896.

[2] Watkins, Desc. 131; 1 Black. Comm. 130; Challis, 111.

[3] Reeve v. Long, 1 Salk. 227; 3 Lev. 408; 4 Mod. 282; Mason v. Jones, 2 Barb. 229, 251, 252.

[4] Steadfast ex dem. Nicoll v. Nicoll, 3 Johns. Cas. 18, 22; Marsellis v. Thalhimer, 2 Paige, 35; Howe v. Van Schaick, 3 Barb. Ch. 488, 508.

[5] Note to 1 R. S. 725, § 31.

[6] Laws of 1774, chap. 2.

[7] Steadfast ex dem. Nicoll v. Nicoll, 3 Johns. Cas. 18, 23; 2 J. & V. 354, § 1.

[8] *Supra.*

[9] Willard, Real Prop. & Conv. 171, citing Steadfast ex dem. Nicoll v. Nicoll.

[10] Challis, 159; *cf.* Marsellis v. Thalhimer, 2 Paige, at p. 40.

[11] 1 R. S. 725, § 30; The Real Prop. Law, § 46.

of or after such contingent remainder to a posthumous child, the other section[1] now consolidated.[2]

Interest on Legacy. Where a posthumous child is entitled to a legacy, with interest, the interest is to be calculated from the time of its birth, and not from the death of testator.[3]

Section 46 of this Act does not Apply to Descents. It will be observed that this section refers wholly to cases where the posthumous child takes by some limitation by way of remainder, and not to cases of descent elsewhere provided for in the Statutes.[4]

How far Posthumous Children Bound by Representation in Partition Suits. How far posthumous children are bound by representation in partition suits is discussed in several cases.[5] How far the interests of posthumous children are bound by judicial sales, is discussed in other cases.[6]

[1] 1 R. S. 725, § 31.

[2] The Real Prop. Law, § 46.

[3] Lawrence v. Lawrence, 1 Edw. 557.

[4] 1 R. S. 754, § 18; now § 292, The Real Prop. Law.

[5] Fox v. Fee, 24 App. Div. 314, and cases cited; Kent v. Church of St. Michael, 136 N. Y. 10; Matter of Baer, 147 id. 348; Townshend v. Frommer, 125 id. 446; Campbell v. Stokes, 142 id. 23; Mead v. Mitchell, 17 id. 210; Moore v. Littel, 41 id. 76.

[6] Monarque v. Monarque, 80 N. Y. 320; Ehling v. Dreyer, 149 id. 460.

§ 47. **When expectant estates are defeated.**— An expectant estate can not be defeated or barred by any transfer 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; but an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation.

Formerly 1 Revised Statutes, 725, section 32 and 33:

§ 32. 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 disseisin, forfeiture, surrender, merger or otherwise.[1]

§ 33. The last preceding section shall not be construed to prevent an expectant estate from being defeated in any manner, or by any act or means, which the party creating such estate shall, in the creation thereof, have provided for or authorized; nor shall an expectant estate thus liable to be defeated, be on that ground adjudged void in its creation.[2]

Reason of Section 47. The original revisers in their note gave a very clear and cogent statement of their reasons for the first part of this section.[3] At common law contingent remainders might be barred by the destruction of the particular estate before the remainder vested.[4] This destruction might occur by the forfeiture, surrender, or merger of the precedent estate by the particular tenant, pending the contingency.[5] The remainder might be so barred by fine, or recovery, or by a feoffment.[6] For this reason limitations of remainders, even after estates tail, were not regarded as within the rule against perpetuities.[7] After the Statutes of Uses and Wills were passed executory limitations of estates, taking effect contrary to the principles of the common law being freely allowed,[8] such contingent future estates as were effected by way of springing or shifting uses[9] or executory devises,[10] were held not to be able to be defeated by the act of the tenant of the precedent estate.[11] This being so, these executory limita-

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Note to 1 R. S. 725, § 32; Appendix II, *infra*.

[4] Fearne, Conting. Rem. 316, *seq.*

[5] Challis, 94.

[6] Fearne, Conting. Rem. 317; Lewis, Perp. 132, *seq.*

[7] See *supra* under § 32, pp. 38, 155.

[8] Van Horne v. Campbell, 100 N. Y. at p. 292, and pp. 29, 34, 35, *supra*.

[9] Lewis, Perp. 128.

[10] Lewis, Perp. 131.

[11] Lewis, Perp. 131, *seq.*

tions were finally subjected to the rule against perpetuities.[1] Had the decision been the other way, the rule against perpetuities would not have been formulated.[2] The revisers saw no reason why, at common law, contingent estates, created by an executory devise, could not be barred, and a contingent estate, by way of remainder, could be barred and destroyed by the particular tenant. As the revisers had expressly subjected all future estates to the rule against perpetuities,[3] they deemed it proper that no future estates, valid, within that rule, should be defeated by the act of the owner of some precedent estate.[4] Hence, the first part of the above consolidated sections. The various changes effected in the old rule by this and kindred sections are discussed in Moore v. Littel,[5] and other cases.[6]

Expectant Estate may be Defeated as Provided by Settlor. The second part[7] of the foregoing consolidated section had reference to a totally distinct principle. It is to be considered with reference to the pre-existing law. It is thought to justify a limitation of a mere possibility by way of a remainder after an estate in fee, although the power of defeating a possibility of enjoying the remainder in possession is expressly vested in the first taker.[8] Such a limitation of a fee would, before the Revised Statutes, have been invalid,[9] and it is assumed that where successive gifts or devises are totally repugnant they may, under the Revised Statutes, be still void.[10] But now even in the case of inconsistent devises, if the inconsistency enter into the limitation itself, it may be supported under this section,[11] or as a power.[12]

Life Tenant's Power of Disposition, or Spending, not Inconsistent with Remainder Over. The question how far a power of disposition of the *corpus* of an estate in the life tenant, is repugnant to a remainder over, is discussed in many cases, involving both realty and personalty.[13]

[1] Lewis, Perp. 130, *seq.*; Butler's note to Fearne, Conting. Rem. 565, 566.

[2] Lewis, Perp. 134, *et supra*, pp. 38, 154.

[3] The Real Prop. Law, § 32.

[4] Revisers' note to 1 R. S. 725, § 32; Griffin v. Shepard, 124 N. Y. at p. 76.

[5] 41 N. Y. at p. 78.

[6] Bennett v. Garlock, 10 Hun, 328, 341.

[7] *Supra*, p. 207, 1 R. S. 725, § 33.

[8] Greyston v. Clark, 41 Hun, 125, 130.

[9] Van Horne v. Campbell, 100 N. Y. 287; Jackson v. Robins, 16 Johns. 537.

[10] Crozier v. Bray, 120 N. Y. at p. 373; Campbell v. Beaumont, 91 id. 464; Coleman v. Beach, 97 id. at p. 553.

[11] Leggett v. Firth, 132 N. Y. 7, 11; Bell v. Warn, 4 Hun, 406.

[12] Matter of Cager, 111 N. Y. 343, 349; Leggett v. Firth, 132 id. 7, 11; Wells v. Seeley, 47 Hun, 109.

[13] *Cf.* Matter of Westcott, 16 N. Y. St. Repr. 286–289; Simpson v. French,

§ 48. **Effect on valid remainders of determination of precedent estate before contingency.**— A remainder valid in its creation shall not be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder was limited to take effect; should such contingency afterwards happen, the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period.

Formerly 1 Revised Statutes, 725, section 34:

§ 34. No remainder valid in its creation, shall be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; but should such contingency afterwards happen, the remainder shall take effect, in the same manner and to the same extent, as if the precedent estate had continued to the same period.[1]

Explanation of Section 48. As at common law the particular estate and the remainder must take effect so as to prevent any abeyance of the seisin, or, if they did not, the remainder failed,[2] the revisers, in this section, expressly repealed or abrogated an old rule of law. But as a freehold estate can be limited to begin *in futuro*,[3] this section was probably drawn more by way of precaution and to prevent litigation than because it was absolutely necessary to validate limitations of estates to take effect *in futuro*, even when by way of a *quondam* remainder.[4] But despite this section, no future estate can now take effect beyond the period stated in the section directed against a perpetuity.[5]

Estate Results, when. If the particular estate determine before the contingency on which the remainder is limited occur, then the estate results,[6] just as it did before the Revised Statutes in the case of a springing use or devise.[7]

6 Dem. 108; Greyston v. Clark, 41 Hun, 125; Bell v. Warn, 4 id. 406; Rose v. Hatch, 55 id. 457; S. C., 125 N. Y. 427; Cole v. Gourlay, 9 Hun, 453; Wells v. Seeley, 47 id. 109; Douglass v. Hazen, 8 App. Div. 25; Swarthout v. Renier, 143 N. Y. 499; Van Axte v. Fisher, 117 id. 401; Matter of Gardner, 140 id. 122; Schmeig v. Kochersberger, 18 Misc. Rep. 617; Simmons v. Taylor, 10 App. Div. 499; Matter of Haskell, 19 Misc. Rep. 206; Blauvelt v. Gallagher, 22 id. 565.

[1] Repealed, chap. 547, Laws of 1896.

[2] See Revisers' note to 1 R. S. 725, § 34; Campbell v. Rawdon, 18 N. Y. 412, 418.

[3] The Real Prop. Law, § 40, *supra*.

[4] *Cf.* Sheridan v. House, 4 Abb. Ct. App. Dec. 224.

[5] The Real Prop. Law, § 32.

[6] Sheridan v. House, 4 Abb. Ct. App. Dec. at p. 224.

[7] *Supra*, pp. 35, 126; *et infra*, p. 223.

§ 49. **Qualities of expectant estates.**—An expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession.

Formerly 1 Revised Statutes, 725, section 35:

§ 35. Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession.[1]

Remainders. At common law vested remainders were estates,[2] whereas contingent remainders were interests only.[3] Vested remainders were descendible at common law, and *a fortiori* are now so under this section.[4]

Contingent Interests. At common law and before the Revised Statutes expectant interests in land, if contingent, were not assignable before the contingency.[5] Contingent interests might be so remote as to constitute a mere possibility of inheritance.[6] "To prevent maintenance and the multiplying of contentions and suits, it was an established maxim of the common law that no possibility, right, title or any other thing that was not in possession or vested in right could be granted or assigned to strangers."[7]

Contingent Remainders and Possibilities. But contingent remainders might pass by estoppel, by deed or fine, or by common recovery, wherein the person entitled to the contingent estate comes in as vouchee, and they were assignable in equity.[8] So a possibility, coupled with an interest when the person was fixed and ascertained, was distinguished for purposes of release and devise from a wholly contingent interest or a bare possibility.[9] Contingent remainders and estates were, however, finally held devisable,[10] and also descendible,[11] except the existence of the devisee of the

[1] Repealed, chap. 547, Laws of 1896.

[2] Vanderheyden v. Crandall, 2 Den. at p. 20.

[3] *Infra*, under this section.

[4] Watk. Desc. 123; Savage v. Pike, 45 Barb. 464, 469; Ham v. Van Orden, 84 N. Y. 257, 270; Moore v. Littel, 41 id. 66; Doe v. Provoost, 4 Johns. 61.

[5] See *supra*, p. 145, under § 30, The Real Prop. Law.

[6] Edwards v. Varick, 5 Den. at p. 685.

[7] Miller v. Emans, 19 N. Y. at p. 390, citing note 212 to Co. Litt. 264, 266; Upington v. Corrigan, 151 N. Y. at p. 148.

[8] Cruise, Dig. tit. 16, chap. 8, §§ 20, 22; Fearne, Conting. Rem. 365, 366; Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. at p. 132; Stover v. Eyeleshimer, 4 Abb. Ct. App. Dec. 309.

[9] 1 Prest. Est. 76; Moore v. Littel, 41 N. Y. at p. 83; Hennessy v. Patterson, 85 id. 91, 99; Pond v. Bergh, 10 Paige, 140.

[10] Cruise, Dig. tit. 16, chap. 8, § 23; Fearne, Conting. Rem. 367, note g. See a naive note of reporter on this point, 41 N. Y. at p. 228.

[11] Watk. Desc. 4; Cruise, Dig. tit. 16, chap. 8, §§ 14, 15, 16; Fearne, Conting. Rem. 364; Kenyon v. See,

contingent interest at some particular time might, by implication, enter and make a part of the contingency itself upon which such interest was intended to take effect.[1]

Reversions. Reversions expectant on a freehold estate are held alienable and consequently are devisable and descendible.[2]

Possibilities and Contingent Interests under the Revised Statutes. How far the revisers intended, by this section, to alter the rules of the common law in respect of possibilities and contingent interests will now be considered. It will be observed that the section relates wholly to estates. At common law, a contingent remainder was an interest, not an estate.[3] Yet, under the Revised Statutes, a contingent remainder is always regarded as an "expectant estate" for the purposes of the application of this section,[4] although formerly a contingent remainder did not confer seisin for the purposes of descent[5] in all cases.[6]

Possibility of Reverter since the Revised Statutes. A *possibility of reverter* is not, however, an estate under this section. Upon every determinable fee or grant subject to a condition subsequent there is annexed a possibility of reverter. At common law, such a possibility of reverter was descendible, but not devisable or assignable.[7] Since the Revised Statutes such a possibility of reverter is held not to be an estate in lands, under the section of the act now under consideration,[8] and not to be assignable,[9] or devis-

94 N. Y. 563, 568; Hennessy v. Patterson, 85 id. 91, 99.

[1] Mr. Butler's note to Fearne, Conting. Rem. 364, citing English authorities; Edwards v. Varick, 5 Den. 685, 686; *cf.* Byrnes v. Stilwell, 103 N. Y. at p. 461, as to future estates vested but liable to be divested; Flanagan v. Staples, 28 App. Div. 319.

[2] Vanderheyden v. Crandall, 2 Den. 9, 23; Fowler v. Griffin, 3 Sandf. 385.

[3] 2 Prest. Abst. 107; Challis, 58; Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. at p. 135.

[4] Lawrence v. Bayard, 7 Paige, 70, 76; Pickert v. Windecker, 73 Hun, 476; Hennessy v. Patterson, 85 N. Y. 91, 99; Ham v. Van Orden, 84 id. 257, 270; Beardsley v. Hotchkiss, 96 id. 201, 213; Crooke v. County of Kings, 97 id. 421, 449; Dodge v. Stevens, 105 id. 585, 588; Griffin v. Shepard, 124 id. 70, 76; Savage v. Pike, 45 Barb. 464; Freeborn v. Wagner, 2 Abb. Ct. App. Dec. 175, 182; *cf.* Vanderheyden v. Crandall, 2 Den. at p. 20, as to vested remainder.

[5] Bing. Desc. 221.

[6] Fearne, Conting. Rem. 364, note e.

[7] Challis, 58, 63, 153; Prest. Shep. Touch. 120; *sed. cf.* Judge Hare's note to Dumpor's Case, 1 Smith, L. C.

[8] Upington v. Corrigan, 151 N. Y. 143; Nicoll v. N. Y. & Erie R. R. Co., 12 id. 121, 123; Vail v. L. I. R. R. Co., 106 id. 283; *cf.* Newkirk v. Newkirk, 2 Caines Cas. 345, as to the old law, *et vide* p. 455, *infra*.

[9] Towle v. Remsen, 70 N. Y. at p. 312; Upington v. Corrigan, 151 id. at p. 152; *cf.* Code Civ. Proc. § 1910, passed after Nicoll v. N. Y. & Erie.

able[1] although it may be released[2] or merge in the inheritance. Conditions subsequent (leaving a possibility of reverter) may be reserved only for the benefit of the grantor and his heirs, and no others may take the benefit of a breach.[3] Upon the death of the grantor before entry, the possibility of reverter devolves upon the heirs at law of grantor by force of representation, and not by descent.[4]

Descent of Possibilities. Possibilities are said by Watkins, in his justly-celebrated Treatise on Descent,[5] to be descendible to the heirs of the persons entitled to them, in the same manner as remainders or executory devises. If this statement be accurate still, a possibility of reverter, being a right of entry[6] *sub conditione*, follows our "Statute of Descents."[7] But a distinction is made in a late case between "representation" and "descent."[8] It is however, to be noticed in this connection that a grant in fee on condition subsequent that the grantee render rent certain has been held not to leave a "possibility of reverter" in grantor and his heirs.[9] This class of conditions subsequent do not depend on a "possibility of reverter," but the rents reserved stand on a statutory basis, and are, in this State, wholly independent of the common law or of tenure.[10]

Determinable fee. A determinable fee descends.[11]

R. R. Co. was decided. Observe that this point of assignability is *obiter* in Upington v. Corrigan.

[1] Countryman v. Deck, 13 Abb. N. C. 110, 112; Van Rensselaer v. Ball, 19 N. Y. 100, 103; Upington v. Corrigan, 151 id. 143; *cf.* Pond v. Bergh, 10 Paige, 140.

[2] 4 Kent Comm. 9; Church in Brattle Square v. Grant, 3 Gray (Mass.), 142.

[3] Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. at p. 131; Towle v. Remsen, 70 id. at p. 312; Hoyt v. Dillon, 19 Barb. 644, 651; Countryman v. Deck, 13 Abb. N. C. 143.

[4] Upington v. Corrigan, 151 N. Y. 143; *cf.* Watk. Desc. 5, and see note, 20 Abb. N. C. 61, 62, for difference between representation and descent.

[5] P. 5; p. 14, London ed. of 1837.

[6] 1 R. S. 754, § 27; The Real Prop. Law, art. IX, § 280, *infra*.

[7] *Cf.* Stilwell v. Melrose, 15 Hun, 387.

[8] Upington v. Corrigan, 151 N. Y. 143; *cf.* Watk. Desc. 5, and note to 20 Abb. N. C. 61.

[9] Van Rensselaer v. Read, 26 N. Y. at p. 563.

[10] Van Rensselaer v. Ball, 19 N. Y. at p. 105, and see remarks and citations under The Real Prop. Law, § 21, at pp. 104–111, *supra*.

[11] Stilwell v. Melrose, 15 Hun, 378, 380.

§ 50. **Disposition of rents and profits.**— A disposition of the rents and profits of real property 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 this article, for future estates in real property.

Formerly 1 Revised Statutes, 725, section 36:

§ 36. Dispositions of the rents and profits of lands, 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 this Article in relation to future estates in lands.[1]

Comment on Section 50. There were certain well-established principles regulating the disposition of rents and profits of lands at the common law. The foregoing section was intended to bring all future limitations of the rents and profits of lands into harmony with future estates in the lands themselves.[2]

Rent an Incorporeal Hereditament. Rent is generally classified as an incorporeal hereditament,[3] or an intangible right in respect of land, which right passes to the heir on intestate successions.[4] Even this plain definition of law has found its opponents in this country, who doubted whether any rent is here an "incorporeal hereditament."[5] But nothing else is now better established than that a rent is an incorporeal hereditament.[6]

Rent a "Tenement." So a rent was a tenement also in the sense of being a subject of common-law tenure.[7] Burton classed rents with incorporeal tenements,[8] and so Challis.[9]

Classification of Rents. Rents were the subject of an accurate classification: (I) Rents incident to tenure. (II) Rent which is not incident to tenure, but which is itself a tenement and capable of being the subject of estates limited by analogy to estates in lands. (III) Rent incident to reversions.

No Rents Incident to Tenure now. Since the abolition of quit rents, there are no rents in this State incident to tenure. The last

[1] Repealed, chap. 547, Laws of 1896.

[2] Per V. C. McCoun, in Lorillard v. Coster, 5 Paige, at pp. 195, 223, 224; S. C., 14 Wend. 318.

[3] 2 Black. Comm. 41; Van Rensselaer v. Hayes, 19 N. Y. 68; *infra*, under § 280, The Real Prop. Law.

[4] Co. Litt. 6a; *infra*, under § 280, The Real Prop. Law.

[5] Bing. Desc. 23; *sed. vide* Van Rensselaer v. Hayes, 19 N. Y. 68.

[6] Van Rensselaer v. Read, 26 N. Y. at p. 564; Van Rensselaer v. Hayes, 19 id. 68.

[7] Challis, 37.

[8] Burton, Compend. of Real Prop. chap. VI.

[9] Introductory Remarks, at pp. 2, 33.

class, or rent incident to reversions, needs no explanation as such rents follow estates in lands.[1]

Rents not Incident to Tenure. The second class of rents only need be alluded to. They include the older perpetual rents of the law of New York.[2] Rents were at common law divided into[3] rents service, rents charge, and rents seck.[4] After the Statute of *Quia Emptores* there could be no rent service reserved by a common person on a conveyance in fee.[5] But a rent charge might be reserved to him and his heirs on a grant or conveyance in fee, and this gave them a "fee simple" in the rent.[6] Rent charges in fee simple were formerly very common in New York,[7] and also in Liverpool,[8] and Manchester, England. Such a rent could be entailed under the Statute *De Donis*.[9] If a grantee of a rent in fee simple died without heirs it did not escheat, but the owner of the land held the land discharged of the rent.[10]

Freeholds in a Rent in esse. At common law no limitation of an estate of freehold in a rent *in esse* could be limited so as to exist at intervals; it was otherwise at the creation of the rent.[11] Nor could an estate of freehold in a rent *in esse* be limited to commence *in futuro*.[12] A rent charge was subject to dower and curtesy,[13] and it was descendible to the heirs of the party to whom it was reserved.[14]

Perpetual Rents in New York. The nature of perpetual rents issuing out of estates in fee, and the constitutional limitation on demises of agricultural lands have been already considered.[15]

Explanation of Section 50. If we assume that a rent *in esse* is now the subject of limitation, the estates created therein, their duration, quantity and quality, are made precisely analogous by the

[1] *Supra*, pp. 91, 92.

[2] *Supra*, pp. 88, 103.

[3] Litt. § 213.

[4] *Supra*, under § 20, at p. 89, The Real Prop. Law.

[5] 18 Edw. I, chap. 1; Tudor, Lead. Cas. Real Prop. 297.

[6] Cruise, Dig. tit. 28, chap. 2.

[7] *Supra*, pp. 104, 107.

[8] Tudor, Lead. Cas. Real Prop. 297; Watk. Desc. (Ed. 1837) 247.

[9] Challis, 38; Cruise, Dig. tit. 28, chap. 2, § 2.

[10] Challis, 33; Tudor, Lead. Cas. Real Prop. 333; *cf.* Atty.-Gen. v. Sands, Hardr. 488; S. C., Tudor, Lead. Cas. Real Prop. 760.

[11] Challis, 88, 89.

[12] Challis, 87, 88; 1 Prest. Est. 217; so as to rent *de novo*, Lewis, Perp. not 600.

[13] Co. Litt. 32a.

[14] Van Rensselaer v. Read, 26 N. Y. at p. 564; Watk. Desc. 247; *supra*, at pp. 103, 104, under § 21, The Real Prop. Law.

[15] *Supra*, under § 21, The Real Prop. Law.

above section to future estates in lands. There may, therefore, be a fee simple estate in the rent; two successive life estates to persons in being with remainder over, and an estate *pur autre vie* with remainder over in fee[1] after the death of a *cestui que vie;* in short, such limitations of estates in the rent as there may be in land under this article of "The Real Property Law."[2]

[1] The Real Prop. Law, §§ 34, 35, [2] Art. II. *supra.*

§ 51. **Accumulations.**— All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real property as follows:

1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority.

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority.

3. If in either case such direction be for a longer term than during the minority of the beneficiaries it shall be void only as to the time beyond such minority.

Formerly 1 Revised Statutes, 726, sections 37 and 38:

§ 37. An accumulation of rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed, sufficient to pass real estate, as follows:

1. If such accumulation be directed to commence on the creation of the estate, out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority:

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this Article permitted for the vesting of future estates and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.[1]

§ 38. If, in either of the cases mentioned in the last section, the direction for such accumulation shall be for a longer term than during the minority of the persons intended to be benefited thereby, it shall be void as respects the time beyond such minority. And all directions for the accumulations of the rents and profits of real estate, except such as are herein allowed, shall be void.[2]

Rule by the Common Law. At common law the accumulation of the income of property might be directed for the same period as the suspension of its alienation, or vesting, viz., for a life or

[1] Repealed, chap. 547, Laws of 1896. [2] Repealed, chap. 547, Laws of 1896.

lives in being and twenty-one years after; the rule against perpetuities being then the only rule directed against accumulations.[1] This being so, the will of Mr. Thelluson, taking effect in England in the year 1797, bequeathed a large estate to trustees to accumulate the rents and profits during the lives of his three sons, and the lives of their sons then in being, and of such issue of the latter as might be living at testator's decease. At the time of Mr. Thelluson's death these several lives, during which accumulation was directed, numbered nine, which an actuary measured as equivalent to seventy years.[2] This attempt to tie up an estate for the sole purpose of accumulation excited condemnation, although the period might have been made still longer by the addition of the term of twenty-one years in gross. The will, being adjudged valid,[3] led to the act 39 and 40 George III, chapter 98 (sometimes called "Lord Loughborough's Act," but more often the "Thelluson Act"),[4] restricting the period of accumulation to: (1) During the life of the grantor and twenty-one years thereafter, where the direction for the accumulation is by deed, and where it is by will, twenty-one years from the death of the testator; or (2) during the minority of any person or persons who shall be living or conceived at the death of the grantor or testator directing the accumulation; or (3) during the minority of any person or persons who, under the deed or will directing the accumulation, would, if then of full age, be entitled to such rents and profits.

The Revised Statutes. The revisers intended, by the original sections above,[5] to confine the powers of accumulation to the third or last period just mentioned.[6]

Existing Rules Governing Accumulations. In every case of accumulation it must be now directed to be made for the sole benefit of a minor or minors, during a period measured by the respective minority of such minor or minors; and at the expiration of each minority the accumulation must be made payable to such *quondam* minor absolutely, without defeasance; not qualifiedly, such as for

[1] Tudor, Lead. Cas. Real Prop. 505; note to Griffeths v. Vere, 9 Ves. 127; Cadell v. Palmer, 1 Cl. & Fin. 372; Lewis, Perp. 592; Pray v. Hegeman, 92 N. Y. 508, 514.

[2] Mr. Hargrave's Treatise on the Thelluson act, at p. 5.

[3] Thelluson v. Woodford, 4 Ves. 227; 11 id. 112.

[4] Vail v. Vail, 4 Paige, 317, 323.

[5] 1 R. S. 726, §§ 37, 38.

[6] Revisers' note to 1 R. S. 725, §§ 36, 37, 38; Vail v. Vail, 4 Paige, 317; S. C., 7 Barb. 226; Hawley v. James, 5 Paige, 318, 481; S. C., 16 Wend. 61; Lovett v. Gillender, 35 N. Y. 617, 620.

his life, remainder over or in trust, etc.;[1] but *it seems* that a testator has power to make a contingent disposition of the accumulation in the event that the minor die before attaining majority, and that such contingent beneficiary may be adult.[2]

Accumulations may not be During Life of an Adult. Yet accumulation may not be directed to be made during the life of adults, even though such accumulation may accrue for the benefit of minors as residuary legatees or devisees;[3] nor, may it be directed to be made for the benefit of adults and minors conjointly, even though confined to the period of the actual minority of a beneficiary.[4]

Accumulations to be for Actual Minority Only. The period of accumulation can only be an actual minority of the person beneficially entitled[5] and not an arbitrary period of three[6] or ten years[7] or a life of a person in being.[8]

Accumulation for the Purpose of Paying off Mortgages. Accumulations cannot be directed to be made only for the purpose of paying off mortgages,[9] or other indebtedness.[10]

Accidental Accumulations. But it is no violation of this section of the statute for a testator, after rendering his estate inalienable for two lives, to give pecuniary legacies payable at a future time, in such manner as to show that he intended them to be paid

[1] Boynton v. Hoyt, 1 Den. 53; Harris v. Clark, 7 N. Y. 242; Matter of Hayden, 77 Hun, 219; Tweddle v. N. Y. Life Ins. & Trust Co., 89 id. 602, 606; Gilman v. Healy, 1 Dem. 404; Pray v. Hegeman, 92 N. Y. 508; Barbour v. De Forest, 95 id. 13; Schermerhorn v. Cotting, 131 id. 48, 61; Mason v. Mason's Exrs., 2 Sandf. Ch. 432, 475.

[2] Smith v. Campbell, 146 N. Y. 116; *cf.* Gilman v. Healy, 1 Dem. 404; Pray v. Hegeman, 92 N.. Y. 508, 519.

[3] Lovett v. Gillender, 35 N. Y. 617, 620; Kilpatrick v. Johnson, 15 id. 322; Cook v. Lowry, 95 id. 103; Cochrane v. Schell, 140 id. 516; Matter of Rogers, 22 App. Div. 428, 431.

[4] Hawley v. James, 16 Wend. 61; Boynton v. Hoyt, 1 Den. 53; Manice v. Manice, 43 N. Y. 303; Pray v. Hegeman, 92 id. 508; Barbour v. De Forest, 95 id. 1, 16; *cf.* Smith v. Campbell, 146 id. 116; Gilman v. Healy, 1 Dem. 404.

[5] Harris v. Clark, 7 N. Y. 242; Pray v. Hegeman, 92 id. at p. 515.

[6] Morgan v. Masterson, 4 Sandf. 442.

[7] Converse v. Kellog, 7 Barb. 590.

[8] Lovett v. Kingsland, 44 Barb. 560.

[9] Bean v. Hockman, 31 Barb. 378; Matter of Rogers, 22 App. Div. 428, 431; Killam v. Allen, 52 Barb. 605; Cowen v. Rinaldo, 82 Hun, 479, 484; Re Fisher's Estate, 4 Misc. Rep. 46; Garvey v. McDevitt, 72 N. Y. 556, 562; Goelet v. Wolff, 113 id. 405, 414; *cf.* Becker v. Becker, 13 App. Div. 342, citing Parks v. Parks, 9 Paige, 107, 122; Hascall v. King, 19 N. Y. Law Jour. 355, to be reported in 28 App. Div.; *vide infra*, § 76, The Real Prop. Law.

[10] Matter of Hoyt, 71 Hun, 13.

exclusively from income as it should accrue, leaving the *corpus* of the estate intact.[1] The statute is not violated by an accumulation which is accidental and not the result of direction, *e. g.*, if it arises *ex necessitate rei*, as from the surplus income of a fund held for a person *incapax*.[2]

Accumulation Implied from Character of Limitation. In the absence of any express direction, a direction for the accumulation of surplus income may be implied from the character of the limitation of the *corpus* of the estate, and it may then be adjudged void;[3] notwithstanding a trust is not ordinarily implied in order that it may be then decreed to be void;[4] the general rule of construction of trust limitations being that an unlawful intendment is never presumed where a double construction is possible.[5]

When Accumulations May Begin. This section of the statute expressly permits accumulation to be directed to begin at any time within the period permitted for the vesting of future estates, and to continue thereafter for the actual minority of a person *in esse*.[6] But the person for whose benefit the accumulation is directed must be *in esse* at the time when such accumulation is directed to begin, or else the direction is void.[7] Yet accumulation may be directed for the benefit of a class of infants, some of whom are *in esse* and others not, when accumulation is directed to begin,[8] provided the period of accumulation does not violate this section.[9]

Unlawful Directions for Accumulation, how far Void. An unlawful direction for accumulation alone is made void by the statute, and if the devise or conveyance of the original estate can be separated therefrom, it will stand.[10] So, where accumulation is directed to

[1] Phelps' Exr. v. Pond, 23 N. Y. 60.

[2] Hendricks v. Hendricks, 3 App. Div. 604; Craig v. Craig, 3 Barb. Ch. 76; Livingston v. Tucker, 107 N. Y. 549; *cf.* Cochrane v. Schell, 140 id. 516.

[3] Craig v. Craig, 3 Barb. Ch. 76, 93; Cochrane v. Schell, 140 N. Y. 516; Matter of Fritts, 19 Misc. Rep. 402; *cf.* In re Nesmith, 140 N. Y. 609; Vail v. Vail, 7 Barb. 226; Converse v. Kellog, Id. 590; Hawley v. James, 5 Paige, 318, 481; Hendricks v. Hendricks, 3 App. Div. 604.

[4] Smith v. Edwards, 88 N. Y. at p. 102.

[5] Phelps v. Phelps, 28 Barb. 121, 149; S. C., 23 N. Y. 69; Roe v. Vingut, 117 id. 204, 218; Titus v. Weeks, 37 Barb. 136.

[6] Manice v. Manice, 43 N. Y. 303, 375; Mason v. Mason's Exrs., 2 Sandf. Ch. 432, 474; Mason v. Jones, 2 Barb. 229; affd., 3 N. Y. 375; Gott v. Cook, 7 Paige, 521.

[7] Kilpatrick v. Johnson, 15 N. Y. 322; Manice v. Manice, 43 N. Y. at p. 376.

[8] Mason v. Mason's Exrs., 2 Sandf. Ch. at pp. 474, 475; Mason v. Jones, 2 Barb. 229; affd., 3 N. Y. 375.

[9] Gott v. Cook, 7 Paige, 521; Haxtun v. Corse, 2 Barb. Ch. 506, 518.

[10] Lang v. Ropke, 5 Sandf. 363, 371; Hawley v. James, 5 Paige, at p. 481;

be made for the benefit of minors only, but also to continue during their majority, the direction is not wholly void, but void only as to the period in excess of actual minority.[1]

Kilpatrick v. Johnson, 15 N. Y. 322; De Peyster v. Clendening, 8 Paige, 305; Coster v. Lorillard, 14 Wend. 265; Manice v. Manice, 43 N. Y. 303, 383, 384; Cochrane v. Schell, 140 id. 516, 536.

[1] § 51, *supra*; Kilpatrick v. Johnson, 15 N. Y. 322, 325; Gilman v. Reddington, 24 id. 1; Hull v. Hull, Id. 647.

§ 52. **Anticipation of directed accumulation.**—Where such rents and profits are directed to be accumulated for the benefit of a minor entitled to the expectant estate, and such minor is destitute of other sufficient means of support and education, the supreme court, at a special term, or, if such accumulation has been directed by will, the surrogate's court of the county in which such will has been admitted to probate, may, on the application of his general or testamentary guardian, direct a suitable sum out of such rents and profits to be applied to his maintenance or education.

Formerly 1 Revised Statutes, 726, section 39:

§ 39. Where such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and such infants shall be destitute of other sufficient means of support and education, the chancellor, upon the application of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education.

In 1891 section 39 was amended by "An act to amend section thirty-nine of article first of title two of chapter one of part two of the Revised Statutes, relating to infants' estates." (Chap. 172, Laws of 1891.) Approved April 13, 1891, so as to read as follows:

§ 39. Where such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and such infants shall be destitute of other sufficient means of support and education, the supreme court at special term, and, where such accumulations have been directed by a last will and testament, the surrogate's court of any county in which such last will and testament has been admitted to probate, upon the application of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education.[1]

Comment on this Section. Under this section the allowance may be to the father[2] or mother,[3] and for past as well as for future support.[4] Where the accumulation is directed to be made for the benefit of a class with the right of the survivors to take the whole, the court may allow maintenance out of this fund, although, as a rule, maintenance cannot be allowed to minors out of the accumulations of a fund which on a certain contingency is to go elsewhere than to the person maintained.[5] If the trust for accumulation is void under the statute, and indivisible, the *corpus* of the

[1] As amended, repealed, chap. 547, Laws of 1896.

[2] Matter of Burke, 4 Sandf. Ch. 617.

[3] Gladding v. Follett, 2 Dem. 58, 68.

[4] Matter of Kane, 2 Barb. Ch. 375; Smith v. Gertner, 40 How. Pr. 185; Matter of Bostwick, 4 Johns. Ch. 100.

[5] Matter of Davidson, 6 Paige, 316.

property goes as undevised, as in other void trusts,[1] or into the residuary.[2] But if the estate is limited in trust generally, and only the direction for accumulation is void, the income alone may go as undevised[3] or as provided for in the fifty-third section[4] of this article.

Disposition of Accumulations when Infant Dies before Distribution. In the event of the demise of an infant entitled to accumulations, but before distribution thereof, such accumulations, if vested in interest, pass to the personal representatives of the deceased, unless they are otherwise limited, devised or bequeathed over;[5] and, it seems that the accumulations of personal estate may be limited over to adults in the contingency of the infant's death before majority,[6] and so the accumulations from real property.[7]

Surrogates May Order. Under this section, as amended in 1891, the surrogate has now jurisdiction to make the order, and it rests in discretion.[8]

Direction for Accumulation Void but Trust Valid. If the direction for accumulation is void, but the limitation in trust is otherwise valid, the accumulation goes to the persons entitled to the next eventual estate under the next section.[9]

[1] Edson v. Bartow, 10 App. Div. 104, 117; Manice v. Manice, 43 N. Y. 303, 383.

[2] Cruikshank v. Home for the Friendless, 113 N. Y. 337; Matter of Allen, 151 id. 243; *cf.* Kerr v. Dougherty, 79 id. 327, 346.

[3] Haxtun v. Corse, 2 Barb. Ch. 506, 518; Vail v. Vail, 4 Paige, 317, 328; Manice v. Manice, 43 N. Y. 303, 383; Cochrane v. Schell, 140 id. 516.

[4] *Vide infra*, under next section.

[5] Smith v. Parsons, 146 N. Y. 116.

[6] Smith v. Parsons, 146 N. Y. 116; *cf.* Pray v. Hegeman, 92 id. 508, 519; Gilman v. Healy, 1 Dem. 404.

[7] Pray v. Hegeman, 92 N. Y. at p. 513.

[8] Matter of Lehman, 2 App. Div. 531.

[9] § 53, *infra*; Gilman v. Healy, 1 Dem. 404; Gott v. Cook, 7 Paige, 542; Haxtun v. Corse, 2 Barb. Ch. 506, 518.

§ 53. **Undisposed profits.**— When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.

Formerly 1 Revised Statutes, 726, section 40:

§ 40. When in consequence of a valid limitation of an expectant estate, there shall be a suspense of the power of alienation or of the ownership, during the continuance of which, the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.[1]

Common-law Rule. Before this section of the Revised Statutes any portion of real estate undevised went to the heirs[2] or resulted to the grantor or settlor.[3]

Rule Now, Since the Revised Statutes. The Revised Statutes altered the common-law rule only where a limitation of an estate suspended the power of alienation or of the ownership, and, during the continuance of such suspension, there was no specific devise of the rents and profits.[4] There must be a valid, not an invalid, limitation of an expectant estate, before this section can apply to undisposed of income and profits,[5] and there must be also a failure or omission to dispose of the rents and profits of the estate, in whole or in part, in the interim before the expectant estate vests in interest or possession. Then this section applies, and undisposed of rents and profits go to the person entitled to the next eventual estate.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] See Lalor, Law of Real Prop. of the State of New York, 112, and cases cited; Vail v. Vail, 4 Paige, 328; Cruise, Dig. tit. 38, chap. 18, § 1; 2 Black. Comm. 173.

[3] *Supra*, pp. 35, 126; Cornish, Uses, 68 *et seq.*

[4] Gott v. Cook, 7 Paige, 542; Craig v. Craig, 3 Barb. Ch. 76, 93.

[5] Williams v. Williams, 8 N. Y. 538; Gilman v. Reddington, 24 id. 9, 19; Schettler v. Smith, 41 id. 328, 340; Manice v. Manice, 43 id. 303, 384; Pray v. Hegeman, 92 id. 508, 519; Cook v. Lowry, 95 id. 103.

[6] Delafield v. Shipman, 103 N. Y. 463, 469; Schermerhorn v. Cotting, 131 id. 48, 61; *cf.* Tompkins v. Verplanck, 10 App. Div. 572, 579.

§ 54. **When expectant estates are deemed created.**—Where an expectant estate is created by grant, the delivery of the grant, and, where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate.

Formerly 1 Revised Statutes, 726, section 41:

§ 41. 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.[1]

Comment on this Section. This section is closely related to section 32,[2] and to section 209 of this act. At common law a deed did not take effect from delivery, but from livery of seisin.[3] Yet a feoffment without livery was not precisely void, but it created an estate at will only, determinable by the feoffor.[4] Deeds of bargain and sale, without consideration, were ordinarily void as bargains and sales,[5] yet might be good under certain circumstances as covenants to stand seised.[6] Now the delivery of the deed, or death of testator, alone controls under this section the creation of the future estate limited by deed, or devise.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, p. 151; Everitt v. Everitt, 29 N. Y. 39, 71.

[3] Challis, 83.

[4] Co. Litt. 56b; 1 Prest. Shep. Touch. tit. 203; Smith, Compend. Real & Pers. Prop. 517; *sed. cf.* Gilbert, Uses & Trusts, 251.

[5] Schott v. Burton, 13 Barb. 173; Corwin v. Corwin, 6 N. Y. 342; Wood v. Chapin, 13 id. 509, 517.

[6] Sir E. Sugden, note to p. 251 of Gilbert, Uses & Trusts.

[7] Lang v. Ropke, 5 Sandf. 363, 369; Sherman v. Sherman, 3 Barb. 385, 387; Eels v. Lynch, 8 Bosw. 465, 475.

§ 55. **Estates in severalty, joint tenancy and in common.** — Estates in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy and in common; the nature and properties of which respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter.

Formerly 1 Revised Statutes, 726, section 43:

§ 43. Estates, in respect to the number and connexion of their owners, are divided into estates in severalty, in joint tenancy and in common; the nature and properties of which respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this Chapter.[1]

Estates in Possession as at Common Law. In these pages, and particularly under section 20 of this article, the term "estate" was considered at some length,[2] and it was intimated that the common law, and not the statute law, still regulated in New York the quantity and the quality of estates in possession.[3] That proposition is confirmed by this section.

Future Estates. The common law, regulating the limitation of future estates or estates not in possession, has been extensively remodeled by the original of this article,[4] but the incidents of estates in possession remain as before.

Estates in Severalty, Joint Tenancy and in Common. What is an estate in severalty or in joint tenancy or in common is defined by the common law. These are essentially terms of the old law. Blackstone states: "He that holds lands or tenements in severalty, is he that holds in his own right only."[5] Joint tenants hold not in severalty but conjointly, and the survivor takes all unless the estate, during the joint dominion, has been previously severed or partitioned.[6] Tenants in common hold severally but by unity of possession, because none knows his own severalty. The *jus accrescendi*, or right of survivorship, is not a legal characteristic of tenancy in common.[7] Tenancy in common was, for all practical purposes at common law, a sole ownership of an undivided share, and one tenant in common might convey his share to another,[8] but not release to another.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, pp. 81–85.

[3] *Supra*, pp. 43, 80.

[4] Art. I, tit. II, chap. 1, part II, R. S.

[5] 2 Black. Comm. 179.

[6] Partition, after statute of Hen. VIII, could be compelled. 2 Black. Comm. 179–187; Challis, 294; Miller v. Emans, 19 N. Y. 384, 388.

[7] 2 Black. Comm. 191.

[8] Challis, 297.

[9] Miller v. Emans, 19 N. Y. 384, 388, citing Shep. Touch. 326, 327.

§ 56. **When estate in common; when in joint tenancy.**—Every 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; but every estate vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereafter granted or devised.

Formerly 1 Revised Statutes, 727, section 44:

§ 44. Every 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; but every estate, vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested, as to estates hereafter to be granted or devised.[1]

History of the Enactment Embodied in Section 56. At common law if lands were limited to several persons by name they held as joint tenants[2] unless it was expressly declared that they should hold as tenants in common.[3] But by conveyance of a freehold estate to husband and wife *simpliciter* they took as tenants by entireties.[4] In the year 1782 the Legislature modified this rule in New York so as to provide that unless a grant or devise was expressly declared to be in joint tenancy it should be taken to be in tenancy in common.[5] In 1786 another statute excepted conveyances and devises to executors and trustees from the operation of this new rule. The Revised Statutes remodeled the rule. As thus amended, the statute of 1782 has since furnished the rule of construction of grants and devises in this State.[6]

Gifts to a Class. The rule stated in this section[7] is now so absolute that by analogy a gift of income to beneficiaries as a class is presumed to be to them as tenants in common and not as joint tenants.[8]

Trustees Hold as Joint Tenants. The Revised Statutes declared with emphasis that every estate vested in executors and trustees

[1] Repealed, chap. 547, Laws of 1896.

[2] Litt. §§ 277, 281; Purdy v. Hayt, 92 N. Y. 446, 452.

[3] Co. Litt. 183b; 2 Black. Comm. 180.

[4] Challis, 303; 2 Black. Comm. 182.

[5] Chap. 2, Laws of 1782 (6th session).

[6] Chap. 12, Laws of 1786; 1 J. & V. 245, § 6; 1 K. & R. 44; 1 R. L. of 1813, at p. 54; 1 R. S. 727, § 44.

[7] § 56, *supra*.

[8] Moffett v. Elmendorf, 152 N. Y. 475; Tompkins v. Verplanck, 10 App. Div. 572, 576, and cases cited.

as such was to be a joint tenancy, without reference to the terms of the limitation. It went further in this particular than the law of 1786.[1] The foregoing section of this Act now furnishes the final statutory expression of the rule of construction relative to grants and devises to two or more persons.

How Joint Tenancy Created. In order to create an estate in joint tenancy it is not necessary to employ the words in *joint tenancy*. Any other expression clearly imputing such an intent is sufficient.[2]

Tenants in Common. Where there is a devise to a number of persons by their individual names, giving an equal share to each, without words applying strictly to a class, etc., they take as tenants in common, and consequently lapsed devises go into the residuum and not to the survivors.[3]

Tenants by Entireties. It was, however, soon well settled that this section did not apply to conveyances of freeholds[4] to husband and wife, who continued to take as tenants by entireties, as they were formerly one person in contemplation of law.[5] Nor did the Married Women's Acts of 1848, 1849, 1860, 1862 and 1880 disturb this exception to the statutory rule,[5] and, at the present day, unless there are words prescribing the kind or quality of estates each shall take, husband and wife are still seised as tenants by entireties *per tout* and not *per my*, and upon the death of either the survivor takes the whole, no matter who pays the consideration. Where, however, it appears from the words of the grant or devise that the intent was to create a tenancy in common, husband and wife take as tenants in common.[7] Where husband and wife are seised as tenants by entireties the husband does not now, as at common law he did,[8] possess the exclusive right and control of the

[1] Everitt v. Everitt, 29 N. Y. 39, 72; *cf.* Lorrilard v. Coster, 5 Paige, at p. 229; Purdy v. Hayt, 92 N. Y. 446, 452, 453.

[2] Purdy v. Hayt, 92 N. Y. at p. 453, Coster v. Lorillard, 14 Wend. 342.

[3] Moffett v. Elmendorf, 152 N. Y. 475.

[4] Preston states that this tenancy is also applicable to terms of years. 2 Abst. tit. 39, and so Goelet v. Gori, 31 Barb. 314.

[5] Jackson v. Stevens, 16 Johns. 109, 116; Sutliff v. Forgey, 1 Cow. 81–95; Doe v. Howland, 8 id. 277–283; Rogers v. Benson, 5 Johns. Ch. 431; Miller v. Miller, 9 Abb. Pr. (N. S.) 444; Wright v. Sadler, 20 N. Y. 230. 320

[6] Bertles v. Nunan, 92 N. Y. 152, 157; Goelet v. Gori, 31 Barb. 314; Farmers' Bank v. Gregory, 49 id. 155; Zortlein v. Bram, 100 N. Y. 13; *cf.* Meeker v. Wright, 76 id. 262.

[7] Ward v. Crum, 54 How. Pr. 95; Miner v. Brown, 133 N. Y. 308.

[8] *Cf.* Challis, 304; Hiles v. Fisher, 144 N. Y. 306, 313.

lands during the lives of himself and wife.[1] But it seems the statute relative to partition does not apply to tenancy by entireties.[2]

Conveyances to Husband and Wife and a Third Person Simpliciter. Such being the rules regarding conveyances to husband and wife, it follows that the common law would control conveyances to husband, wife and a third person *simpliciter*, and that the latter would have a moiety for his share, and the husband and wife take the other moiety between them.[3] Where the estate is limited to a husband and his wife and a third person as tenants in common at common law, each was tenant of a third part,[4] and doubtless, this is now *a fortiori* the rule of construction under this section of "The Real Property Law."

Partners Take as Tenants in Common. We must next consider conveyances of land to persons being partners in trade. Chancellor Walworth states that at common law they took primarily as joint tenants, and that in New York the rule was changed by the statutes mentioned above.[5] But in equity the rule was always quite otherwise, and the great maxim of the common law "*Jus accrescendi inter mercatores pro beneficio commercii locum non habet*," was applied to purchases of real estate by partners no matter in whose name the purchase was made. Consequently partnership realty was never subject to survivorship.[6] And such, on general principles, would, no doubt, have become the rule in this State, in respect of partnership realty, quite irrespective of this section of The Real Property Law and the other statutory enactment displaced thereby.[7] As by statute in this State several persons, including partners, take as tenants in common unless it is otherwise prescribed, partners as such have the rights and powers which accrue to this tenancy. Each may convey or mortgage so as to transfer all the title he has.[8] In the liquidation of partnership dealings real estate is in this country treated as personalty, and what remains after payment of debts and adjusting equities is treated as real estate and goes to the respective heirs of the tenants in common.[9] Section 56 now ends this Article.

[1] Bertles v. Nunan, 92 N. Y. 152; Hiles v. Fisher, 144 id. 306; Grosser v. City of Rochester, 148 id. 233.

[2] Miller v. Miller, 9 Abb. Pr. (N. S.) 444.

[3] Burton, Compend. § 757; Litt. § 291; Smith, Compend. Law Real & Pers. Prop. 177.

[4] 1 Prest. Est. 132.

[5] Buchan v. Sumner, 2 Barb. at p. 198.

[6] Story, Eq. Juris. § 1207; 2 Spence, Eq. Juris. 399; Smith, Compend. Real & Pers. Prop. 172; Fairchild v. Fairchild, 64 N. Y. 471, 477.

[7] *Supra.*

[8] Hiscock v. Phelps, 49 N. Y. 97, 102.

[9] Hiscock v. Phelps, 49 N. Y. at p. 477; Greenwood v. Marvin, 111 id. 423.

ARTICLE III.[1]

Uses and Trusts.

SECTION 70. Executed uses existing.
71. Certain uses and trusts abolished.
72. When right to possession creates legal ownership.
73. Trustees of passive trust not to take.
74. Grant to one where consideration paid by another.
75. Bona fide purchasers protected.
76. Purposes for which express trusts may be created.
77. Certain devises to be deemed powers.
78. Surplus income of trust property liable to creditors.
79. When an authorized trust is valid as a power.
80. Trustee of express trust to have whole estate.
81. Qualification of last section.
82. Interest remaining in grantor of express trust.
83. What trust interest may be aliened.
84. Transferee of trust property protected.
85. When trustee may convey trust property.
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87. Notice to beneficiary where trust property is conveyed, mortgaged or leased.
88. Person paying money to trustee protected.
89. When estate of trustee ceases.
90. Termination of trusts for the benefit of creditors.
91. Trust estate not to descend.
92. Resignation or removal of trustee and appointment of successor.
93. Grants and devises of real property for charitable purposes.

[1] This article on Uses and Trusts is simply a redaction of the earlier article in the Revised Statutes on the same subject. It must always be remembered that when the Revised Statutes were first enacted the old systems of law and equity were in full force. The history of Uses and Trusts is closely connected with the history of equity jurisdiction in England and in the Crown province of New York. From the inception of the government of New York by the English, the equity powers of the Lord Chancellor were lodged somewhere, and after the year 1683 the distinctions observed in England between the forums of law and equity were fully established in New York. The local Chancellor had jurisdiction over trusts, but uses executed into legal estates by the Statute of Uses (always in force in New York as part of the socage tenure) were cognizable in the common-law courts of the province. The present writer has traced the jurisdiction of the courts of equity and law in the province of New York so frequently that he may be pardoned for referring the reader to his own fuller citations of authorities, as it avoids the necessity of unnecessary repetition of matters, less and less frequently consulted. (See chapters VI and VII History of the Law of Real Property

SECTION 70. **Executed uses existing.**— Every estate which is now held as a use, executed under any former statute of the state, is confirmed as a legal estate.

Formerly 1 Revised Statutes, 727, section 46:

§ 46. Every estate which is now held as an use, executed under any former statute of this state, is confirmed as a legal estate.[1]

Account of this Section 70. The foregoing section has distinct reference to the Statute of Uses, and to a state of things existent in the law of England prior to 27 Henry VIII, when the Statute of Uses was passed, fastening the possession and legal title to a certain fiduciary interest called the "use," which, before then, was only cognizable in chancery.[2] This important statute of England was, by extension, in force in the province of New York, after the English occupation, in the year 1664.[3] It is one of the English statutes revised by Jones and Varick,[4] under the act of the State Legislature, authorizing them to revise only those English statutes extending to the province,[5] and adopted by the first Constitution of the State.[6] It was afterwards continued in those several revisions of the law of the State preceding the Revised Statutes.[7] When the Revised Statutes subjected the entire law of Uses and Trusts to a general scheme of reform,[8] the revisers first abolished, for the future, all uses and trusts, except those expressly authorized, in the Revised Statutes; but naturally at the

in New York; notes to the Grolier edition of Bradford's Laws of New York in 1694, and particularly the citations of authorities.) It was through the machinery of the judicial establishment of the province of New York that the distinctions between legal and equitable estates, and between uses and trusts, distinctions familiar to the law of England in the last two centuries, were established and perpetuated in New York. When the State Constitution of 1846 was established and the courts of law and equity consolidated and the practice in both assimilated, the distinction between uses and trusts had become so ineradicable in the law of New York as to survive even these reforms. The strength of this survival was, no doubt, partly due to the statutory revision of the law of Uses and Trusts in the Revised Statutes.

[1] Repealed, chap. 547, Laws of 1896.

[2] 27 Hen. VIII, chap. 10; Downing v. Marshall, 23 N. Y. at p. 378; Seaman v. Harvey, 16 Hun, 71, 73; Johnson v. Fleet, 14 Wend. 176, 180.

[3] The patent to the Duke of York was to be holden by the socage tenure as it then existed in England. This involved all statutes, not repealed, antecedently affecting this tenure.

[4] 2 J. & V. 68; Bennett v. Garlock, 10 Hun, 328, 337, 338.

[5] Chap. 35, Laws of 1786.

[6] § 35, Const. of 1777.

[7] 1 K. & R. 66; 1 R. L. 72.

[8] Art. II of chap. 1, pt. 2, R. S.

same time they saved all legal estates which then existed in New York as executed uses, solely under and by force of the old Statute of Uses.[1] The revisers, in their note to this section of the original revision, distinctly announce this, for they expressly say: "It seems proper to confirm all uses already executed as legal estates, in order to prevent the possible construction that they are included in the general abolition of uses."[2]

Distinction between Uses and Trusts. The distinction between an executed use under the Statute of Uses, and a trust which, after that statute, was not executed, is apparent,[3] and still exists, even under the Revised Statutes and this act.[4]

[1] 1 R. S. 724, § 46; Bennett v. Garlock, 10 Hun, 328, 338.

[2] Appendix II, *infra*.

[3] Cuyler v. Bradt, 3 Cai. Cas. 326; Fisher v. Fields, 10 Johns. 495; Johnson v. Fleet, 14 Wend. 176; Burgess v. Wheate, 1 Eden, at p. 216.

[4] *Vide infra*, *et* § 76.

§ 71. **Certain uses and trusts abolished.**— Uses and trusts concerning real property, except as authorized or modified by this article, have been abolished; every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter.

Formerly 1 Revised Statutes, 727, section 45:

§ 45. 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.[1]

Object of this Section. This section is part of a scheme larger than a mere revision of the former Statute of Uses. The original revisers, in their note to this section, outlined very fully the general scheme of their reform in the old law of uses and trusts.[2] They desired to abolish all passive or naked trusts, and to cause the legal title to estates to devolve on, or descend to, heirs in all cases where some good purpose was not subserved by the trustee's taking the legal title.[3] Trust settlements of estates had thitherto in New York not been frequently employed in practice, and the time was, therefore, not inopportune for so radical a change in this ancient law of English-speaking peoples. Before the reform could be consummated, however, much litigation ensued, involving practically every section of the Revised Statutes relating to estates in lands. The decisions of the higher courts are, therefore, a necessary complement of the Revised Statutes concerning real property.

The Intent of this Section. The original of this section was then a part of an announced attempt to restore the design of the old Statute of Uses (27 Hen. VIII, chap. 10), adopted in New York,[4] and thus finally to abolish all uses and trusts not expressly authorized by law.[5] With this design in view, the section of the statute was followed by two others taken to some extent out of the former

[1] Repealed, chap. 547, Laws of 1896.

[2] *Vide infra*, Revisers' note, with article on Uses and Trusts, Appendix II; Eysaman v. Eysaman, 24 Hun, 430, 433; Johnson v. Fleet, 14 Wend. 176; Rawson v. Lampman, 5 N. Y. 456; Downing v. Marshall, 23 id. 366, 378, 379, 380.

[3] Townshend v. Frommer, 125 N. Y. at p. 458, and cases last cited.

[4] *Supra*, p. 230; Eysaman v. Eysaman, 24 Hun, 430, 433; 2 J. & V. 68; 1 R. L. 72.

[5] Eysaman v. Eysaman, 24 Hun, 430, 433; Leggett v. Perkins, 2 N. Y. 297, 307; Rawson v. Lampman, 5 id. 456, 462; Townshend v. Frommer, 125 id. at p. 457.

Statute of Uses.[1] The section of the Revised Statutes now under consideration expressly abolished all uses and trusts not saved or justified by some provision of the article on Uses and Trusts.[2]

Did this Enactment Abolish Charitable Uses? The first question of importance made under the original of this section was, "whether charitable uses and trusts (or those indefinite and uncertain uses and trusts intended to benefit the public or a class where no particular interest vested), were intended to be abolished thereby?"[3] After great fluctuation of judicial opinion, embracing forty-three years, it was finally held that charitable uses and trusts were within the purview of the Revised Statutes,[4] and, therefore, that they were abolished, and that no charitable use or trust was since valid at law or in equity unless it complied with the Revised Statutes and some particular interest vested in a definite person entitled to enforce the trust.[5] Consequently an express trust for charity in New York stood until a statute passed in 1893,[6] on the same basis as a trust for a person not engaged in charitable endeavor.[7] It was subject to the rule concerning suspension of the power of alienation directed against a perpetuity.[8] If the trust was valid only as a power, it was still subject to the same rules concerning definiteness of the beneficiary[9] and suspension of the power of alienation.[10] In short, the ancient characteristics of charitable uses — permanence in the duration of the trust, and indefiniteness of the beneficiaries — were no longer allowed under the Revised Statutes.[11] Consequently the only legal mode of

[1] 1 R. S. 727, §§ 47, 49, now §§ 72 and 73, *infra*, of The Real Prop. Law.

[2] Art. 2, chap. 1, pt. 2, R. S., being now art. III of The Real Property Law here under consideration.

[3] Shotwell, Exr., v. Mott, 2 Sandf. Ch. 46, 49, 52; Ayres v. Meth. Church, 3 Sandf. 351; Williams v. Williams, 8 N. Y. at pp. 554–559.

[4] Clemens v. Clemens, 37 N. Y. 59, 76; Holmes v. Mead, 52 id. 332; Holland v. Alcock, 108 id. 312, 336; Cottman v. Grace, 112 id. 307; Fosdick v. Town of Hempstead, 125 id. 581.

[5] Phelps v. Pond, 23 N. Y. at p. 77; Downing v. Marshall, Id. 366, 382; O'Hara v. Dudley, 95 id. 403; Read v. Williams, 125 id. 560, 569; Holland v. Alcock, 108 id. 312; Tilden v. Green, 130 id. 29.

[6] Chap. 701, Laws of 1893.

[7] Levy v. Levy, 33 N. Y. at p. 124; Bascom v. Albertson, 34 id. 584; Cottman v. Grace, 112 id. 299, 306, 307; Cruikshank v. Home for the Friendless, 113 id. 337, 350; People v. Simonson, 126 id. 299, 307.

[8] Bascom v. Albertson, 34 N. Y. 584, 619.

[9] Fosdick v. Town of Hempstead, 125 N. Y. at p. 592; Tilden v. Green, 130 id. 29; People v. Powers, 147 id. 104.

[10] Booth v. Baptist Church, 126 N. Y. 215.

[11] Dodge, Exr., v. Pond, 23 N. Y. 69.

limiting estates permanently in trust for the benefit of the poor, or other indefinite objects, consisted in a limitation absolute to a charitable corporation, whose charter supplemented the trust features and whose chartered vocation permitted the amelioration of an indefinite class.[1] The limitation in such a case was not in trust or a charitable use, but a gift absolute to a charitable corporation.

Restoration of Charitable Uses. In 1893 the Legislature, finding too many charitable foundations defeated by the new judicial canon, that no valid trust could be made for the benefit of no one in particular, *incertæ personæ*,[2] passed a law,[3] which provided, in substance, that no gift, grant, bequest or devise to religious, educational, charitable or benevolent uses which, in other respects, was valid under the laws of the State, should be deemed invalid by reason of the indefiniteness or uncertainty of the beneficiaries. The substance of that act has now become part of the article on Uses and Trusts,[4] with the effect, no doubt, of abrogating that principle formerly determined, that there could not be, under the Revised Statutes, a trust for the benefit of an indefinite set of beneficiaries. This amendment may not relieve charitable limitations from the necessity of conforming to the existing rule against perpetuities,[5] which, before the Revised Statutes, was not generally applicable to charitable settlements,[6] except as to the time of their vesting in possession or interest.[7] But a strong argument will be made, no doubt, that the legislative effect of consolidating chapter 701 of the Laws of 1893 with the present article on Uses and Trusts, is to restore charitable uses as they were at common law, independently of the Statute of Charitable Uses,[8] and even to except charitable uses altogether from the operation of section 32 of the article on "Creation and Division of Estates."[9]

What Other Uses and Trusts Abolished. What other uses and trusts were abolished by this article may be considered under sub-

[1] Ayres v. Meth. Church, 3 Sandf. 351; Yates v. Yates, 9 Barb. 324; King v. Rundle, 15 id. 139; Levy v. Levy, 33 N. Y. 97, 108; Bascom v. Albertson, 34 id. at pp. 612, 613; Holland v. Alcock, 108 id. 312, 336.

[2] Dammert v. Osborn, 140 N. Y. 30, 43.

[3] Chap. 701, Laws of 1893.

[4] § 93, *infra*, The Real Prop. Law.

[5] § 32, The Real Prop. Law.

[6] Lewis, Perp. 688, 689; Williams v. Williams, 8 N. Y. at p. 535; Shotwell, Exr., v. Mott, 2 Sandf. Ch. 53.

[7] Challis, 157; Rose v. Rose, 4 Abb. Ct. App. Dec. 108.

[8] 43 Eliz. chap. 4; *cf.* Allen v. Stevens, 22 Misc. Rep. 158.

[9] See remarks under § 93, The Real Prop. Law, *infra*.

sequent sections of this act. Mere passive uses and trusts were those designed to be prevented.

Comment on the Language of Section 71. That part of the section under consideration, which relates to cognizance of vested uses as legal rights, was originally intended to indicate the withdrawal from the courts of equity of all such uses[1] as were not called express trusts[2] or revived as powers in trust.[3] Now that trusts and legal estates are justiciable in the same forum,[4] the Committee of Statutory Revision might have omitted the latter part of this section. As they have altered the language of the Revised Statutes, the present section seems to contemplate a class of legal rights not cognizable in the courts, which is absurd.

[1] All naked or passive trusts were abolished by the Revised Statutes, and cognizance of them consequently was, by the Revisers, formally transferred to the courts of law as executed uses, the antinomy of law and equity being in full force when the Revised Statutes were enacted.

[2] 1 R. S. 728, § 55; § 76, The Real Prop. Law; Johnson v. Fleet, 14 Wend. 176.

[3] Downing v. Marshall, 23 N. Y. at p. 378.

[4] Const. of 1846, art. VI; Const. of 1894, art. VI.

§ 72. **When right to possession creates legal ownership.**—Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or 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; but this section does not divest the estate of the trustee in any trust existing on the first day of January, eighteen hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.

Formerly 1 Revised Statutes, 727, sections 47 and 48:

§ 47. 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 receipt 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]

§ 48. 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 disposition or management, in relation to the lands which are the subject of the trust.[2]

Comments on Section 72. It will be remarked that this section differs from the old Statute of Uses in that it does not require a person to stand seised to a use.[3] It acts on attempted conveyances,[4] and even on those constructively prohibited by the following section of this act.[5] By the above section the legal estate is made to devolve on the real party in interest, without regard to the form of the conveyance. Thus, the scope and intent of the old Statute of Uses was supplemented by the Revised Statutes in material particulars. But this section never operates to vest title in an intended beneficiary, if the beneficiary himself is under a disability,[6] or so uncertain and indefinite as to be incapable of identification.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] *Cf.* 1 Sand. Uses & Trusts, 85; Challis, 313.

[4] Properly termed "attempted trusts," by a recent writer. Chapl. Express Trusts & Pow. 395; Heermans v. Burt, 78 N. Y. 259, 266; Helck v. Reinheimer, 105 id. 470, 475; Syracuse Bank v. Holden, Id. 415.

[5] § 73, *infra;* Downing v. Marshall, 23 N. Y. 366, 378, 379; Townshend v. Frommer, 125 id. 446, 456, 457; Helck v. Reinheimer, 105 id. 470.

[6] Beekman v. Bonsor, 23 N. Y. 298, 316; Downing v. Marshall, Id. 366, 385, 387.

[7] See the cases on charitable uses cited under § 71, 105 N. Y. 470.

Scope of Sections 72 and 73. The original of sections 72 and 73 of The Real Property Law were to some extent taken from the Revised Laws of 1813,[1] which in turn embodied the old Statute of Uses (27 Hen. VIII, chap. 10).[2] The revisers' design, as has been stated before,[3] was to effectuate the supposed intention of the framers of the original Statute of Uses and actually to destroy all passive trusts in lands. With this end in view, the language of the first part of section 72[4] was intended to create a presumption of law, that any use or trust for another vested that other with the legal title at a time when the legal and the equitable titles were of distinct judicial cognizance.[5] Prior to the Statute of Uses all uses were of equitable cognizance only,[6] and, where there was a use, the presumption was consequently always in favor of equity. The Revised Statutes changed this rule.

The Old Statute of Uses. The Statute of Uses (27 Hen. VIII, chap. 10) did not destroy active fiduciary agencies or trusts, but only those passive uses where one had a legal title and another the *dominium utile* and the right to the rents and profits of the estate.[7] Indeed, soon after the statute a use upon a use was held not executed;[8] so where the limitation was "to and to the use of A. and his heirs in trust for B. and his heirs," only the first use was executed. In this manner most passive uses or trusts were revived by the action of the chancellors.[9] But the revival depended upon the form of the limitation. If the estate was limited to A. and his heirs to the use or in trust for B. and his heirs, the statute executed the estate in B.[10] This induced Lord Hardwicke to say that the Statute of Uses "had no other effect than to add at most three words to a conveyance."[11] But, as Mr. Sanders and Sir Edward Sugden have pointed out, this is to overlook the fact that the real effect of the Statute of Uses was to introduce a new sys-

[1] 1 R. L. 72, § 1.

[2] *Supra*, pp. 121, 230.

[3] *Supra*, p. 232, and Greene v. Greene, 125 N. Y. at p. 511.

[4] *Quondam*, 1 R. S. 727, § 47.

[5] Johnson v. Fleet, 14 Wend. 176, 179.

[6] 1 Sand. Uses & Trusts, 5.

[7] Townshend v. Frommer, 125 N. Y. at p. 456; Willis, Origin of Trusts, 22; Lewin, Trusts, 210; Kerly, Hist. Eq. 134; 1 Prest. Est. 189, 190; note 2, p. 334, Digby, Hist. Real Prop.; *cf.* 1 Sand. Uses & Trusts, 86; 1 Spence, Eq. Juris. 491.

[8] 1 Spence, Eq. Juris. 490; Tyrrell's Case, Dyer, 155a; Digby, Hist. Real Prop. 334, chap. VII, § 4; *supra*, p. 30.

[9] Kerly, Hist. Eq. 135; 1 Spence, Eq. Juris. 491; Fisher v. Fields, 10 Johns. 495, 506; Lewin, Trusts, 209.

[10] 1 Prest. Est. 190; Austen v. Taylor, 1 Eden, 361; Robinson v. Grey, 9 East, 1.

[11] 1 Atk. 591.

tem of conveyancing and to tolerate future estates at variance with the common law.[1]

Uses Vested by the Old Statute. The uses which the Statute of Uses intended to fasten to the legal estate were those passive trusts or uses where "terre tenant simply took the legal title," suffering the *cestui que use* to take the profits, and to direct conveyances of the estate;[2] a device originally intended to subvert the rigor of the old feudal law, which forbade wills of lands in most places, and permitted very few future interests to vest in land, even by conveyances *inter vivos*.[3] It is well known how the main intent of the Statute of Uses was frustrated.[4]

The Reforms of the Revised Statutes. By the allowance of only four express trust purposes,[6] and the exclusion of all others,[6] the revisers of New York judged that they might frustrate a like miscarriage in the case of passive uses; but they did not intend to abolish all other fiduciary agencies or trusts, for they expressly permitted other trust purposes to continue as powers.[7] Thus, the Revised Statutes annihilated equitable estates as they had thitherto existed, and reduced all such to the rank of mere equitable interests cognizable in chancery, but without the incidents of equitable estates, equitable seisin, equitable entails, bars, etc., for formerly the analogy between legal estates and equitable estates was almost complete.[8]

Extent of the Reforms Instituted by this Section. Sections 72 and 73[9] are then a present and reformed survival of the old Statute of Uses, and are intended to vest the legal estate in a person entitled to the beneficial use, wherever no recognized trust exists,[10]

[1] 1 Sanders, Uses & Trusts, 277; Sugden's Introduction to Gilbert on Uses, *supra*, p. 27, Introduction.

[2] Bacon's "Reading on the Statute of Uses," and his essay on the use of the law, are still the most helpful commentary on the legislative meaning of the Statute of Uses. Willis, Treatise on Duties of Trustees, and the Origin and History of Trusts, may also be consulted, while Spence, Equity Jurisdiction, is a comprehensive work on the origin of equitable institutions.

[3] *Supra*, pp. 16, 21, 22, 23, 32.

[4] *Supra*, pp. 27, 29, 30.

[5] 1 R. S. 728, § 55; § 76, *infra*, The Real Prop. Law,

[6] 1 R. S. 729, § 56; id. § 58; The Real Prop. Law, §§ 77, 79; Downing v. Marshall, 23 N. Y. at p. 377.

[7] 1 R. S. 729, § 58; § 79, The Real Prop. Law; Townshend v. Frommer, 125 N. Y. 446.

[8] 1 Prest. Abst. tit. 147; 2 id. 229; 2 Spence, Eq. Juris. 875; Digby, Hist. Real Prop. 337; *supra*, pp. 26, 28.

[9] The Real Prop. Law.

[10] Cushney v. Henry, 4 Paige, 345; Matter of De Kay, Id. 403; Johnson v. Fleet, 14 Wend. 176; Selden v. Vermilya, 3 N. Y. 525; Rawson v. Lamp-

either expressly, under the 76th section of this act,[1] or by virtue of a power in trust.[2] In the latter case the legal title may descend,[3] result[4] or vest in persons otherwise entitled, without regard to the trust power, which overrides the legal estate thus vesting, descending or resulting.[5] But it is to be remarked, with some care, that a merely passive use, which does not direct or authorize the performance of some active trust by the trustee, may not be validated as a power in trust.[6]

Legal Estate of Trustees Functi Officio Vests under this Act. The Revised Statutes were so framed as to vest even trust estates lawful, in those next entitled[7] without the necessity of any conveyance, when the purposes of the trustee no longer required him to have the legal title.[8] At common law, a fee in trustees never could become a legal estate of those next entitled, except through the medium of a conveyance.[9] In a modern case in New York the rule of the common law on this point is so stated as to make it appear that the estate of a trustee before the Revised Statutes devolved on the persons beneficially entitled whenever trust purposes ceased.[10] But it is apprehended that this confuses another principle, viz., that by construction, courts of equity would so limit the legal estate of trustees as to make them commensurate

man, 5 id. 456; Wright v. Douglass, 7 id. 564, 570; Ring v. McConn, 10 id. 268; Downing v. Marshall, 23 id. 366, 379; Adams v. Perry, 43 id. at p. 496; Verdin v. Slocum, 71 id. 345, 347; Nat. Bank of Commerce v. Nat. Bank of New York, 17 Misc. Rep. 691; Rose v. Hatch, 125 N. Y. 427, 432; The Syracuse Savings Bank v. Holden, 105 id. 415; Greene v. Greene, 125 id. 506, 511.

[1] Formerly 1 R. S. 728, § 55.

[2] § 79, The Real Prop. Law; N. Y. Dry Dock Co. v. Stilman, 30 N. Y. 174, 194.

[3] § 79, The Real Prop. Law.

[4] § 79, The Real Prop. Law; Wright v. Douglass, 7 N. Y. 564, 576.

[5] § 79, The Real Prop. Law; The Syracuse Savings Bank v. Holden, 105 N. Y. 415.

[6] Townshend v. Frommer, 125 N. Y. 446, 447; *cf.* Heermans v. Burt, 78 id. 259, 267.

[7] §§ 82, 89, The Real Prop. Law, formerly 1 R. S. 729, § 62; 1 R. S. 730, § 67.

[8] Selden v. Vermilya, 3 N. Y. 525; Ring v. McConn, 10 id. 268, 271; Briggs v. Davis, 20 id. 15, 22; Matter of Livingston, 34 id. 555, 567; Kip v. Hirsch, 103 id. 565, 570; Watkins v. Reynolds, 123 id. 211; Nat. Bank of Commerce v. Nat. Bank of New York, 17 Misc. Rep. 691; Rose v. Hatch, 125 N. Y. 427, 431, 432.

[9] 1 Prest. Est. 144; *sed cf.* 1 Sugd. Pow. 230, citing Rich v. Beaumont, 3 Bro. P. C. 308, where wife had a power of revocation and appointment which she exercised; see, also, 2 Chance, Pow. 7, on same case. It is questionable whether, in that case, trustees had a fee simple absolute.

[10] Bennett v. Garlock, 79 N. Y. 302, 324.

with the trust,[1] and when the trust purpose ceased, would compel the trustees to convey the outstanding legal title.[2] If this were not the old rule, why the necessity of the so-called "vesting acts" in England? Of course these observations apply only to those cases where the trustees took a fee, for if their estate was less in quantity the next limitation took effect or the estate resulted when the trustee's estate came to an end by lapse of time or otherwise.

Saving Trustees' Estates Existing before 1830. The latter part of this section[3] referring to trusts existing on the 1st day of January, 1830, was intended to save all anterior trust limitations and estates which were not purely passive uses.[4] If they were those active trusts now classed as powers in trust, the legal title of the trustees was thus saved; but if they were mere passive uses or trusts the legal title vested in the beneficiaries under the general rule.[5]

Covenants to Stand Seised — Declarations of Uses. A covenant to stand seised has been said to be still operative as a conveyance under the existing statute executing uses in possession.[6] This form of conveyance was recognized as a legal conveyance after the Statute of Uses (27 Hen. VIII), as it was theretofore recognized in equity.[7] How far the covenant to stand seised must be contained in a deed delivered, in order to have the statute operate, is a question for further consideration.[8] So a deed to declare uses upon a separate conveyance by fine was at first operative after the Revised Statutes,[9] and a conveyance to declare uses still may be valid when the conveyance is contained in a separate instrument, notwithstanding conveyances by fines and recoveries are now abolished.[10]

[1] Lewin, Trusts, 213, 221, and cases cited.

[2] 6 Cruise, Dig. 203; Lewin, Trusts, 684, 686; *cf.* Briggs v. Davis, 20 N. Y. at p. 22.

[3] § 72, *supra*.

[4] Cushney v. Henry, 4 Paige, 345; Anderson v. Mather, 44 N. Y. 249, 258.

[5] Matter of De Kay, 4 Paige, 403; Fraser v. Western, 1 Barb. Ch. 220, 238; affd., 3 Den. 610.

[6] Eysaman v. Eysaman, 24 Hun, 430; *cf.* Nat. Bank of Commerce v. Nat. Bank of New York, 17 Misc. Rep. 691.

[7] Smith, Compend. Real & Pers. Prop. 573. Between others than relations it was operative as a bargain and sale if founded on a valuable consideration. Id. at p. 575.

[8] *Infra*, § 207, The Real Prop. Law.

[9] Willard Real Est. & Conv. 444; Eysaman v. Eysaman, 24 Hun, at p. 434; 2 R. S. 135, § 7; amd., chap. 322, Laws of 1860; 2 R. S. 343, § 24.

[10] 2 R. S. 343, § 24; Eysaman v. Eysaman, 24 Hun, at p. 434; Bank of Commerce v. Bank of New York, 17 Misc. Rep. 691.

§ 73. **Trustee of passive trust not to take.**— Every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section nor the preceding sections of this article shall extend to the trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this chapter.

Formerly 1 Revised Statutes, 728, sections 49, 50:

§ 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]

§ 50. The preceding sections in this Article shall not extend to trusts arising, or resulting by implication of law, nor be construed to prevent or affect the creation of such express trusts, as are hereinafter authorized and defined.[2]

Construction of Section 73. This section is construed as complementary of the foregoing section;[3] and while it declares expressly that under the circumstances indicated in the section no estate shall vest in the trustee, yet the courts do not construe such a conveyance as void, but hold that it is operative to carry the title to the intended beneficiary.[4] In this respect the Revised Statutes differed from the old Statute of Uses, which required a person to stand seised to a use before the statute would transfer the seisin.[5] So that now, when a conveyance or devise limits an estate on trusts not recognized as one of the four authorized trusts,[6] or not permitted to take effect as powers in trust,[7] such conveyance or devise is not necessarily ineffective *in toto*, but is operative to carry the estate to the persons really intended by the

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] The Real Prop. Law, § 72.

[4] Helck v. Reinheimer, 105 N. Y. at p. 475; *cf.* Justice Bronson, Root v. Stuyvesant, 18 Wend. at p. 278; Nat. Bank of Commerce v. Nat. Bank of New York, 17 Misc. Rep. 691.

[5] 1 Sanders, Uses & Trusts, 85; Challis, 313.

[6] Under § 76, The Real Prop. Law.

[7] The Real Prop. Law, §§ 77, 79; Townshend v. Frommer, 125 N. Y. 446.

settlor to be benefited as usufructuaries of the grant or devise.[1] But when the grantor is the sole beneficiary of a use or trust not within the four express trust purposes, no title vests in the grantee, but the title is left in the grantor.[2]

Saving Clause. The saving clause attached to this section excepts all trusts arising by implication of law,[3] and all express trusts saved by the statute,[4] from the operation of the other portion of the section.

Classification of Trusts before the Revised Statutes. Before considering what are "implied" trusts under this section, let us briefly recall the various classifications of trusts, after the Statute of Uses, when the former trusts passive disappeared as trusts and passed into the rank of legal estates by operation of that statute. Anterior to the Revised Statutes trusts were variously classified, according to the nature of the duty imposed on the trustee, into naked, simple or passive,[5] and active or special.[6] When classified according to the manner of their creation, trusts were (1) by act of the parties,[7] (2) by operation of law.[8] Special trusts by act of the parties were (1) express [9] or (2) implied.[10] Trusts by operation of law were classified again as (a) presumptive,[11] (b) resulting[12] and (c) constructive.[13] The classification was not always strictly observed and the terms sometimes clash in practice, contrary terms being used as equivalents.[14] Other classifications, such as executed[15] and executory,[16] we need not notice in this connection.

Implied Trusts. Implied trusts are strictly those trusts which are to be inferred from the language of a particular limitation. They might, therefore, be termed with more accuracy inferential trusts special. But the use of the term is not now confined to this class of trusts, but sometimes denotes all resulting trusts.[17]

[1] Downing v. Marshall, 23 N. Y. 366, 379; Helck v. Reinheimer, 105 id. at p. 475; Root v. Stuyvesant, 18 Wend. at p. 278.

[2] Heermans v. Burt, 78 N. Y. 259, 266.

[3] Formerly 1 R. S. 727, § 50.

[4] The Real Prop. Law, §§ 76, 79.

[5] Lewin, Trusts, 18.

[6] Lewin, Trusts, 18.

[7] Lewin, Trusts, 21; 1 Spence, Eq. Juris. 495.

[8] Lewin, Trusts, 21; 1 Spence, Eq. Juris. 495.

[9] Lewin, Trusts, 108; 1 Spence, Eq. Juris. 495.

[10] Lewin, Trusts, 108; 1 Spence, Eq. Juris. 509.

[11] Lewin, Trusts, 201.

[12] 1 Spence, Eq. Juris. 510.

[13] 1 Spence, Eq. Juris. 510.

[14] Foose v. Bryant, 47 N. Y. 544; 1 Spence, Eq. Juris. 509, note h.

[15] Lewin, Trusts, 111.

[16] 2 Spence, Eq. Juris. 128.

[17] Johnson v. Fleet, 14 Wend. 176; Foote v. Bryant, 47 N. Y. 544; *cf.* Henderson v. Henderson, 113 id.

As no particular language is necessary to create a trust,[1] it seemed appropriate to exclude from the operation of this section of the statute those trusts which, though not express, the courts might imply from the context of instruments. Implied trusts are not, however, favored.[2]

Secret Trusts. To some extent certain secret trusts, which were not strictly trusts arising *ex maleficio*, may be said to be saved by this section rather than by that following in this act. For section 74 refers only to two classes of trusts *ex maleficio*. Thus, where one is induced to give a legacy or to change his will by a promise, express or implied, of the legatee to devote it to a lawful purpose other than that of the legatee, equity will enforce the promise or undertaking as an implied or secret trust.[3]

1, 12, where "implied" is used strictly.

[1] Leggett v. Perkins, 2 N. Y. 297; Wright v. Douglass, 7 id. 564; Dillaye v. Greenough, 45 id. 438, 445; Vernon v. Vernon, 53 id. 351; Heermans v. Robertson, 64 id. 332; Moore v. Hegeman, 72 id. 376, 384; Donavan v. Van De Mark, 78 id. 244; Morse v. Morse, 85 id. 53; Ward v. Ward, 105 id. 68; Toronto Trust Co. v. C., B. & Q. R. R. Co., 123 id. 37.

[2] Foose v. Whitmore, 82 N. Y. 405; Henderson v. Henderson, 113 id. 1, 11.

[3] Trustees of Amherst College v. Ritch, 151 N. Y. 282; O'Hara v. Dudley, 95 id. 403; Williams v. Fitch, 18 id. 546; *cf.* Hone v. Van Schaick, 7 Paige, 221.

§ 74. **Grant to one where consideration paid by another.**—A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either,

1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or,

2. In violation of some trust, purchases the property so conveyed with money or property belonging to another.

Formerly 1 Revised Statutes, 728, sections 51, 52, 53:

§ 51. Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by anotner, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.[1]

§ 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 may be necessary to satisfy their just demands.[2]

§ 53. The provisions of the preceding fifty-first 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 monies belonging to another person.[3]

Comment on Section 74. The reader will observe that, notwithstanding the changes made by this section in the language of the Revised Statutes,[4] the Statutory Revision Commission have reported to the Legislature that the law remains unchanged by this section.[5]

Consideration. At common law a conveyance, even by way of feoffment, if made without consideration, raised a use in favor of feoffor after the Statute *Quia Emptores*,[6] although it is said that a consideration was not regarded as necessary to support a com-

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Repealed, chap. 547, Laws of 1896.

[4] *Supra*, 1 R. S. 728, §§ 51, 52, 53.

[5] *Infra*, Appendix I, note to § 74, The Real Prop. Law.

[6] Serj. Carthew's "Reading on the Law of Uses" (1 Collect. Jurid. by Hargrave, 370), citing Dyer, 146b.

mon-law conveyance[1] by way of feoffment or fine.[2] But, since the Statute of Uses, those conveyances which originated in equity, bargain and sale and covenant to stand seised, have required a consideration to support them.[3] And so a lease and release, which was a compound conveyance, made effective partly by the common law and partly by the Statute of Uses, required a consideration.[4] But the consideration need not always be expressed in a deed.[5]

Consideration Given by a Third Person. So, at common law, the principles governing uses in equity dictated that, where the consideration was paid by a third person, the grantee should *prima facie* stand seised to the use of such third person.[6] The old Statute of Uses then executed the use in the third person.[7] The revisers believed that the preservation of these rules of law might defeat the effort to abolish passive uses and trusts, and that there was no real reason why a person paying the consideration should ever take the legal title in the name of a third person[8] unless a fraud was contemplated.

Changes Made by the Revised Statutes. The Revised Statutes consequently abolished resulting trusts in favor of persons furnishing the actual consideration for a deed taken by their direction in the name of a third person; and such statutes also discharged the third person from any trust by reason thereof,[9] excepting in those cases where the person paying the consideration then had creditors.[10] In such cases a trust resulted to the extent of the just

[1] Cornish, Uses, 63; Gilbert, Uses, 90, 109 (ed. 1811).

[2] Id. *supra*.

[3] Carthew, Id. *supra*, 371; Cornish, 63; Smith, Compend. Real & Pers. Prop. 667; Schott v. Burton, 13 Barb. 173; Corwin v. Corwin, 6 N. Y. 342; Wood v. Chapin, 13 id. 509, 517; *supra*, p. 27 (Introduction).

[4] Carthew, *supra*, 371.

[5] Cunningham v. Freeborn, 11 Wend. 240, 248; Wood v. Chapin, 13 N. Y. 509, 517; *cf.* Morris v. Ward, 36 id. 587, 598; Loeschigk v. Hatfield, 51 id. 660.

[6] Foote v. Colvin, 3 Johns. 216; Jackson ex dem. v. Mills, 13 id. 463; Jackson ex dem. v. Morse, 16 id. 197; Garfield v. Hatmaker, 15 N. Y. 475, 477; McCartney v. Bostwick, 32 id. 53; Willard, Real Est. & Conv. 234.

[7] See Revisers' note, 1 R. S. 728, § 51, Appendix II, *infra*.

[8] Id. *supra*.

[9] Jeremiah v. Pitcher, 20 Misc. Rep. 513; Bodine v. Edwards, 10 Paige, 504; Norton v. Stone, 8 id. 222; Garfield v. Hatmaker, 15 N. Y. 475; Everett v. Everett, 48 id. 218; Dunlap v. Hawkins, 59 id. 342; Niver v. Crane, 98 id. 40; *cf.* Rogers v. N. Y. & Texas Land Co., 134 id. 197; Robertson v. Sayre, Id. 97.

[10] In case of fraudulent conveyances under section 226. *infra*, subsequent as well as existing creditors can impeach the conveyance. Mead v.

demands of existing creditors,[1] who might proceed to enforce the trust after exhausting their legal remedies.[2]

Partners an Exception. But a partner, taking a deed in his own name for convenience, is not within the general rule abolishing resulting trusts, even though the consideration of the conveyance was furnished by the other partners.[3]

Parents and Children. Nor does the statute abolishing resulting trusts apply to a case where parents furnished the consideration of a conveyance to a third person, it being understood it was done for the benefit of an infant child,[4] or some other member of the family.[5] A trust was not ordinarily implied in favor of parents furnishing the consideration of a conveyance to a child, if the transaction might be deemed an "advancement."[6] Thus, where the father takes a title in the name of the son, it will be deemed an "advancement," rather than a resulting trust for the father,[7] although in several recent cases this principle is not noticed in the opinion.[8]

Involuntary Trusts an Exception. Where a grantee takes the conveyance in his own name without the consent or knowledge of the person furnishing the consideration, a resulting trust still exists in favor of the person wronged; the case being excepted out of the abolition of resulting trusts.[9] But the trust so results only to the extent of the consideration actually furnished.[10]

Gregg, 12 Barb. 653; Read v. Livingston, 3 Johns. Ch. 481.

[1] Wood v. Robinson, 22 N. Y. 564, 566; McCartney v. Bostwick, 32 id. 53; Underwood v. Sutcliffe, 77 id. 58; *cf.* Dunlap v. Hawkins, 59 id. 342; Niver v. Crane, 98 id. 40; *cf.* The Real Prop. Law, §§ 226, 227, *infra*.

[2] Ocean Bank v. Olcott, 46 N. Y. 12; Underwood v. Sutcliffe, 77 id. 58, 63; note to 14 Abb. N. C. at p. 40.

[3] Fairchild v. Fairchild, 64 N. Y. 471; *cf.* Levy v. Brush, 45 id. 589; Chester v. Dickinson, 54 id. 1; Traphagen v. Burt, 67 id. 30; Greenwood v. Marvin, 111 id. 423, on questions of partnerships in real estates.

[4] Siemon v. Schurck, 29 N. Y. 598; Foote v. Bryant, 47 id. 544; *et vide infra*, The Real Prop. Law, § 295, and cases there cited; Proseus v. McIntyre, 5 Barb. 524; *cf.* Lee v. Timken, 10 App. Div. 213.

[5] Siemon v. Schurck, Id. *supra*.

[6] See under the Real Prop. Law, §§ 295, 296.

[7] Partridge v. Haven, 10 Paige, 618; Story, Eq. Juris. § 1202.

[8] Smith v. Balcom, 24 App. Div. 437.

[9] *Supra*, § 74; 1 R. S. 728, § 53; Swinburne v. Swinburne, 28 N. Y. 568; Lounsbury v. Purdy, 18 id. 515; Reitz v. Reitz, 80 id. 538; Helms v. Helms, 64 id. 642; Roulston v. Roulston, Id. 652; Brown v. Cherry, 57 id. 645; note to 14 Abb. N. C. 18.

[10] Schierloh v. Schierloh, 148 N. Y. 103; *cf.* Willard, Real Est. & Conv. at p. 234, and authorities there cited.

Separate Instrument. This section abolishing resulting trusts has no application where the trust is declared by a separate instrument from the grant.[1]

Trusts Arising Ex Maleficio. The condemnation of resulting trusts does not apply to trusts arising *ex maleficio*,[2] or through the frauds of persons who occupy confidential relations to those furnishing the real consideration.[3] And although trusts concerning lands can now be created and declared only by some deed or writing, or else by a last will,[4] yet resulting trusts and those arising *ex maleficio* may be proven by evidence not in writing.[5]

This Section not an Instrument of Fraud. This section of the statute has no application to cases where equities arise out of the agreement of the parties; the statute cannot be used as an instrument of fraud.[6]

[1] Woerz v. Rademacher, 120 N. Y. 62; Nat. Bank of Commerce v. Nat. Bank of New York, 17 Misc. Rep. 691.

[2] 1 R. S. 728, § 53; Ryan v. Dox, 34 N. Y. 307; Day v. Roth, 18 id. 448; Carr v. Carr, 52 id. 251, 261; Foote v. Foote, 58 Barb. 258.

[3] Robbins v. Robbins, 89 N. Y. 251; Wood v. Rabe, 96 id. 414, 425; Goldsmith v. Goldsmith, 145 id. 313; Sandford v. Norris, 4 Abb. Ct. App. Dec. 144; *cf.* Wheeler v. Reynolds, 66 N. Y. 227.

[4] § 207, The Real Prop. Law; Hutchins v. Van Vechten, 140 N. Y. 115; Sturtevant v. Sturtevant, 20 id. 39; Dillaye v. Greenough, 45 id. 438, 445; *cf.* Duke of Cumberland v. Graves, 9 Barb. 595; 7 N. Y. 305.

[5] Lounsbury v. Purdy, 16 Barb. 376; affd., 18 N. Y. 515; Swinburne v. Swinburne, 28 id. 568; Foote v. Bryant, 47 id. 544, 547; Wheeler v. Reynolds, 66 id. 227; *cf.* Traphagen v. Burt, 67 id. 30, 33.

[6] Wood v. Rabe, 96 N. Y. 414, 425; Smith v. Balcom, 24 App. Div. 437, and cases there cited; Jeremiah v. Pitcher, 26 id. 402, and cases there cited.

§ 75. **Bona fide purchasers protected.**— An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust.

Formerly 1 Revised Statutes, 728, section 54:

§ 54. No implied or resulting trust shall be alleged or established, to defeat or prejudice the title of a purchaser, for a valuable consideration, without notice of such trust.[1]

Comment on this Section. This section states a necessary exception to the resulting trust in favor of creditors, saved by the preceding section.[2] No resulting or secret trust is now tolerated so as to defeat the title of a *bona fide* purchaser for value, nor should it be in a State where the recording acts are established.[3] Who may come within the exception denoted is, however, another question. A person put upon inquiry by any circumstance, but failing to inquire, cannot be regarded as a *bona fide* purchaser under this section.[4] Nor may one who takes for an antecedent debt.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] Siemon v. Schurck, 29 N. Y. 598, 613.

[3] *Vide* § 84, *infra*, The Real Prop. Law.

[4] Baker v. Bliss, 39 N. Y. 70.

[5] Wood v. Robinson, 22 N. Y. 564, 567.

§ 76. **Purposes for which express trusts may be created.**—An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors;

2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

3. To receive rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;

4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.

Formerly 1 Revised Statutes, 728, section 55:

§ 55. Express trusts may be created, for any or either of the following purposes:

1. To sell lands for the benefit of creditors:

2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon:

3. To receive the rents and profits of lands, and apply them to the education and support, or either, of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first Article of this Title:

4. 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.[1]

The third express trust purpose, originally stated in the Revised Statutes, was amended by chapter 320, Laws of 1830,[2] so as to read as follows: To receive the rents and profits of lands, 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 first article of this title. As thus amended, the third trust purpose stood until 1 Revised Statutes, 728, section 55, was superseded by section 76 (*supra*) of The Real Property Law.

Origin of Trusts in Anglo-American Jurisprudence. The precise origin of trusts originally cognizable in the courts of equity in England, and in the states derived from her empire, or adopting her laws, is not fully determined. One school of jurists assert that uses were introduced by the clergy who were well acquainted with the dual ownership of the Roman law, "*quiritarian*" and

[1] Repealed, chap. 547, Laws of 1896.

[2] This section of this act (Chap. 320, Laws of 1830) does not appear to be expressly repealed by chap. 547, Laws of 1896, but it was intended so to be, and the repeal of 1 R. S. 728, § 55, repealed the amendment.

"*in bonis*," and with *dominium* and *usufruct*, and *fidei-commissa*, in order to avoid the restrictions on gifts in mortmain or to ecclesiastical bodies.[1] Others see in the English law of uses and trusts a Teutonic origin, and assert that it developed out of the more ancient law relating to a "salman," or agent, such as an executor who was salman to distribute the estate.[2] This view is adopted by those historians who argue that the technical English word "use" is derived from the Latin "*opus*," and not from the Latin "*usus*."[3] But the practicing lawyer is little concerned with the precise origin of the English law of trusts. We are content to know that at the end of the reign of Henry V (A. D. 1430), the Lord Chancellor's jurdisdiction over uses at the suit of the beneficiary, or *cestui que use*, was a fixed fact.[4] For, as Justice Story states, not one-half of the doctrines of the common law go back of the reign of Queen Elizabeth.[5] The law of trusts, indeed, was not on a good footing in England until Lord Nottingham's chancellorship,[6] which began only after New York had become a province of England. Thus the modern English law of trusts or *jus honorarium*, as it is sometimes called,[7] does not precede the establishment of a Court of Chancery in New York.[8] Lord Eldon, who is said to have crowned the completed edifice of English equity, was a contemporary of Chancellor Kent. In view of these facts it is not surprising that the revisers of the New York statutes subjected the former law of trusts to radical changes.

Trusts under the Revised Statutes. The Article on Uses and Trusts in the Revised Statutes recognized the historic jurisdiction of the chancellor over trusts and equitable estates. It had distinct reference to the dual nature of property according to Anglo-American jurisprudence. In that law trusts were the creatures of equity, and to be enforced only in a court of equity.[9] When the Court of Chancery ceased to exist as a separate tribunal in New York, pursuant to the Constitution of 1846[10] (its place

[1] Willis, Estate of Trustees, chap. 1; Kerly, Hist. of Eq. 78; 2 Black. Comm. 271; Digby, Hist. Real Prop. 271; Viner's Abr. Uses; 1 Spence, Eq. Juris. 446; Tomlin's Lyttleton, 521; *cf.* Scrutton, Rom. Law and Law of England, 156, 157.

[2] Mr. Justice Holmes, 1 Law Quar. Rev. 162.

[3] 2 Pollock & Maitland, Hist. Eng. Law, 226; 8 Harv. Law Rev. 127.

[4] 1 Law Quar. Rev. 162; 1 Spence, Eq. Juris. 343.

[5] § 646, Eq. Juris.

[6] Lord Mansfield, in Burgess v. Wheate, 1 Eden, 177, 223.

[7] From its similarity to the origin and development of Roman equity.

[8] Hist. of Law of Real Prop. in New York, chap. 7.

[9] 1 R. S. 729, § 60.

[10] Art. VI, Const. of 1846.

being taken by the Supreme Court as a court of general jurisdiction in both law and equity[1]), the powers and jurisdiction of the Court of Chancery were made the measure of the equitable powers of the Supreme Court.[2] Notwithstanding an effort to obliterate the distinction between actions at law and suits in equity,[3] the historic jurisdiction of the Supreme Court over trusts is still referred to its equitable powers, with the effect of preserving, to some extent, such distinction between legal and equitable interests and estates.[4] But this distinction is not now to be emphasized unduly, for both trusts and legal estates are largely the creature of the statute,[5] and independent of their common-law origin. Many of the former doctrines of courts of equity have been swept away, and the law of express trusts in lands is henceforth primarily referable to this article of the statute now under consideration.[6]

Express Trusts. Having reference to the classification of trusts first contemplated by the Revised Statutes, the reader will find that in New York trusts in lands are now of two general orders or classes: express trusts[7] and powers in trust.[8] Express trusts at the time of the enactment of the Revised Statutes were those trusts distinctly cognizable only in chancery. The revisers believed that the four purposes, enumerated above in the text of this section, embraced all the instances where it was either desirable or essential that the legal title of lands should pass to the trustee.[9] But by thus limiting the instances where the trustee took the legal title to four purposes, the Legislature did not intend to take away from owners of property the right to impress upon their estates other trusts, but such other trust purposes were to be valid only as powers.[10] Now, as we shall see below,[11] the main dis-

[1] Art. VI, Const. of 1846; chap. 280, Laws of 1847.

[2] § 217, Code Civ. Proc.; Onderdonk v. Mott, 34 Barb. 106.

[3] § 62, Code of Proc. of 1849; § 69 of old Code; § 3339, Code Civ. Proc.

[4] McCartney v. Boswick, 32 N. Y. 53; § 80, The Real Prop. Law.

[5] Chap. 1, part 2, R. S., now The Real Prop. Law.

[6] Art. 3, The Real Prop. Law.

[7] *Supra*, § 76; 1 R. S. 728, § 55.

[8] *Infra*, § 79; 1 R. S. 729, § 58.

[9] Note to the article on Uses and Trusts; Heermans v. Robertson, 64 N. Y. 332; *supra*, pp. 232, 238.

[10] Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 613, 652; Selden v. Vermilya, 3 N. Y. 525, 536; Belmont v. O'Brien, 12 id. 394, 403; Downing v. Marshall, 23 id. 366, 377; Gilman v. Reddington, 24 id. 9, 15; Delaney v. McCormack, 88 id. 174, 181; Holly v. Hirsch, 135 id. 590, 594; Heermans v. Robertson, 64 id. 332; Henderson v. Henderson, 113 id. 1.

[11] Under § 79, *infra*, The Real Prop. Law.

tinction between these express trusts and powers in trust is that only where there is an express trust does the trustee take the legal title. Where there is a power in trust the title does not pass to the trustee of the power, but the lands to which the trust relates remain in or descend to the person otherwise entitled, subject to the execution of the power.[1]

What Express Trusts now are. An express trust in lands remains, in most respects, that which an active use or trust was before the Statute of Uses. The trustee takes the legal title,[2] but the beneficiary is entitled to the fruits or net profits of the estate. The old nature of the estate or interest of the beneficiary was, however, modified by the Revised Statutes in respects which will be considered below.[3] Yet it was not essentially modified, for it was said anciently that he who hath a use or trust, hath neither *jus in re* nor *jus ad rem*, but only a confidence and trust for which he hath no remedy at the common law.[4] Active uses or trusts, it will be remembered, were not affected at all by the Statute of Uses (27 Hen. VIII), but continued as before,[5] while even passive uses were ultimately continued as trusts by limiting a use upon a use and thus evading the statute.[6] The Revised Statutes contemplated not the abrogation of the old law of trusts, but a reform which should effectually destroy passive uses, and circumscribe the express trust purposes to four active trusts.[7] Thus, it must be apparent that, historically, an express trust under the present act is what an active use or trust was before the Statute of Uses (27 Hen. VIII).

Definition of a Trust. In a late case the Court of Appeals refer to the following as an accurate definition of a valid trust:[8] "(1) A sufficient expression of an intention to create a trust; (2) a beneficiary who is ascertained or capable of being ascertained; that the appointment or non-appointment of a trustee of the legal estate is not material; that if the trust or beneficial purpose be well

[1] 1 R. S. 729, § 59; *et infra*, § 79, The Real Prop. Law; Booth v. Baptist Church, 126 N. Y. 215, 239.

[2] *Vide supra*, § 34; under *infra*, § 80, The Real Prop. Law; *cf.* Matter of Straut, 126 N. Y. 201, as to personal property.

[3] 1 R. S. 729, § 60; *infra*, § 80, The Real Prop. Law.

[4] Mr. Butler's note, 249; Co. Litt. 290b; Gilbert, Uses & Trusts, 1.

[5] *Supra*, pp. 29, 238.

[6] *Supra*, pp. 30, 237; Downing v. Marshall, 23 N. Y. at p. 378.

[7] *Supra*, pp. 232, 238; Leggett v. Perkins, 2 N. Y. at p. 307; Chapl. Express Trusts & Pow. § 395.

[8] Holland v. Alcock, 108 N. Y. at p. 330.

declared, and if the beneficiary is a definite person or corporation capable of taking, the law itself will fasten the trust upon him who has the legal estate, whether the grantor, testator, heir or next of kin as the case may be. * * *" The definition embraces not only express trusts, but those powers in trust which are imperative.[1] The formal distinction between trusts and powers in trust has been already noticed.

No Particular Language Necessary to Create a Trust. No particular language is necessary to create an express trust in lands or a power in trust. It is sufficient if such express trust purpose is clearly manifested[2] in writing.[3] Nor is the appointment of a trustee essential to the validity of an express trust.[4]

Identity of Trustee and Cestui Que Trust. But the *cestui que trust* and the trustee appointed by the settlement cannot be the very same persons. There is, however, a manifest distinction between the case of a failure to designate a trustee, and a limitation giving both the legal and the equitable interests to the same person *eo nomine*.[5] But, although the trustee and the sole *cestui que trust* cannot be the same person, the fact that one of several testamentary trustees is one of the beneficiaries does not incapacitate him from acting as trustee for his co-beneficiaries, nor work a merger of the equitable interest.[6] A beneficiary of a trust can take in fee after the trust estates terminates.[7]

[1] The decisions touching the requisites of a valid trust since the Revised Statutes, are fully and carefully collated in my Essay on Charitable Uses and Trusts, 102, 103.

[2] Leggett v. Perkins, 2 N. Y. 297; Wright v. Douglass, 7 id. 564; Dillaye v. Greenough, 43 id. 445; Vernon v. Vernon, 53 id. 351; Heermans v. Robertson, 64 id. 322; Moore v. Hegeman, 72 id. 376, 384; Donovan v. Van De Mark, 78 id. 244; Heermans v. Burt, Id. 259; Cass v. Cass, 15 App. Div. 235; Morse v. Morse, 85 N. Y. 53; Ward v. Ward, 105 id. 68; Toronto Trust Co. v. C., B. & Q. R. R. Co., 123 id. 37; Steinhardt v. Cunningham, 130 id. 292, 299; § 207, The Real Prop. Law.

[3] *Infra*, § 207, The Real Prop. Law; Hutchins v. Van Vechten, 140 N. Y. 115; 2 R. S. 135, § 7, as amended by chap. 322, Laws of 1860, repealed, and § 207 substituted; *cf.* Wright v. Douglass, 7 N. Y. 564.

[4] Downing v. Marshall, 23 N. Y. at p. 382; Levy v. Levy, 33 id. 102; Wetmore v. Truslow, 51 id. 338; Holland v. Alcock, 108 id. at p. 330; Kirk v. Kirk, 137 id. 510, 514; Cross v. U. S. Trust Co., 131 id. 330, 350; McDougall v. Dixon, 19 App. Div. 420.

[5] Greene v. Greene, 125 N. Y. 506; Rose v. Hatch, Id. 427; Woodward v. James, 115 id. 346; Steinway v. Steinway, 10 Misc. Rep. 563; Mulry v. Mulry, 89 Hun, 531; *cf.* Wetmore v. Truslow, 51 N. Y. 338.

[6] Rogers v. Rogers, 111 N. Y. 228.

[7] Cass v. Cass, 15 App. Div. 235.

Beneficiary's Consent not Necessary to Creation of Trust. In order to constitute a valid trust it is not necessary that the beneficiaries should assent to, or have knowledge of, the creation of the trust by the settlor.[1]

Express Trusts Suspending Power of Alienation. Trusts provided for under subdivisions 1 and 2 of this section have been called trusts for the purposes of alienation. They are thus contra-distinguished from the trust purposes specified in subdivisions 3 and 4,[2] which under the peculiar provisions of the Revised Statutes have been held to suspend the power of alienation and, therefore, to be within the rule against perpetuities.[3] The trusts for alienation need not be limited on lives in being,[4] although the trust term necessary for the execution of the trusts may be of some duration.[5] But limitations on trusts which suspend the power of alienation must be measured by lives in being or they are void.[6]

The Four Statutory Express Trust Purposes. Having considered the nature of express trusts under the Revised Statutes and under the present section of the Real Property Law, we may proceed to consider somewhat more at large and in detail each of the four express trust purposes enumerated in this section.

Trusts to Sell for Benefit of Creditors. (1) *Trusts to sell real property for the benefit of creditors.* Here it was deemed desirable that the trustee for creditors should ordinarily take the legal title, for had it remained in an insolvent debtor complications might have arisen concerning priorities, or under the recording acts.[7] So it was thought expedient that the expressed assent of creditors should not be required.[8] A general assignment for the benefit of creditors, in so far as it involves lands, is an express trust of the first class,[9] as is a trust of part of an estate for particular cred-

[1] Martin v. Funk, 72 N. Y. 134; Maloney v. Tilton, 22 Misc. Rep. 682.

[2] Mr. Justice Bronson, Hawley v. James, 16 Wend. at p. 153; Cowen v. Rinaldo, 82 Hun, 479; In re Fisher's Estate, 25 N. Y. Supp. 80; 4 Misc. Rep. 46; Chapl. Express Trusts & Pow. § 386; *cf.* Becker v. Becker, 13 App. Div: 342, as to subd. 2, and Garvey v. McDevitt, 72 N. Y. 556, 562.

[3] *Vide infra.*

[4] They are presumed to be executed or performed *eo instanti*. *Cf.* Deegan v. Wade, 144 N. Y. 573; Manice v. Manice, 43 id. at p. 365; Eels v. Lynch, 8 Bosw. 465, 481.

[5] *Cf.* Becker v. Becker, 13 App. Div. 342.

[6] *Infra.*

[7] Revisers' note to 1 R. S. 728, § 55; People ex rel. Short v. Bacon, 99 N. Y. 275, 279; Heermans v. Robertson, 64 id. 332, 342.

[8] Cunningham v. Freeborn, 11 Wend. 240, 247.

[9] Chapl. Express Trusts & Pow. § 397; Heermans v. Robertson, 64 N. Y. at p. 342.

itors.[1] The creditors contemplated by this first trust purpose are existing creditors.[2] The sale provided for in a trust limitation to sell for the benefit of creditors must be absolute and imperative, without discretion, except as to the time and manner of performing the duty imposed. It is not sufficient to invest the trustee with a merely discretionary power of sale, which he may, or may not, exercise at his option. The sale must be the direct and express purpose of the trust.[3] The trust embraces all the property conveyed, even though a part only is necessary to satisfy the debts of the beneficiaries.[4] The trustee of this trust purpose takes a fee when the trust is created by deed,[5] but when created by devise to executors or other trustees, only a power of sale.[6] The cessation of the trust estate of a trustee for the benefit of creditors is regulated by a special provision of the statute, which will be considered in that connection.[7]

Trusts for Annuitants, Legatees or to Satisfy Charges. (2) *Trusts to sell, mortgage or lease real property for the benefit of annuitants or other legatees or for the purpose of satisfying any charge thereon.* The words "of annuitants" are new to this subdivision. But, as stated above, the term "annuitant" has acquired a more extended meaning than at common law,[8] and now ordinarily denotes a trust beneficiary entitled to annual payments or possibly to a gross sum.[9] The term is also used antithetically to indicate a trust beneficiary entitled to an annual payment for a term less than his own life.[10] Or it may have reference to a charge on land[11] and also to a beneficiary of a fund converted from realty by a peremptory power of

[1] Knapp v. McGowan, 96 N.Y. 75, 85; Royer Wheel Co. v. Fielding, 101 id. 504.

[2] Rome Ex. Bank v. Eames, 4 Abb. Ct. App. Dec. 83.

[3] Cooke v. Platt, 98 N. Y. 35, 38, 39; Woerz v. Rademacher, 120 id. 62; Steinhardt v. Cunningham, 130 id. 292, 300.

[4] Bennett v. Garlock, 79 N. Y. 302, 318.

[5] See *supra*, pp. 180, 181, under § 34, The Real Prop. Law; Briggs v. Davis, 21 N. Y. 574; Bennett v. Garlock, 79 id. 302, 317; People ex rel. Short v. Bacon, 99 id. 275, 279; McCosker v. Brady, 1 Sandf. Ch. 329; *cf.* Losey v. Stanley, 147 N. Y. 560, 568.

[6] *Infra*, § 77, The Real Prop. Law; Hawley v. James, 16 Wend. at p. 114.

[7] *Infra*, § 90, The Real Prop. Law, but see under § 34, *supra*, argument that this makes it none the less a fee.

[8] *Supra*, pp. 175, 176, under § 32, The Real Prop. Law.

[9] Graff v. Bonnett, 31 N. Y. 9; Lang v. Ropke, 5 Sandf. 363; Cochrane v. Schell, 140 N. Y. 516, 535; Mason v. Mason's Exrs., 2 Sandf. Ch. 432, 477; McCosker v. Brady, 1 Barb. Ch. 329; Booth v. Baptist Church, 126 N. Y. 215.

[10] Buchanan v. Little, 6 App. Div. 527; Clark v. Clark, 147 N. Y. 639.

[11] Tucker v. Tucker, 5 N. Y. 408.

sale. Obviously such an annuitant must now be a legatee to come under this subdivision. This trust purpose refers to an alienation of land for the benefit of particular persons or to enable the trustee to satisfy a charge on land. The mode of alienation specified is three-fold: by a sale, or a mortgage, or a lease. The beneficiaries of this trust must be legatees,[1] including annuitants.[2] The context shows that the annuitants meant are always legatees. The sale under this subdivision must be peremptory, not discretionary.[3] A mortgage is but another mode of alienation.[4] A trust to lease at first seemed to contradict the rule against perpetuities and to imply a trust for the term of the lease, for at common law rents could not be reserved to a stranger.[5] But this rule of the common law is now modified so that the lease may reserve the rent directly to the legatee, or the trustee may sell outright a term of years for a gross sum under this subdivision; and, therefore, this trust does not necessarily violate the rule that a lawful trust term can be limited only for lives in being. The trusts contemplated under this subdivision indeed do not suspend the power of alienation.[6] How far a trust to lease lands for the purpose of paying mortgages is allowable under this subdivision, is a matter of some uncertainty at the present time owing to the decision in Becker v. Becker.[7] Before that decision it was commonly thought that a trust to pay mortgages out of rents was a trust falling only under the fourth subdivision of this section and, therefore, void as a direction for unlawful accumulation.[8] A trust for the purpose of paying off indebtedness has been held void.[9] But the statute is not violated by an accidental accumulation from a fund held on valid trusts.[10] A trust to mortgage

[1] A person entitled to a gift by a last will; Weeks v. Cornwell, 104 N. Y. 325, 338, 342.

[2] As to the persons comprised in this class, see *supra*, pp. 175, 176.

[3] Cooke v. Platt, 98 N. Y. 35, 38, 39; Woerz v. Rademacher, 120 id. 62; Steinhardt v. Cunningham, 130 id. 292, 300.

[4] Hawley v. James, 16 Wend. at p. 153.

[5] Litt. § 346; Hawley v. James, Id. *supra*; *cf.* Becker v. Becker, 13 App. Div. 342.

[6] Hawley v. James, 16 Wend. at pp. 153, 154, 155; *cf.* Becker v. Becker, 13 App. Div. 342; Garvey v. McDevitt, 72 N. Y. 556, 562; Eells v. Lynch, 8 Bosw. 465, 481.

[7] 13 App. Div. 342, where it was held that a mortgage was a *charge on land*; Hascall v. King, 28 App. Div. 280; 25 N. Y. Law Jour. 355.

[8] *Vide supra*, pp. 218, 256, under § 51, The Real Prop. Law; Bean v. Hockman, 31 Barb. 378; Killam v. Allen, 52 Barb. 605; Cowen v. Rinaldo, 82 Hun, 479, 484; Re Fisher's Estate, 4 Misc. Rep. 46.

[9] Matter of Hoyt, 71 Hun, 13.

[10] *Vide supra*, pp. 218, 219, under § 41, The Real Prop. Law.

lands for the benefit of creditors at large cannot stand under this subdivision.[1] The trust under this subdivision must be one for the benefit of legatees.[2] A limitation to persons, not being executors, within the purview of subdivisions 1 and 2 of this section, if not limited on lives in being and invalid as an express trust, cannot be valid as a power in trust for the reason that a trust for alienation by the trustees was clearly intended, and only two such trusts for alienation are permitted, and then as express trusts only.[3] A trustee under the second subdivision of this section, as under the first, takes a fee when the estate is created by deed or by a settlement *inter vivos*,[4] but the trust may be only a power when it is created by will unless the trustee is also empowered to receive the rents and profits.[5] It has been said that a trustee of trusts created under this subdivision may make leases of any duration for the purposes set forth in this subdivision.[6] But this primarily depends on the question whether the trustee takes a fee or an estate *pur autre vie*[7] and also how far this subdivision was modified by chapter 886, Laws of 1895, now section 86 of this act.[8]

Trusts to Receive and Apply Rents and Profits. (3) *Trusts to receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto.* It will be observed that the latter part of this subdivision does not refer explicitly to the article containing the rule against the suspension of the power of alienation, as did the revised section.[9] But the Commissioners of Statutory Revision have reported to the Legislature that the verbal changes in this section were not intended to make any change in the antecedent law.[10] This trust purpose, therefore, remains one of those which have been called trusts suspending the power of alienation.[11] Its duration must not, therefore, exceed the limit allowed by law.[12] At the head of the observations on this

[1] Darling v. Rogers, 22 Wend. 483; Irving v. De Kay, 9 Paige, 521, 529.

[2] Weeks v. Cornwell, 104 N. Y. 325, 338.

[3] *Vide infra*, under § 79, The Real Prop. Law; Garvey v. McDevitt, 72 N. Y. 556, 562; *cf.* Bailey v. Bailey, 28 Hun, 603, 609.

[4] *Supra*, pp. 180, 181; *et infra.*

[5] *Infra*, § 77, The Real Prop. Law; Hawley v. James, 16 Wend. at p. 114; Palmer v. Marshall, 81 Hun, 15.

[6] Hawley v. James, 16 Wend. 153–155; Matter of Hoysradt, 20 Misc. Rep. 265, 270.

[7] *Supra*, pp. 180, 181.

[8] *Infra.*

[9] 1 R. S. 728, § 55; *supra*, p. 249.

[10] Appendix I; see Report with § 76, The Real Prop. Law.

[11] *Supra*, p. 254.

[12] *Infra*, p. 261.

section of The Real Property Law, the change instituted by chapter 320 of the Laws of 1830 was noticed.[1] As the avowed purpose of the Revised Statutes was to abolish all passive uses and trusts, such as one to receive the rents and profits of land and to pay them over to an adult beneficiary *sui juris*, the question soon arose whether such a trust in lands was to be tolerated under this subdivision.[2] As originally drawn, the revisers no doubt intended that the trustees of a trust to receive and pay over should be the arbiters of the beneficiaries' necessities,[3] and that the beneficiaries themselves should be persons *non sui juris*, such as infants, *femes covert*, lunatics and spendthrifts.[4] The amendment of 1830 was thought at first not to change the character of this trust purpose and not to authorize a mere trust to receive and pay over rents.[5] But in Leggett v. Perkins[6] it was finally adjudged that a trust to receive the rents and profits of lands and pay them over to any beneficiary, *sui juris* or *non sui juris*,[7] was good under this section of the statute regulating express trusts, and that the settlor was the sole judge of the person who should be designated as a beneficiary.[8] This trust to receive and pay over is not, however, a passive trust, but an active express trust.[9] Under this subdivision a trust may be created for the payment of annuities.[10] A married woman stands in the same position as a *feme sole* in respect of such trusts since the Revised Statutes.[11] A very obvious distinction exists, under this subdivision 3, between such trusts created by

[1] *Supra*, p. 249.

[2] Coster v. Lorillard, 14 Wend. 265; Hawley v. James, 16 id. 61; Leggett v. Perkins, 2 N. Y. at pp. 321, 322; Moore v. Hegeman, 72 id. at p. 384; Schenk v. Barnes, 25 App. Div. 153, 158.

[3] The original trust purpose was "to receive rents and profits of lands and apply them to the education and support, or either, of any person." 1 R. S. 728, § 55.

[4] Craig v. Hone, 2 Edw. Ch. 554; Coster v. Lorrilard, 14 Wend. 265, 321, 330; Gott v. Cook, 7 Paige, 521, 537; 24 Wend. 641; Campbell v. Low, 9 Barb. 585; Mason v. Jones, 2 id. 229; Jarvis v. Babcock, 5 id. 139; Donovan v. Van De Mark, 78 N. Y. 244, 246; Crooke v. County of Kings, 97 id. 448.

[5] Id. *supra*, *et cf.* 1 R. S. 728, § 57, now § 78, The Real Prop. Law.

[6] 2 N. Y. 297, 308, 321, 325; Tucker v. Tucker, 5 id. 408, 416; Moore v. Hegeman, 72 id. 376, 384; Gott v. Cook, 7 Paige, at p. 538.

[7] Except a corporation not authorized to take, *vide supra*, p. 249.

[8] Leggett v. Perkins, 2 N. Y. at pp. 325, 326; *cf.* Holden v. Strong, 116 id. 471.

[9] Cooke v. Platt, 98 N. Y. 35, 39; *cf.* Townshend v. Frommer, 125 id. 446.

[10] Cochrane v. Schell, 140 N. Y. 516, overruling Lang v. Ropke, 5 Sandf. 363, on this point; *cf.* Beeman v. Beeman, 88 Hun, 14; De Graw v. Clason, 11 Paige, 136.

[11] L'Amoreux v. Van Rensselaer, 1 Barb. Ch. 34, 37.

third persons and trusts created by a settlor for his own benefit. When the trust in question is created for his own benefit by the settlor, it is declared void as to creditors existing or subsequent.[1]

Trusts to Accumulate. (4) *Trusts to receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by law.* Here again the slight change in phrase of the present act has not altered the antecedent law; the trust purpose remains the same as under the Revised Statutes.[2] Trusts in land for accumulation are the second class of trusts suspending the power of alienation, or at all events they fall by common consent within the rule directed against a perpetuity.[3] The limits for trusts for accumulation are distinctly pointed out in the prior article of The Real Property Law.[4] The cases controlling limitations of this character in this State have been cited and arranged in connection with section 51,[5] regulating all directions for accumulation, and reference to them will here suffice. It may be observed that trusts for accumulation are the only trusts that at common law were subject to the rule against a perpetuity.[6] They are now subject to an inflexible rule of their own, a modification of the Thelluson act.[7]

Trusts did not Formerly tend to Perpetuities. The rule against perpetuities had at common law little application to those limitations in trust which were not trusts for accumulation.[8] The trustee might freely alienate the trust estate, and if the purchaser acquired it without notice and for value, he held it free of the trusts.[9] Any undue restraint imposed, in the creation of the trust, on the power of

[1] 2 R. S. 135, § 1; Schenk v. Barnes, 25 App. Div. 153; Young v. Heermans, 66 N. Y. 374; Spies v. Boyd, 1 E. D. Smith, 445, 448, and see, *infra*, under § 78, The Real Prop. Law.

[2] Report to the Legislature by the Commissioners of Statutory Revision; *cf.* 1 R. S. 728, § 55; *supra*, p. 257.

[3] Radley v. Kuhn, 97 N. Y. 26, 31.

[4] § 51, art. II.

[5] *Supra*, The Real Prop. Law.

[6] Ram, Wills, 16; Lewis, Perp. chap. 28, *et infra.*

[7] *Supra*, pp. 216, 217.

[8] Sinclair v. Jackson, 8 Cow. 543, 584; Craig v. Hone, 2 Edw. Ch. 554, 561; Hawley v. James, 16 Wend. at pp. 66, 121; Leggett v. Perkins, 2 N. Y. at p. 327; Dutch Church v. Mott, 7 Paige, at p. 83; Belmont v. O'Brien, 12 N. Y. at p. 401; Robert v. Corning, 89 id. 225; Graff v. Bonnett, 31 id. 9, 19; Hillen v. Iselin, 144 id. at p. 379; Schenk v. Barnes, 25 App. Div. 153, 155. So it was argued at first that trusts of personalty did not suspend the power of alienation even after the Revised Statutes, as it was thought they were not within the article on trusts. Arnold v. Gilbert, 3 Sandf. Ch. 551; Graff v. Bonnett, 31 N. Y. at p. 19.

[9] Hawley v. James, 16 Wend. at p. 121.

alienation (except in the sole case of trusts for married women, which was an exception to the rule)[1] might vitiate the trusts.[2]

Express Trusts in New York now tend to Perpetuities. Express trusts, in New York, were only made subject to the rule against perpetuities by force of that provision of the Revised Statutes which forbade the trustee to alienate the trust estate in contravention of the trust.[3] It is not that provision of the statute which forbids the beneficiary to assign his interest in the trust that now causes a trust in New York to tend to restrain the power of alienation, but section 85 of this law, forbidding the trustee to alienate.[4] As the express trusts are subject to the rule against perpetuities only by force of the statute preventing alienation by trustees, it might appear that sections 85 and 86 of this act had relieved them to some extent from the rule, as trustees may now alienate the trust estate in contravention of the trusts. But such is not the case, for the power of alienation is suspended whenever it cannot be exercised without permission of a court of justice,[5] and sections 85 and 86 require such an application.

What Trusts now Suspend the Power of Alienation. Limitations in trust being subject to the existing rule against a perpetuity only by force of the statute, it remains to consider what limitations are within such rule. The limitations so subject are called the trusts which suspend the power of alienation,[6] and are contradistinguished from trusts for aliention, which are, of course, not within the existing rule against a perpetuity.[7] The trusts which suspend the power of alienation, and are, therefore, within the rule, are trusts to receive the rents or profits of lands and apply to the use of, or pay to, beneficiaries, and trusts for accu-

[1] Bryan v. Knickerbocker, 1 Barb. Ch. 409, 412; Lewin, Trusts (Last ed.), 98, 693, 781; and see brief of Mr. Sandford, in Noyes v. Blakeman, 6 N. Y. at pp. 574, 575, 576; Haynes, Outlines of Equity, 211.

[2] Lewin, Trusts (1st ed.), 138; (Last ed.) 98; *cf.* Rice, Mod. Law of Real Prop. § 223, on valid "spendthrift trusts."

[3] § 85, The Real Prop. Law; 1 R. S. 730, § 65; Leonard v. Burr, 18 N. Y. at p. 107; Everitt v. Everitt, 29 id. at p. 90; Smith v. Edwards, 88 id. 92; Robert v. Corning, 89 id. 225; Booth v. Baptist Church, 126 id. 215, 237; Murphy v. Whitney, 140 id. 541, 546; Hillen v. Iselin, 144 id. at p. 379; Williams v. Montgomery, 148 id. 519, 526.

[4] § 83, The Real Prop. Law; Robert v. Corning, 89 N. Y. at p. 236; *cf.* Lewin, Trusts, 97; Coster v. Lorillard, 14 Wend. at p. 319; Everitt v. Everitt, 29 N. Y. at p. 90; Garvey v. McDevitt, 72 id. at p. 562.

[5] Genet v. Hunt, 113 N. Y. at p. 172; Gray, Perp. § 527.

[6] *Supra*, p. 254.

[7] *Supra*, pp. 151, 254.

mulation. Trusts for other purposes do not necessarily render the estate inalienable, and, therefore, do not tend to a perpetuity.[1]

Trusts to Receive and Apply Rents and Profits. As trusts for accumulation are allowed during an actual minority only,[2] it is necessary to consider, in connection with the rule against perpetuities,[3] only those trusts which are trusts to receive rents and profits of lands and apply them to the use of beneficiaries. Such are clearly within the statutory rule against perpetuities, and, therefore, their validity depends on the correspondence to the requisites of that rule. The trust term must be limited on lives in being, which cannot exceed two.[4] It cannot be measured by a definitive space of time, not part of a life in being.

Lives in Being the Lawful Measure of a Trust Term. A trust for an actual minority is not, however, one for twenty-one years in gross, but is a trust limited on a lesser period than an actual life in being, and the trust term determines if death ensue before majority.[5] The two lives in being, measuring a lawful trust term, need not be connected with the estate,[6] as was formerly thought.[7] Yet a limitation for an absolute period of time is not invalid, provided it is made to terminate within two lives in being at the creation of the trust.[8] As, under this statute, the creation of an estate under the rule against perpetuities dates either from the delivery of the deed or the death of a testator,[9] the lives in being, under section 32,[10] refer to lives in being at the death of testator,

[1] Radley v. Kuhn, 97 N. Y. 26, 31; Rice v. Barrett, 102 id. 161, 164; Boynton v. Hoyt, 1 Den. 53; Griffin v. Ford, 1 Bosw. 123, 142; Eells v. Lynch, 8 id. 465, 481; *supra*, pp. 254, 257.

[2] § 51, The Real Prop. Law; *supra*, pp. 216, 218.

[3] § 32, The Real Prop. Law; *supra*, pp. 151, 160.

[4] *Vide supra*, § 32, The Real Prop. Law, and pp. 156, 254 of this book; Yates v. Yates, 9 Barb. 346; Tucker v. Tucker, 5 N. Y. at p. 417; Jennings v. Jennings, 7 id. 547, 548; Beekman v. Bonsor, 23 id. at p. 316; Hobson v. Hale, 95 id. at p. 611; Rice v. Barrett, 102 id. 161, 164; Henderson v. Henderson, 113 id. 1; Cruikshank v. Home for the Friendless, 113 id. at. p. 351; Greene v. Greene, 125 id. 506, 510; Booth v. Baptist Church, 126 id. 215, 236; Underwood v. Curtis, 127 id. 541; People v. Simonson, Id. 299; Bigelow v. Tilden, 18 Misc. Rep. 689.

[5] Lang v. Ropke, 5 Sandf. 363; McGowan v. McGowan, 2 Duer, 171; Benedict v. Webb, 98 N. Y. 460; Becker v. Becker, 13 App. Div. 342.

[6] Crooke v. County of Kings, 97 N. Y. 421.

[7] Downing v. Marshall, 23 N. Y. at p. 377; Parks v. Parks, 9 Paige, at p. 123.

[8] Schermerhorn v. Cotting, 131 N. Y. at p. 58; Deegan v. Wade, 144 id. 573, 576; Montigni v. Blade, 145 id. 111; Phelps v. Phelps, 28 Barb. 121; S. C., 23 N. Y. 60.

[9] § 54, The Real Prop. Law.

[10] The Real Prop. Law.

and, therefore, the nomination by will may involve originally more standard lives than a trust settlement created by deed. Thus, a devise "to trustees to take and hold in trust for the lives of the two eldest sons of testator living at his decease," is well measured,[1] although, when the will is executed, the testator may have ten sons living. But, as a will is now ambulatory, and takes effect only from decease of the testator,[2] the choice of the lives is, in reality, simply postponed to testator's demise. But in a settlement by deed the lives are fixed at the date of delivery of the deed.

Land and Proceeds of its Sale. Land cannot be "tied up" in trust for one life, and then the proceeds of a sale thereof tied up for two more lives. The entire trust is one and the same.[3]

Power of Sale. The mere creation of a trust, it will be remembered, does not *ipso facto* suspend the power of alienation; it is only suspended when a sale by the trustee during the trust term would be in contravention of the trust.[4] Where the trust is such a one as precludes a sale by the trustee by direction of the statute, the insertion of a power of sale in the settlement does not relieve the limitation from the operation of the statutory rule against a perpetuity.[5]

Beneficiaries of a Trust. If the trust term be well limited on one or two lives in being, the rents and profits may be given to any number of beneficiaries or *cestuis que trustent*,[6] whether persons *in esse* or *not in esse*.[7] So any number of "annuities" may be charged on the fund during the trust term.[8] Formerly an annuity did not suspend the power of alienation. But a charge on land was not an annuity at the common law.[9] Whether or not an "annuity" charged on a trust estate is now assignable under section 83,[10] may

[1] Jennings v. Jennings, 7 N. Y. 547, 549; Schermerhorn v. Cotting, 131 id. 48, 63.

[2] See the old rule stated in Jackson ex dem. v. Blanshan, 3 Johns. 292, 295.

[3] Savage v. Burnham, 17 N. Y. at p. 572; Allen v. Allen, 149 id. 280.

[4] *Supra*, pp. 254, 260; Robert v. Corning, 89 N. Y. 225; Williams v. Montgomery, 148 id. 519, 526; Hawley v. James, 16 Wend. at p. 61.

[5] Hobson v. Hale, 95 N. Y. 588, 603; Amory v. Lord, 9 id. 403; Brewer v. Brewer, 11 Hun, 147; Trowbridge v. Metcalf, 5 App. Div. 318.

[6] Bird v. Pickford, 141 N. Y. 18; Crooke v. County of Kings, 97 id. 421; Bailey v. Bailey, Id. 460; Schermerhorn v. Cotting, 131 id. 48; *cf.* Parks v. Parks, 9 Paige, 107, 116.

[7] Gilman v. Reddington, 24 N. Y. 9, 14; Crooke v. County of Kings, 97 id. 421, 438.

[8] *Supra*, pp. 175, 176; Booth v. Baptist Church, 126 N. Y. 215; Buchanan v. Little, 6 App. Div. 527; *cf.* Hunter v. Hunter, 17 Barb. 25.

[9] 2 Prest. Est. 348; Bouv. Law Dict. *sub voce* "Annuity."

[10] *Infra*, The Real Prop. Law.

be a question for future consideration in connection with the new phraseology. "Annuities" were never inalienable at the common law.[1] So, after the Revised Statutes, unless the entire income of the trust estate was ransacked by the trust.[2] But now a trust to pay annuities is clearly an express trust,[3] and, therefore, it would seem that they are not assignable under this act.[4]

Construction—Separable Trusts. The court will not condemn a limitation in trust as void under section 32 of this act, if by another construction it may be decreed not to violate the rule directed against unlawful suspension of the power of alienation.[5] On the like principle, if the purposes of a trust are separable, and some of them must arise within two lives, and others beyond that limit, the valid limitation will be separated from the invalid, and the former only enforced.[6] Where the trusts are not separately framed, but the interests of the beneficiaries are given in shares, the separable and distinct character of the trust purpose necessarily results.[7]

Powers in Trust. When an express trust is created for any other purpose than those falling within one or another of the foregoing subdivisions of this section, it may be valid as a power under section 79 of this act, but the trustee cannot take the legal title. And this is so whether the trust is created by deed[8] or by devise.[9]

[1] *Cf.* In re Throckmorton, L. R., 7 Ch. Div. 145; Hatton v. May, L. R., 3 Ch. Div. 148; Hunt Foalsten v. Furber, Id. 285.

[2] McGowan v. McGowan, 2 Duer, 57; Lang v. Wilbraham, Id. 171; Lang v. Ropke, 5 Sandf. 363, 370, 371; Eells v. Lynch, 8 Bosw. 465; O'Brien v. Mooney, 5 Duer, 51.

[3] § 76, *supra*; Cochrane v. Schell, 140 N. Y. 516, overruling Lang v. Ropke, 5 Sandf. 363, on this point.

[4] § 83, The Real Prop. Law; Cochrane v. Schell, 140 N. Y. 516; McSorley v. Wilson, 4 Sandf. Ch. 515, 524; Clute v. Bool, 8 Paige, 83; Gott v. Cook, 7 id. 521; 24 Wend. 641; *cf.* De Graw v. Clason, 11 Paige, 136; Lang v. Ropke, 5 Sandf. 336; Maurice v. Graham, 8 Paige, 483, 487.

[5] Post v. Hover, 33 N. Y. 593; Du Bois v. Ray, 35 id. 162; Smith v. Edwards, 88 id. at p. 102; Roe v. Vingut, 117 id. 204; Durfee v. Pomeroy, 154 id. 583; Darling v. Rogers, 22 Wend. at p. 488; *cf.* Cochrane v. Schell, 140 N. Y. 516, 527.

[6] Savage v. Burnham, 17 N. Y. 571; Matthews v. Studley, 17 App. Div. 303; Post v. Hover, 33 N. Y. 593; Manice v. Manice, 43 id. 303, 384; Stevenson v. Lesley, 70 id. 512, 516; Wells v. Wells, 88 id. 323, 333; Kennedy v. Hoy, 105 id. 134, 137; Allen v. Allen, 149 id. 280.

[7] Savage v. Burnham, 17 N. Y. 572, 576; Stevenson v. Lesley, 70 id. 512, 516; Everett v. Everett, 29 id. 39; Monarque v. Monarque, 80 id. 320, 324.

[8] Rawson v. Lampman, 5 N. Y. 456; Heermans v. Burt, 78 id. 259, 266; Nat. Bank of Commerce v. Bank of New York, 17 Misc. Rep. 691.

[9] § 77, The Real Prop. Law.

Remainder on Trust Term. The provisions of the statute vesting the entire estate in the trustees of an express trust, do not prevent a valid limitation of a remainder (in fee)[1] to the same persons who are beneficiaries of the trust, during the existence of the trust term. Nor does the legal estate in remainder merge in the equitable interests of such beneficiaries, because they so take in remainder. Legal estates and equitable interests do not always merge.[2]

[1] *Supra*, pp. 181, 193, under §§ 34, 40, The Real Prop. Law.

[2] Stevenson v. Lesley, 70 N. Y. 512; Losey v. Stanley, 147 id. 560. *Cf.* § 83, The Real Prop. Law, *infra*.

§ 77. **Certain devises to be deemed powers.**— A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power.

Formerly 1 Revised Statutes, 729, section 56:

§ 56. 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.[1]

Power of Sale. Before the Revised Statutes, executors did not acquire the inheritance simply by virtue of a devise of a power of sale.[2] Sugden says, that "as far back as the reign of Henry the Sixth, it was laid down in a case in the year books, that if one devise that his executors shall sell his lands and die seised, his heir is in by descent and consequently the executors have only a power."[3] A devise "in trust to sell" or "to sell lands," but not a devise "that executors shall sell lands" carried a fee.[4] The old law determining when trustees took a fee and when a mere power of sale is well stated in the first edition of Mr. Jarman's Powell on Devises.[5] This section of the statute has been said to declare the pre-existing law.[6] Now as formerly executors may by implication take the inheritance or fee.[7]

Devise of a Power of Sale. A devise of a mere power of sale to an executor or trustee does not carry the fee to him unless he is empowered to receive the rents.[8] A power of sale given to an

[1] Repealed, chap. 547, Laws of 1896.

[2] *Vide infra*, under § 79, The Real Prop. Law.

[3] 1 Sugd. Pow. 129; Bradstreet v. Clarke, 12 Wend. at p. 663.

[4] Id. 130.

[5] Vol. 1, 221.

[6] Moncrief v. Ross, 50 N. Y. at p. 435.

[7] Tucker v. Tucker, 5 N. Y. at p. 416; Kinnier v. Rogers, 42 id. 351, 534; Marx v. McGlyn, 88 id. 357; Robert v. Corning, 89 id. 225, 237.

[8] Van Vechten v. Van Veghten, 8 Paige, 104; Germond v. Jones, 2 Hill, 569; Campbell v. Johnson, 1 Sandf. Ch. 148; Thompson v. Carmichael's Exrs., Id. 387; Tucker v. Tucker, 5 N. Y. 408; Leonard v. Burr, 18 id. 96, 108; Palmer v. Marshall, 81 Hun, 15; Kinnier v. Rogers, 42 N. Y. 531, 534; Manice v. Manice, 43 id. 303, 364; Vernon v. Vernon, 53 id. 351, 358; Lent v. Howard, 89 id. 169; Weeks v. Cornwall, 104 id. 325, 339; Clift v. Moses, 116 id. 144; Steinhardt v. Cun-

executor for the benefit of legatees is a general power in trust.[1] But a merely discretionary power of sale in the executors for the purpose of distribution, even though connected with the right to receive the rents and profits of land, does not vest them with the legal title.[2] A devise to devisees by name is not inconsistent with the devise of a power of sale to executors.[3] Although a power of sale is not in terms peremptory, if the general scheme of the will requires a conversion, it will operate as a conversion.[4]

Title Where Executors do not Take a Fee. Where the executors do not take the fee or inheritance, the title devolves by descent on the heirs of testator who take the rents and profits until the power of sale is executed,[5] unless the land is otherwise devised,[6] or the rents in equity belong to other distributees.[7]

When Legatees may Extinguish Power. Where the power in trust is a power of sale, and is exclusively for the benefit of legatees entitled to the fund, they may elect to take the real property instead and call for a conveyance. But all must concur.[8]

ningham, 130 id. 292; 4 Kent, Comm. 322.

[1] Manier v. Phelps, 15 Abb. N. C. 123, 137; Russell v. Russell, 36 N. Y. 581; § 79, The Real Prop. Law.

[2] Chamberlain v. Taylor, 105 N. Y. 185, 192; Palmer v. Marshall, 81 Hun, 15.

[3] Crittenden v. Fairchild, 41 N. Y. 289; Kinnier v. Rogers, 42 id. 531; Clift v. Moses, 116 id. 144.

[4] Lent v. Howard, 89 N. Y. 169; *cf.* Clift v. Moses, 116 id. 144.

[5] Lent v. Howard, 89 N. Y. 169; Sweeney v. Warren, 127 id. 427; Matter of Spears, 89 Hun, 49.

[6] Embury v. Sheldon, 68 N. Y. 228.

[7] Lent v. Howard, 89 N. Y. 169. Note in this connection that lapsed devises now go into the residuary (Cruikshank v. Home for the Friendless, 113 N. Y. 337; Matter of Allen, 151 id. 243), and not as stated in Gerard's Titles (Last ed. 1896), 398.

[8] McDonald v. O'Hara, 144 N. Y. 566; Mellen v. Mellen, 139 id. 210; Greenland v. Waddell, 116 id. 234; Prentice v. Jansen, 79 id. 478.

§ 78. **Surplus income of trust property liable to creditors.**—Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution.

Formerly 1 Revised Statutes, 729, section 57:

§ 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]

Comment on this Section. Prior to the Revised Statutes, trusts could not be created with a proviso that the interest of *cestui que trust* should not be alienated, unless it were a trust for a married woman.[2] The history of restraints on alienation of trust estates will be noticed under the appropriate and subsequent section.[3] That section was, in all probability, originally framed at a time when the revisers intended to limit express trusts to apply income to the instances of minors, *femes covert*, lunatics and spendthrifts;[4] for a general restraint on the alienation of all trusts of this character was unknown in the best days of equity jurisdiction.[5] When the Revised Statutes imposed a general restraint on alienation[6] by certain *cestuis que trustent*, the section now under consideration[7] was deemed necessary to prevent unjust appropriations of income from trust estates.[8] But notwithstanding the fact that there was, before the Revised Statutes, no restraint on the power of alienation by *cestuis* (which fact frequently led to the loss of the *corpus* of an executed trust), estates could then be limited in trust for the benefit of persons until they became insolvent or

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, pp. 259, 260; Lewin, Trusts (Last ed.), 98, 693, 781; Bryan v. Knickerbocker, 1 Barb. Ch. 409, 412; Graff v. Bonnett, 31 N. Y. 9, 25; Schenck v. Barnes, 25 App. Div. 153, 155.

[3] The Real Prop. Law, § 83.

[4] *Supra*, pp. 258, 259.

[5] Lewin, Trusts, 98; see argument in Noyes v. Blakeman, 6 N. Y. at pp. 574, 575, 576.

[6] 1 R. S. 730, § 3; The Real Prop. Law, § 83.

[7] § 78, *supra*; 1 R. S. 728, § 57.

[8] Clute v. Bool, 8 Paige, at p. 87.

bankrupt and then remainder over, in the nature of a shifting use;[1] and this class of limitations remains still valid.[2]

Effect of this Section. The effect of section 78, from the point of view of creditors, is to limit all trusts, created by third persons, to receive and pay over rents, or apply them to the use of another, to trusts for actual education and maintenance[3] — a principle eminently proper in view of the unlimited adoption by the statute of a restraint on the power of alienation.[4] In ordinary trusts "to receive and apply to the use of, etc., etc.," the trustee has no discretion and cannot withhold from the beneficiary the net income of the estate.[5] In all cases of this character the court alone is the final arbiter, therefore, of the beneficiaries' necessities; and the adjudged surplus may be reached by a creditor's bill[6] after the return of an execution unsatisfied.[7]

When Trust Created by the Beneficiary. When a trust is created by the beneficiary himself for his own benefit solely, the trust is made void by the statute as against creditors, existing or subsequent, of the settlor.[8] But it is good as an express trust as to other persons.[9] Trusts for the benefit of the settlor himself may easily be executed into legal estates by virtue of this statute.[10] But the provisions of the statute, avoiding such trusts as to creditors, can have no effect on the limitation of a remainder to a third person if the settlor was solvent when the settlement was made, for the remainder is not for the benefit of the settlor.

[1] Lewin, Trusts (Last ed.), 101, and cases cited.

[2] Bramhall v. Ferris, 14 N. Y. 41.

[3] Including maintenance of the beneficiary's family, Bunnell v. Gardner, 4 App. Div. 321; Andrews v. Whitney, 82 Hun, 117; Tolles v. Wood, 99 N. Y. 616; Estate of Hoyt, 12 Civ. Proc. Rep. 208, 219; Schenk v. Barnes, 25 App. Div. 153.

[4] Id. *supra*.

[5] Clute v. Bool, 8 Paige, 83, 88; McEvoy v. Appleby, 27 Hun, 44.

[6] Rider v. Mason, 4 Sandf. Ch. 351; S. C., 2 Barb. Ch. 79; Williams v. Thorn, 70 N. Y. 270, 273; Tolles v. Wood, 99 id. 616; Wetmore v. Wetmore, 149 id. 520; Schenk v. Barnes, 25 App. Div. 153; Miller v. Miller, 1 Abb. N. C. 30; Bunnell v. Gardner, 4 App. Div. 321; *cf.* Graff v. Bonnett, 31 N. Y. 9; Locke v. Mabbett, 2 Keyes, 457; as to personalty, Code Civ. Proc. §§ 1871, 1879, 2463; see a valuable note to 16 Abb. N. C. at p. 20, *seq.*

[7] Williams v. Thorn, 70 N. Y. 270.

[8] 2 R. S. 135, § 1; Young v. Heermans, 66 N. Y. 374; Spies v. Boyd, 1 E. D. Smith, 445, 448; Schenck v. Barnes, 25 App. Div. 153; *cf.* Wainwright v. Low, 132 N. Y. 313.

[9] Gilman v. McArdle, 99 N. Y. 451, 457; Townshend v. Frommer, 125 id. 446; *cf.* Wainwright v. Low, 132 id. 313.

[10] *Supra*, The Real Prop. Law, § 72, and see note to 16 Abb. N. C. 23.

§ 79. **When an authorized trust is valid as a power.**—Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees; 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 this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power.

Formerly 1 Revised Statutes, 729, sections 58 and 59:

§ 58. Where an express trust shall be created, for any purpose not enumerated in the preceding sections, no estate shall vest in the trustees; 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 in relation to such powers, contained in the third Article of this Title.[1]

§ 59. In every case where the trust shall be valid as a power, the lands to which the trust relates, shall remain in, or descend to the persons otherwise entitled, subject to the execution of the trust as a power.[2]

Comment on Section 79. Farther back than the time of Littleton, it was well settled that a power of sale for a pious use could override an inheritance, and be vested in others than the heirs taking the land by descent.[3] So Coke distinctly states that a power and an inheritance in land may be separate; or, in other words, that a power of sale may be in one person and the legal title to the estate in another.[4] Sir Edward Sugden points out that this power was separated from the legal title as early as the reign of King Henry VI (A. D. 1422–1461).[5] After the Statute of Wills[6] executors frequently took a power of sale without the inheritance which went to the heirs.[7] Where the executors took a fee, the trust might cover the power, for a normal fee embraces all powers. But the distinction between a power *strictissimi juris* and a trust, or a power in trust, was formerly this, says Sugden: "Powers are never imperative; * * * trusts are always imperative."[8] Thus,

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Litt. § 169; *et vide supra*, p. 265, under § 77. *Cf.* Litt. § 383.

[4] Co. Litt. 113a, and Mr. Hargrave's note 146, Id.

[5] 1 Powers, 129.

[6] 32 Hen. VIII, chap. 1; 34 & 35 id. chap. 5.

[7] See cases cited by 1 Sugd. Pow. 130, and Hargrave's note to Co. Litt. 113a.

[8] 2 Powers, 158; Towler v. Towler, 142 N. Y. 371, 375.

before the Revised Statutes, the distinction between powers in trust and express trusts, where the trustee had the inheritance, was well established, and there might be a trust in lands without an estate at law.[1] The Revised Statutes simply extended the application of this distinction, and embraced in powers in trusts all trusts except those mentioned in its four express trust purposes.[2]

Powers in Trust. It has been intimated that the original revisers committed an error in their attempt to enumerate all the proper occasions for creating a trust estate.[3] But this enumeration in the Revised Statutes of the four express trust purposes has not deprived owners of property of the power of impressing a great variety of active trusts on their estates, but such trusts are now powers in trust and not trusts under the 76th section of this act.[4] Thus limitations of active trusts to partition are not express trusts, but good as powers in trust;[5] so limitations to appraise, divide shares, sell or convey are valid as powers in trust.[6] A power of sale for the benefit of legatees is a power in trust.[7] But a trust which is merely passive cannot be validated as a power in trust; such a trust is annihilated by force of the existing Statute of Uses as revised.[8]

Defective Express Trusts not Valid as Powers. A trust purpose, specified in section 76 of this act, cannot be validated as a power in trust because it fails as an express trust.[9] There must be a

[1] See Jarman, Devises, chap. XXXV, p. 204, *seq.*, "Estates of Trustees," with extensive citations of the old cases.

[2] § 76, *supra*. See note of Revisers with 1 R. S. 729, § 58.

[3] Downing v. Marshall, 23 N. Y. at p. 380.

[4] Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 613, 652; Selden v. Vermilya, 3 N. Y. 525, 536; Belmont v. O'Brien, 12 id. 394, 403; Downing v. Marshall, 23 id. 366; Gilman v. Reddington, 24 id. 9, 15; Delaney v. McCormack, 88 id. 174, 181; Konvalinka v. Schlegel, 104 id. 125, 130; Chamberlain v. Taylor, 105 id. 185, 192; Holly v. Hirsch, 135 id. 590; Booth v. Baptist Church, 126 id. 215, 239; Townshend v. Frommer, 125 id. 446, 457; Reynolds v. Denslow, 80 Hun, 359; Bennett v. Rosenthal, 11 Daly, 91.

[5] Irving v. De Kay, 9 Paige, 521; De Kay v. Irving, 5 Den. 646, 649; Palmer v. Marshall, 81 Hun, 15; Manice v. Manice, 43 N. Y. 303, 364; Konvalinka v. Schlegel, 104 id. 125, 130; Henderson v. Henderson, 113 id. 1.

[6] Townshend v. Frommer, 125 N. Y. 446, 459; Konvalinka v. Schlegel, 104 id. 125; 130; Delaney v. McCormack, 85 id. 174, 181; Manice v. Manice, 43 id. 303, 364; Gilman v. Reddington, 24 id. 9, 15; *cf.* Chapl. Express Trusts & Pow. § 552.

[7] Manier v. Phelps, 15 Abb. N. C. 123, 137; Russell v. Russell, 36 N. Y. 581.

[8] Townshend v. Frommer, 125 N. Y. 446, 457; Adams v. Perry, 43 id. 487, 496.

[9] Hawley v. James, 16 Wend. 61; Arnold v. Gilbert, 3 Sandf. Ch. 563;

definite beneficiary entitled to enforce the trust, whether the trust is under the 76th section of this act or is under this section "a power in trust."[1] So the use must in both cases be sufficiently definite to be capable of judicial enforcement[2] without resort to the doctrine of *cy pres*.[3]

No Particular Language Necessary to Create a Power in Trust. No particular language is necessary to create a power in trust. Any language indicative of an intention to create it is sufficient.[4] But an intention to create an express trust will not be inferred where the purpose may be accomplished as a power.[5]

Power in Trust is Imperative. A power in trust is as peremptory and imperative as an express trust,[6] excepting where it is made to depend wholly on the will of the grantor;[7] and in that case it is not unlike some kinds of honorary[8] or discretionary trusts. If a limitation in trust is so indefinite as not to be capable of enforcement without superseding the discretion of a trustee, it is not good.[9]

Trustee of a Power in Trust Cannot Contravene Trust. A trustee of a power in trust cannot alienate the property in contravention of the trust,[10] any more than can a trustee of an express trust.[11]

Lang v. Ropke, 5 Sandf. 363, 372; Matter of Hall, 24 Hun, 153; Garvey v. McDevitt, 72 N. Y. 556, 562; *et vide infra*, *sub*. § 117, The Real Prop. Law; *cf*. Konvalinka v. Schlegel, 104 N. Y. at p. 130.

[1] Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 613; Sweeney v. Warren, 127 N. Y. 426; Tilden v. Green, 130 id. 29, 64, unless the power in trust is for a charitable, religious, pious or educational use, when, see chap. 701, Laws of 1893, and § 93, The Real Prop. Law.

[2] Owen v. Miss. Soc. M. E. Church, 14 N. Y. 380, 406; Bascom v. Albertson, 34 id. 584, 592; Prichard v. Smith, 95 id. 76, 81.

[3] Adams v. Perry, 43 N. Y. at p. 498; Holland v. Alcock, 108 id. 312, 330; Cottman v. Grace, 112 id. 299, 306; Tilden v. Green, 130 id. 29.

[4] Reynolds v. Denslow, 80 Hun, 359; *cf*. Leggett v. Perkins, 2 N. Y. 297; Wright v. Douglass, 7 id. 564; Dillaye v. Greenough, 45 id. 438, 445; Vernon v. Vernon, 53 id. 351; Heermans v. Robertson, 64 id. 332; Moore v. Hegeman, 72 id. 376, 384; Donovan v. Van De Mark, 78 id. 244; Morse v. Morse, 85 id. 53.

[5] Heermans v. Robertson, 64 N. Y. 332; Henderson v. Henderson, 113 id. 1, 11.

[6] § 137, The Real Prop. Law; 1 R. S. 734, § 96; Smith v. Floyd, 140 N. Y. 337; Downing v. Marshall, 23 id. at p. 380; Farmers' Loan & Trust Co. v. Carroll, 5 Barb. at p. 653.

[7] § 137, The Real Prop. Law.

[8] 5 Harv. Law Rev. 389–402.

[9] Phillips v. Phillips, 112 N. Y. 197, 204; Lawrence v. Cook, 104 id. 632; Collister v. Fassitt, 7 App. Div. 20; Foose v. Whitmore, 82 N. Y. 405; Tilden v. Green, 130 id. 29, 63; Lewin, Trusts, 171 *seq*.

[10] Russell v. Russell, 36 N. Y. 581, 584; McPherson v. Smith, 49 Hun, 254; Arnoux v. Phyfe, 6 App. Div. 605; Benedict v. Arnoux, 7 id. 1.

[11] § 85, The Real Prop. Law.

Devolution of Trust Powers. Upon the death of a sole surviving trustee of a power in trust the trust devolves on the Supreme Court, under the 91st section of this act,[1] as it is applicable to powers in trust.[2]

What Trust Purposes are Lawful as Powers in Trust. What trust purposes are lawful as powers in trust, the statute does not attempt to specify,[3] except negatively by excluding them from the 76th section of this act. They were the trusts lawful by the common law, and not known now as the "*four express trust purposes.*"

Beneficiaries of a Power in Trust. As stated before, in order that a trust may be valid as a power in trust there must be a definite and certain beneficiary entitled to come into equity and enforce the trust,[4] unless the limitation is to a charitable, religious, educational or benevolent use, when it falls under a recent and more liberal law.[5]

Characteristics of Trusts and "Powers in Trust." With the single exception of the devolution of the legal title and the right to undisposed of rents and profits which follow the legal title, trusts, whether called "express trusts" under the 76th section of this act, or called "powers in trusts" under this section, do not materially differ in their trust features.[6] Courts of equity have cognizance of both kinds of trusts because they are trusts and for no other reason.[7] So, when the purposes for which the trust power was created cease, or are completed, the power is extinguished.[8]

[1] *Vide infra.*

[2] *Vide* § 162, *infra.*

[3] Downing v. Marshall, 23 N. Y. at p. 380; Belmont v. O'Brien, 12 id. at p. 403; Read v. Williams, 125 id. at p. 569.

[4] Tilden v. Green, 130 N. Y. 29; Prichard v. Smith, 95 id. 76; Matter of O'Hara, Id. at p. 418; Read v. Williams, 125 id. 560.

[5] Chap. 701, Laws of 1893, § 93, The Real Prop. Law.

[6] Brandow v. Brandow, 66 N. Y. 401, 406; Cruikshank v. Home for the Friendless, 43 id. at p. 351; Read v. Williams, 125 id. at p. 568.

[7] Mellen v. Mellen, 139 N. Y. 210; Dill v. Wisner, 88 id. 153, 160; Haight v. Brisbane, 96 id. 132.

[8] *Vide infra*, under § 137, The Real Prop. Law.

§ 80. **Trustee of express trust to have whole estate.** — Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust.

Formerly 1 Revised Statutes, 729, section 60:

§ 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 lands, but may enforce the performance of the trust in equity.[1]

The Old Law. Prior to the Revised Statutes, a trustee of an express trust[2] acquired the legal title and seisin of the estate. He it was who was the recognized tenant according to the old common or feudal law, which always required that there should be a tenant of the freehold, and that the seisin should not be in abeyance.[3] The trustees' estate might be a chattel interest, that is, an estate for years,[4] or it might be a freehold estate.[5] The freehold, again, might be either in fee[6] or an estate *pur autre vie*.[7] But if the estate was limited by a deed to the use of the trustees and their heirs, they took the legal estate in fee independently of the evidence of intention supplied by the nature of the trust.[8] If the estate of trustees was created by will it was commensurate with the trusts.[9] The *cestui que trust* or beneficiary, on the other hand, had no estate recognizd by the common law.[10] But as equity jurisdiction grew, that which was neither *jus ad rem* nor *jus in re*[11] became an "*estate*" in equity with most of the properties and characteristies of a legal estate.[12] The equitable estate

[1] Repealed, chap. 547, Laws of 1896.

[2] An express trust was then one clearly expressed by the author thereof, or one fairly inferable from a written document. Smith, Eq. 99.

[3] *Supra*, pp. 22, 29, 185, 192.

[4] Doe ex dem. White v. Simpson, 5 East, 162.

[5] 2 Jarm. Wills, chap. XXXV.

[6] Harton v. Harton, 7 Durn. & E. 652; Fisher v. Fields, 10 Johns. 495; Greason v. Kettletas, 17 N. Y. 491.

[7] Doe ex dem. White v. Simpson, 5 East, 162; Challis, 115.

[8] 2 Jarm. Wills, 214; Lewin, Trusts, 102.

[9] 1 Perry, Trusts, § 319, and cases there cited.

[10] *Supra*, p. 252; Mr. Butler's note 249, Co. Litt. 290; Gilb. Uses & Trusts 2.

[11] *Supra*, p. 238.

[12] 1 Sand. Uses & Trusts, 122; Lewin, Trusts (1st ed.), 481; 2 Spence, Eq. Juris. chap. X.

might be in fee or in tail.[1] If in tail, it might be barred by a tenant in tail[2] by means of a common recovery.[3] Equitable estates were susceptible of the same limitations as legal estates. The husband had curtesy in the wife's trust estate though dower by some anomaly was excluded.[4]

The Revised Statutes. The Revised Statutes put an end to equitable estates in lands. This legislation was in this particular the first attempt to modify the antinomy of the old judicial system, with its distinct estates in law and estates in equity. Henceforth *cestui que trust* had no estate whatever.[5] The whole nature of the beneficiary's right had undergone a change; it was made inalienable in some cases,[6] and it was cut down in duration to the life of the beneficiary when the trust was permanent.[7] This section (80) of the statute is to be read, however, in connection with several others *in pari materia*.[8] The first provides for the limitation of estates by way of remainder.[9] The second provides for the reversion so as not to deprive the grantor of it by implication.[10] The last states an old principle of construction in respect of trust estates, viz., that the estate of the trustee shall cease when the purposes of the trust no longer require it to exist.[11]

Does Trustee of an Express Trust Take Now a Fee or an Estate Pur Autre Vie? In view of the legislation on this subject the question arises particularly under the 34th section of this act,[12] whether the trustee of an express trust now takes a base fee, or an estate *pur autre vie*. Elsewhere the more familiar cases on this point have been collated, and the opinion expressed that the *rationale* of the present legislation requires the conclusion that a trustee of an express trust, mentioned in the 76th section of this

[1] 1 Sand. Uses & Trusts, 127.

[2] Lewin, Trusts (1st ed.), 503.

[3] Mr. O'Conor in Wright v. Miller, 8 N. Y. 16, 17; Brydges v. Brydges, 3 Ves. 120, 126; cited, 18 id. at p. 418.

[4] 1 Sand. Uses & Trusts, 293.

[5] Briggs v. Davis, 21 N. Y. 574, 577; L'Amoreux v. Van Rensselaer, 1 Barb. Ch. 37; Degraw v. Clason, 11 Paige, 140; Calkins v. Long, 22 Barb. 97; Darling v. Rogers, 22 Wend. 483; Noyes v. Blakeman, 6 N. Y. 567, 579; Selden v. Vermilya, 3 id. 525; Ring v. McCoun, 10 id. 268, 271; Gilman v. Reddington, 24 id. 9, 15; Marvin v. Smith, 46 id. 571; Duvall v. Eng. Lutheran Church, 53 id. 500; People ex rel. Short v. Bacon, 99 id. 275; Crooke v. County of Kings, 97 id. 421, 446; Van Cott v. Prentice, 104 id. 45, 53.

[6] § 83, The Real Prop. Law, *et supra*, pp. 160, 260.

[7] § 76, The Real Prop. Law.

[8] §§ 81, 82, 89, The Real Prop. Law.

[9] § 81, *infra*.

[10] § 82, *infra*.

[11] § 89, *infra*.

[12] See, also, § 123, *infra*.

act, now takes a base fee and not an estate *pur autre vie*.[1] The language of section 80 of this act makes it not so clear as its prototype,[2] that every express trust shall vest the whole fee in the trustee. But there was no intent to change the law on this point.[3] The theory of the one durable trust under the 76th section of this act was that the trust was for persons incapable of the handling and the disposing of an estate;[4] therefore, the interest of the beneficiary and his power of disposition over it was restricted.[5] The whole inheritance, fee or estate was placed, therefore, in the trustee.[6] But as such estate may not endure forever, the fee must be a base or determinable fee and not a fee simple absolute.[7] There are, however, not wanting authorities, susceptible of the conclusion that the present estate which trustees of an express trust, under the 76th section, now take is an estate *pur autre vie*.[8]

[1] Dyeing & Printing Estab. v. De Westenberg, Daily Reg., Feb. 19, 1886; affd., above; *cf.* Matter of McCaffrey, 50 Hun, 371; Gomez v. Gomez, 147 N. Y. 195, 201; Matter of Hoysradt, 20 Misc. Rep. 265; Geisse v. Bunce, 23 App. Div. 289. For other cases on this point see *supra*, pp. 180, 181, under § 34, The Real Prop. Law.

[2] 1 R. S. 729, § 60.

[3] Report of Commissioners of Statutory Revision with section 80 of this article.

[4] *Supra*, pp. 249, 258; Donovan v. Van De Mark, 78 N. Y. at p. 246.

[5] *Infra*, § 83, The Real Prop. Law.

[6] Coster v. Lorillard, 14 Wend. at p. 304.

[7] *Supra*, pp. 180, 181, § 34, and under § 21, p. 94.

[8] *Supra*, pp. 180, 181; Embury v. Sheldon, 68 N. Y. 227, 234; Nicoll v. Walworth, 4 Den. 385, 388; Stevenson v. Lesley, 70 N. Y. 512, 517; Provost v. Provost, 70 id. 141, 145; Losey v. Stanley, 147 id. at p. 568.

§ 81. **Qualification of last section.**— The last section shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under him.

Formerly 1 Revised Statutes, 729, section 61:

§ 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.[1]

Object of Section 81. This section, as originally framed, was intended to make it quite clear that, although the trustees took the whole legal estate, or a base fee, under the prior section, yet the settlor of the trusts might make another ulterior limitation of the estate, if it were not inconsistent with the estate granted or the rule against a perpetuity.[2] Thus, a remainder in fee may be limited after a trust estate created under the 3d subdivision of the 76th section.[3] For, if the trustees of an express trust take a fee, a fee may be mounted on a fee under the Revised Statutes and this act.[4] And such a remainder is well limited to those who were beneficiaries of the express trust.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] Embury v. Sheldon, 68 N. Y. 227; Matter of Tienken, 131 id. 391, 401; Roberts v. Cary, 84 Hun, 328; Briggs v. Davis, 21 N. Y. 574, 577; *cf.* Amory v. Lord, 9 id. 403, 413.

[3] *Vide* The Real Prop. Law, § 32; Embury v. Sheldon, 68 N. Y. 227; Matter of Tienken, 131 N. Y. 391; Losey v. Stanley, 147 id. 560; Craver v. Jermain, 17 Misc. Rep. 244.

[4] The Real Prop. Law, § 40.

[5] Stevenson v. Lesley, 70 N. Y. 512, 516; Craver v. Jermain, 17 Misc. Rep. 244, 253.

§ 82. **Interest remaining in grantor of express trust.**— Where an express trust is created, every legal 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.

Formerly 1 Revised Statutes, 729, section 62:

§ 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.[1]

Object of this Section. Section 81 having provided for limitations by way of remainder on estates in trust, this section (82) saves reversions. This legislation has express reference to the section declaring the whole estate in the trustees of an express trust.[2] Its object was to save reversionary interests in those cases where the estate of the trustees was a future estate, and where such estate was defeasible after a life or lives, and no remainder was limited, and the reversion was not disposed of in any way.[3] If the estate of trustees is an estate *pur autre vie*,[4] then there is always a reversion or remainder to be disposed of. If not disposed of, it is clear, under this section, that it belongs to the settlor or his heirs,[5] notwithstanding the 80th section of this act. This section would formerly have indicated that the estate of the trustees of an express trust is now an estate *pur autre vie;* for, formerly there could be no reversion on an estate in fee after the Statute of *Quia Emptores*.[6] But this argument cannot hold now, as the fee now taken by trustees of an express trust is by force of the statute and not by the common law.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] The Real Prop. Law, § 80.

[3] Briggs v. Davis, 21 N. Y. 574.

[4] See the cases under § 34, The Real Prop. Law.

[5] James v. James, 4 Paige, 115; Bowers v. Smith, 10 id. 193, 200; White v. Howard, 46 N. Y. 144, 169; Vernon v. Vernon, 53 id. 351; Nearpass v. Newman, 106 id. 47.

[6] *Supra*, pp. 91, 110.

[7] The Real Prop. Law, § 80.

§ 83. **What trust interest may be alienated.**—The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust may be transferred. Whenever a beneficiary in a trust for the receipt of the rents and profits of real property is entitled to a remainder in the whole or a part of the principal fund so held in trust subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such rents and profits, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder.

Formerly 1 Revised Statutes, 730, section 63:

§ 63. 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.[1]

This (§ 63, 1 R. S. 730) was amended in 1893 by the following act:

CHAP. 452.

AN ACT to amend section sixty-three of article second, title two, chapter one, part two of the revised statutes, in relation to uses and trusts.

Approved by the Governor, April 21, 1893. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section sixty-three of article second, title two, chapter one of part two of the revised statutes, is hereby amended so as to read as follows:

§ 63. 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. Always provided that whenever the person beneficially interested in the whole or any part of the income of any trust heretofore or hereafter created for the receipt of the rents and profits of lands or the income of personal property shall have heretofore become or may hereafter be or become entitled in his or her own right or through title derived as legatee, distributee or next of kin, or derived through the legal representatives of any deceased person to the remainder in the whole or any part of the principal fund so held in trust subject to such estate for a life or lives or a shorter term then and in any such case it shall and may be lawful for such person so beneficially interested in the whole or any part of the income of such trust estate for a

[1] Not repealed by chap. 547, Laws of 1896, but by chap. 417, Laws of 1897.

life or lives or a shorter term and become entitled to the remainder in the whole or any part of the principal fund so held subject to said trust estate for a life or lives or a shorter term, to make and execute a conveyance or release, duly acknowledged in like manner as a deed to be recorded, whereby such person so beneficially interested in the whole or any part of the income of such trust for a life or lives or a shorter term shall convey or release to himself or herself or the person presumptively entitled to the remainder or reversion upon the then termination of such trust estate all his or her right, title and interest in and to the income of such trust estate for a life or lives or a shorter term, and thereupon the estate of the trustee or trustees as to the whole or such portion of the principal fund so held in trust to which such person so releasing shall have heretofore become or may hereafter become entitled to the remainder as aforesaid shall cease and determine, and the trust estate for a life or lives or a shorter term so far as it affects the whole or such portion of the income and principal fund to the remainder in which said person so releasing has heretofore become or may hereafter be or become entitled shall be and become forthwith merged in such remainder or reversion.

§ 2. That this act shall take effect immediately.[1]

Comment on this Section. It has been stated above that prior to the Revised Statutes there could be no restraint on the power of alienation by *cestuis que trustent*, excepting in the case of married women.[2] Even in the case of *femes covert* the restraint was one directed against anticipation rather than against alienation generally.[3] A perpetuity never could be created by means of a trust, and a restraint on alienation by *cestui que trust* as it was thought, tended to a perpetuity.[4] The clause restraining a married woman's power of anticipation is of modern growth;[5] following the very harsh, but just, decision in Pybus v. Smith,[6] where the husband's creditors took the wife's trust estate "while the wax was yet warm upon the deed" of settlement.[7] Subsequently Lord Thurlow directed the words "and not by anticipation" to be added to an ordinary limitation for the separate use of the wife. By general consent this was deemed a protection to the wife. But its application was so limited that it was held that it could not operate to

[1] Not repealed by chap. 547, Laws of 1896, but by chap. 417, Laws of 1897.

[2] *Supra*, pp. 259, 267; Bryan v. Knickerbacker, 1 Barb. Ch. 409, 412; brief of counsel in Noyes v. Blakeman, 6 N. Y. at pp. 574–576; Graff v. Bonnett, 31 id. 9, 15; Dyett v. Cent. Trust Co., 140 id. 54, 65.

[3] Lewin, Trusts (Last ed.), 781; Hayne's Outlines of Equity, 207, 211 (Ed. of 1858).

[4] Lewin, Trusts (Last ed.), 97; Schenck v. Barnes, 25 App. Div. 153, 155.

[5] Hayne's Outlines of Equity, 207, *seq.*

[6] 1 Ves. Jr. 194.

[7] Jones v. Harris, 9 Ves. 493.

restrain alienation on the part of a widow or maid, for that was a general restraint on alienation which even equity would not tolerate.[1]

Effect of this Section. It was said in Noyes v. Blakeman, by eminent counsel, "the Revised Statutes[2] have in effect written the clause against anticipation in every instrument which creates an express trust, and made it applicable to all kinds of beneficiaries, so that neither the beneficiary nor the court can deal with it."[3] This novel restraint was framed at a time when the 3d subdivision of the express trust section was thought to authorize only spendthrift trusts, or trusts for the benefit of minors, *femes covert*, lunatics and persons presumed to be incapable of caring for their own estates.[4] But after the general application of the 3d subdivision to all trusts to receive and pay over rents,[5] this restraint received also a general application, and was held to restrain all beneficiaries of such a trust from not only anticipating, but from alienating at all, the rents and profits of lands by instruments operating *inter vivos*.[6] And this rule now applies to annuities charged upon trust estates,[7] although by some judges an annuity was regarded as assignable and not within this section.[8] But there are certain rents charge which are sometimes called annuities which do not fall within this section of this act.[9]

How far Settlors of Trusts May Authorize Alienation or Anticipation. How far settlors of estates may authorize the beneficiaries

[1] Woodmeston v. Walker, 2 R. & M. 197; Browne v. Pocock, Id. 210; Jones v. Salter, Id. 208.

[2] 1 R. S. 730, § 63, now § 83, *supra*.

[3] Noyes v. Blakeman, 6 N. Y. at p. 576; *cf.* Dyett v. Cent. Trust Co., 140 id. at p. 66.

[4] *Supra*, pp. 249, 258.

[5] *Supra*, pp. 257, 258.

[6] Hone v. Van Schaick, 7 Paige, 221; Clute v. Bool, 8 id. 83; Van Epps v. Van Epps, 9 id. 237; L'Amoureux v. Van Rensselaer, 1 Barb. Ch. 34; Grout v. Van Schoonhoven, 1 Sandf. Ch. 336; Noyes v. Blakeman, 6 N. Y. 567; Campbell v. Foster, 35 id. 361, 371; Bull v. Odell, 19 App. Div. 605; Lent v. Howard, 89 N. Y. 169, 181; Radley v. Kuhn, 97 id. 26, 32; Crooke v. County of Kings, Id. 421, 433; Toller v. Wood, 99 id. 616, 617; note to 16 Abb. N. C. 27, *et seq.*

[7] Cochrane v. Schell, 140 N. Y. 516, overruling on this point Lang v. Ropke, 5 Sandf. 363; McSorley v. Wilson, 4 Sandf. Ch. 549; Clute v. Bool, 8 Paige, 83; Gott v. Cook, 7 id. 521; S. C., 24 Wend. 641; *cf.* Arthur v. Dalton, 14 App. Div. 108. See *supra*, pp. 175, 255, as to what were annuities within the meaning of the Revised Statutes.

[8] Lang v. Ropke, 5 Sandf. 363; De Kay v. Irving, 5 Den. 646, 651; Degraw v. Clason, 11 Paige, 136; Maurice v. Graham, 8 id. 483, 487; McGowan v. McGowan, 2 Duer, 57; Lang v. Wilbraham, Id. 117; Eells v. Lynch, 8 Bosw. 465; O'Brien v. Mooney, 5 Duer, 51.

[9] *Vide supra*, pp. 175, 255, 262.

of a trust, entitled to the rents and profits of lands, to anticipate, charge or alienate such beneficial interest is a question which was formerly deemed to go to the validity of the entire trust limitation.[1] But, as was said in Crooke v. County of Kings, there seems to be no good reason why a settlor may not relieve the beneficiary from the ban of this section or any other provision tending to a perpetuity.

A "Sum in Gross" May be Alienated. A "sum in gross" under the Revised Statutes was held to mean a single sum whether payable at one time or in installments.[2] But the present section of this act does not limit the power of any beneficiary to the assignment of sums in gross. All interests of beneficiaries, except those created under the 3d subdivision of the 76th section of this act, are now declared to be alienable.[3] No doubt such was the law prior to this act.[4]

Beneficiary of an Express Trust May Take a "Remainder." We have seen that a beneficiary of an express trust may also be entitled to an estate limited in remainder.[5] This fact gave rise to the act of 1893.[6] This was not the first act of this character. Chapter 375, Laws of 1849,[7] provided for the termination of trusts for the sole benefit of married women on the certificate of a justice of the Supreme Court.[8] At common law trusts might be extinguished by the united action of all parties in interest and the *cestui que trust* might call for a conveyance of the legal estate.[9] This section and the act of 1893 are now said to be dangerously near the constitutional prohibition directed against violations of vested interests;[10] but it is difficult to see why.

Exception. This section has no application to trusts created before January 1, 1830.[11]

[1] Coster v. Lorillard, 14 Wend. 265, 332, 333; Wood v. Wood, 5 Paige, 596; *cf.* Crooke v. County of Kings, 97 N. Y. at p. 448; Marvin v. Smith, 56 Barb. 600, 605; affd., 46 N. Y. 571, 577.

[2] Cochrane v. Schell, 140 N. Y. at pp. 534, 535.

[3] § 83, *supra*.

[4] *Supra*, pp. 249, 258.

[5] *Supra*, p. 264; Stevenson v. Lesley, 70 N. Y. 512.

[6] *Supra*, chap. 452, p. 278, and see Matter of Heinz, 20 Misc. Rep. 371.

[7] Now § 29 of art. III, chap. 272, Laws of 1896.

[8] *Cf.* Douglass v. Cruger, 80 N. Y. 15; Genet v. Hunt, 113 id. at pp. 168, 171; and as to construction of this act of 1849 to trusts created after its enactment, Thebaud v. Schermerhorn, 10 Abb. N. C. 72.

[9] Short v. Wilson, 13 Johns. 33, 37; Brewster v. Brewster, 4 Sandf. Ch. 22, 29; Cuthbert v. Chauvet, 136 N. Y. 326, 329; Lewin, Trusts, 486; *cf.* Wright v. Miller, 8 N. Y. 9.

[10] Oviatt v. Hopkins, 20 App. Div. 168; *cf.* Matter of Heinz, 20 Misc. Rep. 371.

[11] Dyett v. Central Trust Co., 140 N. Y. 54.

§ 84. **Transferee of trust property protected.**— Where an express trust is created, but is not contained or declared in the conveyance to the trustee, the conveyance shall be deemed absolute as to the subsequent creditors of the trustee not having notice of the trust, and as to subsequent purchasers from the trustee, without notice and for a valuable consideration.

Formerly 1 Revised Statutes, 730, section 64:

§ 64. Where 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.[1]

Effect of this Section. While the statute still contemplates that an express trust shall be effected by means of a conveyance or will,[2] yet the declaration of trust may be separate from the instrument of conveyance.[3] As subsequent purchasers have notice of all recorded instruments affecting the title,[4] this section relieves only *bona fide* purchasers and creditors of the grantee from the necessity of inquiring whether a recorded conveyance to their grantor, absolute on its face, is in reality connected with a trust, raised *dehors* such conveyance.

Note of Revisers. In their note to this section the original revisers state that "the effect of this section will be, in a great measure, to abolish secret trusts by making it the interests of the parties, in all cases, that the trust should be incorporated in the conveyance."[5]

This Section does not Refer to Resulting Trusts. This section refers to express trusts only, and not to resulting trusts or trusts arising *ex maleficio*.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Infra*, § 207, The Real Prop. Law.

[3] Hutchins v. Van Vechten, 140 N. Y. 115.

[4] Johnson v. Fleet, 14 Wend. 176, 183; Kirsch v. Tozier, 143 N. Y. 390, 395; Wright v. Douglass, 7 id. 564–569; Briggs v. Davis, 20 id. at p. 21.

[5] *Infra*, Appendix I.

[6] Davis v. Graves, 29 Barb. 480. See a similar provision regarding resulting and implied trusts, § 75, The Real Prop. Law.

§ 85. **When trustee may convey trust property.**— If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust, except as provided in this section, shall be absolutely void. The supreme court may by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property or any part thereof whenever it appears to the satisfaction of the court that said real property, or some portion thereof, has become so unproductive that it is for the best interest of such estate or that it is necessary or for the benefit of the estate to raise funds for the purpose of preserving it by paying off incumbrances or of improving it by erecting buildings or making other improvements, or that for other peculiar reasons, or on account of other peculiar circumstances, it is for the best interest of said estate, and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold if it shall appear to the court to be for the best interest of such estate.

As lately amended by chapter 136, Laws of 1897.

Before this last-mentioned act, section 85 of The Real Property Law,[1] as originally drawn, read as follows:

§ 85. **When trustee may convey trust property.**— If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section, shall be absolutely void. The supreme court may, by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property, or any part thereof, whenever it appears to the satisfaction of the court that it is for the best interest of such estate, or that it is necessary and for the benefit of the estate, to raise funds for the purpose of preserving and improving it; and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold, if it shall appear to the court to be for the best interest of such estate.

Section 85 of The Real Property Law was taken from 1 Revised Statutes, section 65, as amended in the acts mentioned in the note:

§ 65. 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.[2]

Account of Section 85, Supra. As last set forth above stood the Revised Statutes from 1830 until 1882, when chapter 275 of the laws

[1] Chap. 547, Laws of 1896, being chap. 46, General Laws.

[2] Chap. 275, Laws of 1882; chap. 26, Laws of 1884; chap. 257, Laws of 1886; chap. 209, Laws of 1891; chap. 886, Laws of 1895; chap. 547, Laws of 1896; chap. 136, Laws of 1897.

of that year attempted to permit a trustee to mortgage the trust estate, in contravention of the terms of the trust, with the authorization of a Supreme Court justice. In 1884, chapter 275 of the Laws of 1882 was re-enacted in chapter 26 of the Laws of 1884, correcting a wrong reference to section 65, 1 Revised Statutes, 730. In 1886, by chapter 257 of that year, section 65 of 1 Revised Statutes, 730, was further amended so as to provide for a sale as well as a mortgage by the trustee in contravention of a trust. In 1891, by chapter 209 of the laws of that year, section 65, 1 Revised Statutes, 730, was further amended so as to provide for a sale where the trust estate was an undivided part or share of another estate. In 1895, section 65, 1 Revised Statutes, 730, was amended as follows:

CHAP. 886.

AN ACT to amend section sixty-five of part second, chapter one, title two, article second of the Revised Statutes, being in relation to uses and trusts.

Became a law June 4, 1895, with the approval of the Governor. Passed by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section sixty-five of part second, chapter one, title two, article second of the Revised Statutes is hereby amended so as to read as follows:

§ 65. Where the trust is or 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; provided, however, that the supreme court shall have power, upon such terms and conditions as to the court shall seem just and proper, in any case to authorize any such trustee to mortgage or sell any such real estate whenever it shall appear to the satisfaction of said court, or a judge thereof, that it is for the best interest of said estate so to do, and that it is necessary, and for the benefit of the estate, to raise by mortgage thereon, or by a sale thereof, funds for the purpose of preserving or improving such estate, or whenever the interest of the trust estate in any real property is an undivided share or part thereof; and it shall satisfactorily appear to the court or a judge thereof that on that account it is for the best interest of the trust estate to authorize the trustee to sell such undivided part or share. No order directing such trustee to mortgage or sell said lands shall be granted, unless it shall appear to the satisfaction of such court or judge that a notice in writing, stating the time and place of making the application therefor, has been served upon the beneficiary or beneficiaries of said trust, at least eight days before making such application, if said beneficiary or beneficiaries are within this state and adult. In case said beneficiary or beneficiaries are infants, lunatics, persons of unsound mind, habitual drunkards or absentees, said court or judge shall not direct the trustees to mortgage or sell said lands until such beneficiary

or beneficiaries are brought into court by such notice as said court or judge may prescribe. Where a trustee is appointed to hold real estate during the life of a beneficiary, and to pay or apply the rents, income and profits thereof, to or for the use of such beneficiary, the supreme court shall have power to authorize such trustee to lease said real estate for such a term of years, at such a rental and upon such terms and conditions in respect to a renewal or renewals of said lease as to the court shall seem just and proper; provided, however, that such authority shall not be given unless it shall appear to the satisfaction of the said court, or a judge thereof, that it is to the best interests of said trust estate so to do, and the said court shall, in like manner, have power to authorize the trustee to covenant in the said lease to pay at the end of the term or renewed term of said lease to the lessee or lessees, the then fair and reasonable value of any building or buildings which may be erected on the demised premises during such term or terms, such covenant to contain such other conditions for the determination of such value as to the court may seem just and proper. No order directing such trustee to lease said premises shall be granted unless it shall appear to the satisfaction of said court or judge that a notice in writing, stating the time and place of making the application therefor, was served upon the beneficiary or beneficiaries of said trust, and all other persons interested in the estate, at least eight days before making said application, if such beneficiary, beneficiaries or such other persons are within this State and adult. In case said beneficiary, beneficiaries or such other persons are infants or lunatics, persons of unsound mind, habitual drunkards or absentees, said court or judge shall not direct the trustee to lease said lands until such beneficiary, beneficiaries or such other persons are brought into court by such notice as said court or judge may prescribe. Notwithstanding the provisions herein contained, a trustee appointed for the purposes aforesaid, shall have authority, without making such application as aforesaid, to execute and deliver a lease of such real estate for a term of five years or less. In any case where, before the passage of this act, a trustee appointed for the purposes aforesaid, has leased real estate so held by him in trust for a longer term than five years, an application may be made to the supreme court or to a judge thereof upon like notice as hereinbefore mentioned, to the beneficiary, beneficiaries or such other persons for an order confirming such lease, and if on such application it shall appear to the said court or to a judge thereof, that the lease, when made, was for the best interests of the trust estate, such order shall be entered and shall be binding on all persons interested in the trust.

§ 2. This act shall take effect immediately.[1]

Scope of Section 85. This section (85) is now substituted for all the prior legislation respecting sales and mortgages by trustees.[2]

The Old Law. Prior to the Revised Statutes one who had actual notice of a trust could not acquire the property free of the trust

[1] Repealed, chap. 547, Laws of 1896.

[2] Leases by trustees are the subject of the next two sections of The Real Prop. Law.

without the consent of the *cestuis que trustent.*[1] But with the consent of the *cestuis que trustent* it was otherwise until the clause against anticipation was invented and subsequently written in the statute.[2] The trustees of an express trust, who had the fee, had at common law all the powers which legal ownership conferred, although in equity the *cestuis* were the absolute owners.[3]

The Revised Statutes. The original of section 85 of this act introduced a new rule, and, therefore, it applied only prospectively.[4] As the object of the new rule was to protect the rights of the beneficiaries of express trusts, persons now dealing with trustees must take notice of this limitation on their power;[5] for, if the act or deed of a trustee is in contravention of the trust, it is void, not voidable.[6] But a mere exchange or reinvestment is not necessarily in contravention of the trust.[7] It is by force of this provision of the statute rendering trust estates inalienable that trust estates now tend to a perpetuity.[8] This section (85) applies to express trusts valid as powers as much as to express trusts under the 76th section of this act.[9]

Effect of this Section on Estates in Remainder. This section, as now amended, does not, however, authorize the sale of the estate of remaindermen, for that estate vests in possession only when the estate of the trustee ceases.[10]

This Law not Retroactive. The various amendments to 1 Revised Statutes, 730, section 65, are not retroactive.[11] Prior to the act of 1882, the court did not have the power to enable a trustee to make a mortgage in contravention of an express trust to hold.[12] But a

[1] Shepherd v. McEvers, 4 Johns. Ch. 136; Briggs v. Davis, 20 N. Y. 9, 21; Kirsch v. Tozier, 143 id. at p. 395.

[2] *Supra*, pp. 279, 280.

[3] Lewin, Trusts, 242, 412.

[4] 1 R. S. 730, § 64; Johnson v. Fleet, 14 Wend. 176, 183; *cf.* Losey v. Stanley, 147 N. Y. at p. 571.

[5] Johnson v. Fleet, 14 Wend. at p. 183; Briggs v. Davis, 20 N. Y. at p. 21; Losey v. Stanley, 147 id. at p. 571.

[6] Powers v. Bergen, 6 N. Y. 358, 360; Briggs v. Davis, 21 id. 574; Smith v. Bowen, 35 id. 83; Fitzgerald v. Topping, 48 id. 438, 444; McPherson v. Rollins, 107 id. 316; U. S. Trust Co. v. Roche, 116 id. 120, 127; Cuthbert v. Chauvet, 136 id. 326.

[7] Hawley v. James, 5 Paige, 444, 445; S. C., 16 Wend. 163, 164; Belmore v. O'Brien, 12 N. Y. 394, 402.

[8] *Supra*, pp. 160, 260; Hillen v. Iselin, 144 N. Y. at p. 379.

[9] Russell v. Russell, 36 N. Y. 581, 584.

[10] § 85, *supra;* Goebel v. Iffla, 48 Hun, 21; affd., 111 N. Y. 170; Matter of Mills, 22 Misc. Rep. 629; Losey v. Stanley, 147 N. Y. 560, 571; *cf.* Ebling v. Dryer, 149 id. 460; 28 App. Div. 258.

[11] United States Trust Co. v. Roche, 116 N. Y. 120.

[12] Cruger v. Jones, 18 Barb. 467; Briggs v. Davis, 20 N. Y. 15; 21 id. 574; Rathbone v. Hooney, 58 id. 463;

mortgage given to preserve the trust property from a forced sale was not, even prior to 1882, necessarily in contravention of an express trust to hold an estate.[1]

This Section does not Authorize Sale for Reinvestment. This section of this act does not authorize a sale of a trust estate for the purpose of reinvestment, even though such reinvestment may augment the income of the trust estate.[2]

Trustees May Exchange Lands, when. The following act, just passed, regulates exchanges by trustees for certain purposes:

CHAP. 311.

AN ACT to authorize executors and trustees, subject to the approval of the supreme court, to acquire or exchange lands for the purpose of straightening or improving boundary lines of real property.

Became a law April 19, 1898, with the approval of the Governor. Passed, a majority being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Whenever, by the provisions of a will, or of a deed of trust, a power of sale is given to one or more executors or trustees, it shall be lawful for any such executor or trustee, subject to the approval of the supreme court, to acquire or exchange lands adjacent to the land or lands subject to such power of sale, as may be deemed desirable for the straightening or improvement of the boundary lines thereof, upon such terms and conditions as may be approved by the supreme court; and the supreme court may, by order, on such terms and conditions as seem just and proper, authorize any such executor or trustee to acquire or exchange lands adjacent to the land or lands subject to such power of sale for the purposes mentioned in this act.

§ 2. This act shall take effect immediately.

Douglass v. Cruger, 80 id. 15; *cf.* Taylor v. Porter, 4 Hill, 140; Powers v. Bergen, 6 N. Y. 358; Lytle v. Beveridge, 58 id. 592, 602; Ebling v. Dryer, 149 id. 460.

[1] U. S. Trust Co. v. Roche, 116 N. Y. 120; *cf.* Matter of Nesmith, 140 id. 609.

[2] Matter of Roe, 119 N. Y. 509.

§ 86. **When trustee may lease trust property.**— A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to, or for, the use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The supreme court may, by order, on such terms and conditions as seem just and proper, in respect to rental and renewals, authorize such a trustee to lease such real property for a term exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate, and may authorize such trustee to covenant in the lease to pay at the end of the term, or renewed term, to the lessee the then fair and reasonable value of any building which may have been erected on the premises during such term. If any such trustee has leased any such trust property before June fourth, eighteen hundred and ninety-five, for a longer term than five years, the supreme court, on the application of such trustee, may, by order, confirm such lease, and such order, on the entry thereof, shall be binding on all persons interested in the trust estate.

Formerly chapter 886, Laws of 1896, printed in full under section 85.[1]

The Old Law Relating to Leases by Trustees. At the common law a trustee's power to lease (in the absence of an express power) depended primarily on the quantity and quality of the trustee's legal estate. If he had a fee he might make leases of any duration.[2] So, if it was an express trust to lease indefinitely, the nature of the trust was such that a fee in the trustee was implied.[3] But if the trustee had only an estate *pur autre vie*,[4] then (in the absence of an express power) the implied power to lease was limited correspondingly.

Tenant for Life. A tenant for life or *pur autre vie* could not at common law make leases to last beyond his own life in the one case, or that of *cestui que vie* in the other.[5]

[1] *Supra*, p. 284.

[2] Naylor v. Arnitt, 1 Russ. & M. 501; Greason v. Kettletas, 17 N. Y. 491; Comyn, Landl. & Ten. 22; Hedges v. Riker, 5 Johns. Ch. 163.

[3] Doe v. Willan, 2 Barn. & Ald. 84; *sed cf.* Ackland v. Lutley, 9 Ad. & El. 879; Dyeing & Printing Estab. v. De Westenberg, 46 Hun, 281; affd., Daily Reg. Feb. 19, 1886; Hawley v. James, 16 Wend. at pp. 153–155.

[4] As in Jones v. Lord Say & Seale, 8 Viner's Abr. 262.

[5] Doe v. Butcher, 1 Doug. 50; Co. Litt. 47b; Taylor, Landl. & Ten. § 112.

Tenants in Tail. An ancient English statute enabled tenants in tail to make leases for three lives or twenty-one years.

Corporations. Corporations holding in fee were restricted to the same period by certain other ancient statutes.[1]

Tenant for Life. If tenant for life created an estate greater than his own, it formerly worked a forfeiture of his estate.[2] The Revised Statutes altered the last stated rule by providing that such a conveyance by a tenant for life of a greater estate than his own should not work a forfeiture, but be operative to pass the tenant's interest only.[3]

Former Law Relating to Leases by Life Tenants. When tenant for life could not make leases for any certain time, or beyond his own life, it became usual to insert a power of leasing in any well-drawn settlement, limited by way of use, and such a power to lease for any length of time was good against reversioners or remaindermen.[4] But a lease under a power must conform to the power, or it was void in law,[5] but good in equity, at least to the actual extent of the power.[6]

New York Law. Prior to the year 1830 there seems to have been, in New York, no statutory general restriction upon the power of tenants in fee simple to grant leases.[7] The Revised Statutes provided that a power might be granted to tenants for life to make leases of the estate granted for not more than twenty-one years, to commence in possession at any time during such tenants' life.[8] If a trustee had a life estate, he was within the section last denoted.[9]

Trustees' Leasing Power. In a conveyance or devise to trustees, the power of the trustees to grant leases depends primarily on the

[1] *Vide supra*, under § 20.

[2] Cruise, Dig. tit. 5, chap. 2, § 31, note; 2 Black. Comm. 274. Alienations by tenants by the curtesy or in dower regulated by 6 Edw. I, chap. 3; 32 Hen. VIII, chap. 28; re-enacted in New York in 1787, 2 J. & V. 98, 101; 1 K. & R. 44; 1 R. L. 52.

[3] 1 R. S. 739, § 145; Sparrow v. Kingman, 1 N. Y. 242, 257; Moore v. Littel, 41 id. 66, 78.

[4] Cruise, Dig. tit. 32, chap. 15, § 1.

[5] Roe ex dem. Brune v. Prideaux, 10 East, 184; *et infra*, under § 116, The Real Prop. Law.

[6] Powcey v. Bowen, 1 Chan. Cas. 23; Campbell v. Leach, Amb. 740; *cf.* § 116, *infra*.

[7] By 2 R. L. 267, Columbia College was restricted to leases for sixty-three years (2 R. L. 267; *et vide supra*, pp. 86, 89); but a lease for lives could not begin *in futuro*. 2 Sugd. Pow. 344.

[8] 1 R. S. 733, § 87; § 123, *infra*, The Real Prop. Law.

[9] See the discussion on this point, *supra*, pp. 180, 274.

question whether or not they take a fee, or an estate *pur autre vie*.[1] If the conveyance to them contains a power to trustees to make leases of any duration beyond twenty-one years, then the question arises how far this power is controlled by section 123 of this act,[2] restricting tenants for life to leases for twenty-one years. If the settlement is made since 1895, then whether the act of 1895 or this section applies to an express trust with power to make leases beyond five years, will also have to be considered. The language of this section (86) would seem to confine its operation to those trusts which arise under the 3d subdivision of section 76 of this act,[3] and not to refer to trustees of the trusts arising under the 2d subdivision of section 76.[4] It has been held that trustees under the 2d subdivision of section 76 of this act take a a fee,[5] and, therefore, said that they may make leases of any duration.[6] If trustees, under the 3d subdivision of section 76, have a base or determinable fee, then they undoubtedly fall within the general rule that tenants in fee may make leases of urban lands of indefinite duration. But if trustees have only an estate *pur autre vie*, then the leases may not extend beyond the life of *cestui que vie*,[7] independently of the act of 1895 and this section, which are enabling acts, and under them trustees of an estate *pur autre vie* are authorized to make leases for five years, which will be good against the remaindermen. In the case where the trustee has a fee with general leasing powers, the act of 1895 and this section would be simply supererogatory, and may be construed as intended for the general protection of such trustees.

Is this Section Retroactive or Unconstitutional? How far this section, or chapter 886, Laws of 1895, is retroactive and may lawfully empower trustees to make leases to bind vested estates in remainder, or those future estates limited to take effect after the trustees' own estate has terminated, is questioned in a late work on constitutional grounds.[8] The acts enabling life tenants to make leases to bind reversioners and remaindermen are, however, very well known in the common law, and as, where a rent it reserved, it

[1] *Supra*, pp. 180, 274.

[2] The Real Prop. Law. *Cf.* 1 R. S. 733, § 87.

[3] *Supra*, pp. 257, 258.

[4] *Supra*, pp. 249, 255.

[5] *Supra*, pp. 249, 257.

[6] Hawley v. James, 16 Wend. at pp. 153, 155; Matter of McCaffrey, 50 Hun, 371, 375; *cf.* Greason v. Kettletas, 17 N. Y. 491, as to common law.

[7] Matter of McCaffrey, 50 Hun, 371, 374; Gomez v. Gomez, 147 N. Y. 195, 200; Matter of Hoysradt, 20 Misc. Rep. 265.

[8] Chapl. Exp. Trusts & Pow. § 462.

runs with the reversion, it is difficult to perceive how a power of this kind may be said to infringe vested rights. Where the rights in remainder are expressly subject to a power to lease, the power overrides the estate in remainder, or the remainder is subject to the power.

This Section Does not Enable Leases of Agricultural Lands Prohibited by the Constitution. As the Constitution restricts leases of agricultural lands to terms of twelve years,[1] this section clearly cannot enable trustees of such lands to make leases beyond twelve years, even pursuant to an order of the court, provided for in this section.

[1] *Supra*, pp. 45, 87.

§ 87. **Notice to beneficiary and other persons interested where real property affected by a trust is conveyed, mortgaged or leased and procedure thereupon.**— The supreme court shall not grant an order under either of the last two preceding sections unless it appears to the satisfaction of such court that a written notice stating the time and place of the application therefor has been served upon the beneficiary of such trust, and every other person in being having an estate vested or contingent in reversion or remainder in said real property at least eight days before the making thereof, if such beneficiary or other person is an adult within the state or if a minor, lunatic, person of unsound mind, habitual drunkard or absentee until proof of the service on such beneficiary or other person of such notice as the court or a justice thereof prescribes. The court shall appoint a guardian ad litem for any minor and for any lunatic, person of unsound mind or habitual drunkard who shall not be represented by a committee duly appointed. The application must be by petition duly verified which shall set forth the condition of the trust estate and the particular facts which make it necessary or proper that the application should be granted. After taking proof of the facts, either before the court or a referee and hearing the parties and fully examining into the matter, the court must make a final order upon the application. In case the application is granted, the final order must authorize the real property affected by the trust or some portion thereof, to be mortgaged, sold or leased, upon such terms and conditions as the court may prescribe. In case a mortgage or sale of any portion of such real property is authorized, the final order must direct the disposition of the proceeds of such mortgage or sale and must require the trustee to give bond in such amount and with such sureties as the court directs, conditioned for the faithful discharge of his trust and for the due accounting for all moneys received by him pursuant to said order. If the trustee elects not to give such bond, the final order must require the proceeds of such mortgage or sale to be paid into court to be disposed of or invested as the court shall specially direct. Before a mortgage, sale or lease can be made pursuant to the final order, the trustee must enter into an agreement therefor, subject to the approval of the court and must report the agreement to the court under oath. Upon the confirmation thereof, by order of the court he must execute as directed by the court a mortgage, deed or lease. A mortgage, conveyance or lease

made pursuant to a final order granted as provided in this and the last two preceding sections shall be valid and effectual against all minors, lunatics, persons of unsound mind, habitual drunkards and persons not in being interested in the trust or having estates vested or contingent in reversion or remainder in said real property, and against all other persons so interested or having such estates who shall consent to such order, or who having been made parties to such proceeding as herein provided, shall not appear therein and object to the granting of such order.

This section in its present form was enacted by chapter 136, Laws of 1897, entitled "An act to amend The Real Property Law relative to uses and trusts."

Prior to such amendment this section, as originally enacted in The Real Property Law, read as follows:

§ 87. **Notice to beneficiary where trust property is conveyed, mortgaged or leased.**— The supreme court shall not grant an order under either of the last two preceding sections, unless it appears to the satisfaction of such court that a written notice, stating the time and place of the application therefor, has been served upon the beneficiary of such trust property, at least eight days before the making thereof, if such beneficiary is an adult within the state; or if a minor, lunatic, person of unsound mind, habitual drunkard or absentee, until proof of the service on such person of such notice as the court, or a justice thereof prescribes.

Note on this Section.— *Cf.* chap. 275, Laws of 1882; chap. 26, Laws of 1884; chap. 257, Laws of 1886; chap. 209, Laws of 1891, and chap. 886, Laws of 1895, pp. 284, 285, *supra*.

§ 88. **Person paying money to trustee protected.** — A 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 not be responsible for the proper application of the money, according to the trust; and any right or title derived by him from the trustee in consideration of the payment shall not be impeached or called in question in consequence of a misapplication by the trustee of the money paid.

Formerly 1 Revised Statutes, 730, section 66:

§ 66. 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 monies paid.[1]

The Old Law. The old rule that a purchaser from a trustee was bound to see to the application of the purchase money and that it was applied in the furtherance of the trusts,[2] was always subject to many exceptions.[3] The rule itself was so inconvenient and prejudicial oftentimes that it led to the usual insertion in powers of sale of a clause relieving purchasers from the necessity of seeing to the application of the purchase money. Mr. Humphreys, a leading reformer in England, just prior to the Revised Statutes of this State, forcibly criticised the old rule, which the Revised Statutes consequently abolished.[4] Yet the old rule was oftentimes very beneficial to beneficiaries of trusts, such as infants and persons *non compotes*. The principle that all persons having notice take subject to a trust is not inequitable. But where the trust was to sell and pay debts generally, it was never deemed equitable to apply the rule to purchasers. A series of acts following the Revised Statutes have in England also relieved purchasers from the rigid application of the common-law rule.[6]

The Present Law. Now, where the trust authorizes a sale, a purchaser from a trustee and other persons under legal obligations to trustees, who shall actually and in good faith pay money to the

[1] Repealed, chap. 547, Laws of 1896.

[2] Cruise, Dig. tit. 12, chap. 14, §§ 13, 17, 19.

[3] Story Eq. Juris. § 1125 *seq.*; Field v. Schieffelin, 7 Johns. Ch. 150.

[4] 1 R. S. 730, § 66; Humph. Real Prop. (1st ed.) 305; Revisers' note to 1 R. S. 730, § 66.

[5] Lewin, Trusts (Last ed.), 456.

[6] Lord St. Leonard's Act, 22 & 23 Vict. chap. 35, § 23; Lord Cranworth's

trustees, are by this section relieved from seeing to the application of such money. It may be purloined by the trustee and never reach the beneficiaries, but the purchaser or payer is nevertheless discharged, so far as the trust estate is concerned.[1] While a *bona fide* purchaser is now relieved by this section from the necessity of seeing to the application of the trust purchase money where a trustee is empowered to sell, yet the statutory relief to purchasers extends only to persons clearly within the purview of this section. Where the purchaser has notice of some breach of trust on the part of the trustee, he may rapidly lose the protection of this section of the statute, and even be held to have participated in the breach of trust.[2] In such cases it is obvious that the exception stated in this section has no application, and that the old rule applies with full force.

Trustees under Powers in Trust. The original of this section (1 R. S. 730, § 66) was formerly expressly applicable to trustees of powers in trust.[3] But section 162 of this act omits a like cross-reference to this section of The Real Property Law.

Act, 23 & 24 id. chap. 145, § 29; 44 & 45 id. chap. 41, §§ 36, 71.

[1] Belmont v. O'Brien, 12 N. Y. 394; 402; Thomas v. Evens, 105 id. 601, 615.

[2] Champlin v. Haight, 10 Paige, 274, 282; 7 Hill. 245; but reversed on another point, Moore v. American Loan & Trust Co., 115 N. Y. 65, 79; Benedict v. Arnoux, 7 App. Div. 1.

[3] 1 R. S. 734, § 102.

§ 89. **When estate of trustee ceases.**— When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease.

Formerly 1 Revised Statutes, 730, section 67:

§ 67. When the purposes for which an express trust shall have been created, shall have ceased, the estate of the trustee shall also cease.[1]

Comment on Section 89, Supra. 1 Revised Statutes, section 67, was, in 1885, amended by chapter 545 of the Laws of 1875.[2] This amendment is now set out under the next section of The Real Property Law.[3]

Estate of Trustees. In the course of the observations on the text of section 72 of this act, it was stated that if a settlement in trust was not immediately executed by the Statute of Uses (27 Hen. VIII, chap. 10), a fee simple estate of the trustee could not become the estate of the beneficial owner, without a conveyance from the trustee, even though all the active duties of the trustees had ceased.[4] It was by reason of this principle that the so-called "vesting acts" were passed in England. Since the Revised Statutes of New York a different rule seems to have obtained, and when the trusts cease the estate of the trustee ceases, without the necessity of any conveyance whatever.[5] The rule stated in this section is not to be confused with the older principle referred to by Chancellor Kent, "that a trust estate is not to continue beyond the period required by the purposes of the trust.[6] This was a common principle of construction where the estate of the trustee was indeterminate.[7] But where the estate of the trustees was in fee a conveyance was required, before the Revised Statutes, to divest it, and this the beneficial owners might call for when the trusts were fulfilled.[8]

Retroactive Application of this Section. This provision of the statute has been held to apply to trusts created before the Revised Statutes took effect,[9] and also to apply to powers in trust.[10]

[1] Repealed, chap. 547, Laws of 1896.

[2] See this act set out under the next section, *infra*.

[3] § 90, *infra*, p. 297.

[4] *Supra*, pp. 239, 240.

[5] *Supra*, pp. 239, 240; Matter of the Petition of Livingston, 34 N. Y. 555, 567.

[6] 4 Comm. 233.

[7] Doe, Lessee of Poor, v. Considine, 6 Wall. 458, 471, and cases there cited; Fisher v. Fields, 10 Johns. at p. 505.

[8] *Supra*, pp. 239, 240.

[9] January 1, 1830; Bellinger v. Shafer, 1 Sandf. Ch. 293, 296.

[10] Manier v. Phelps, 15 Abb. N. C. 123; Bruner v. Meigs, 64 N. Y. 506, 517.

§ 90. **Termination of trusts for the benefit of creditors.** —Where an estate or interest in real property has heretofore vested or shall hereafter vest in the assignee or other trustee for the benefit of creditors, it shall cease at the expiration of twenty-five years from the time when the trust was created, except where a different limitation is contained in the instrument creating the trust, or is especially prescribed by law. The estate or interest remaining in the trustee or trustees shall thereon revert to the assignor, his heirs, devisee or assignee, as if the trust had not been created.

Formerly chapter 545 of the Laws of 1875, as follows:

CHAP. 545.

AN ACT to amend section sixty-seven of article two, chapter one, part two, title two of the revised statutes in relation to trusts.

Passed June 7, 1875.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

SECTION 1. Section sixty-seven of article two, chapter one, part two, title two of the revised statutes, is hereby amended so as to read as follows:

§ 67. When the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease, and where an estate has been conveyed to trustees for the benefit of creditors and no different limitation is contained in the instrument creating the trust, such trust shall be deemed discharged at the end of twenty-five years from the creation of the same; and the estate conveyed to trustee or trustees and not granted or conveyed by him or them shall revert to the grantor or grantors, his or their heirs or devisees, or persons claiming under them, to the same effect as though such trust had not been created.[1]

Comment on Section 90. This provision of this section of the statute had its origin in chapter 545, Laws of 1875, just set out in full, which it superseded. The necessity of that act was so manifest as to cause the court to construe it as retroactive, affecting old assignments made long prior to 1875.[2] Assignments for the benefit of creditors were frequently made in the early part of this century by farmers and others, and in some cases the assignors or their descendants remained in peaceable and undisturbed possession of their assigned estates, but without any proof of the discharge or satisfaction of such assignments of record. Under the former law the fee simple title of trustees descended to their heirs,[3]

[1] Repealed, chap. 547, Laws of 1896.

[2] Kip v. Hirsch, 103 N. Y. 565.

[3] *Infra*, at p. 299, under § 91 of this act.

or passed under a devise of the trustee subject to the trusts.[1] Subsequently to the Revised Statutes the legal estate might, under certain circumstances, vest in the creditors as the persons beneficially entitled.[2] In either event an old general assignment of record was a cloud on the title of the assignor's descendants, and, consequently, the act of 1875 was not unwelcome, as the assignee's descendants and the creditors' descendants were usually scattered over the Union, and by reason of early migrations and changes of neighborhood so common in this country, releases were almost impossible to obtain.

Devolution of Trust Estate under Old Law. Before the Revised Statutes not all estates of surviving trustees devolved on their heirs; for by express limitation the estate of the surviving trustees might be one for years or for his own life, or else one *pur autre vie*,[3] and then such estate pursued the course prescribed for other estates of like quantity. But where trustees had a fee simple, the ordinary rule of descents applied in case the surviving trustees did not devise it subject to the trusts.[4]

[1] Jackson v. De Lancey, 13 Johns. 537, 554.

[2] *Supra*, The Real Prop. Law, § 72.

[3] *Supra*, p. 273.

[4] Note of Revisers, with 1 R. S. 730, § 68; Anderson v. Mather, 44 N. Y. 249; Hawley v. Ross, 7 Paige, 103, 107; *cf.* 2 Spence, Eq. Juris. 364.

§ 91. **Trust estate not to descend.**— On the death of the last surviving or sole trustee of an express trust, the trust estate shall not descend to his heirs nor pass to his next of kin or personal representatives; but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the supreme court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court, who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice in such manner as the court or a justice thereof may direct.

Formerly 1 Revised Statutes, 730, section 68:

§ 68. Upon the death of the surviving trustee of an express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives; but the trust, if then unexecuted, shall vest in the court of chancery, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court.[1]

The Revised Statutes. The 68th section of the Revised Statutes on Uses and Trusts first changed the common-law rule just indicated, in respect of trusts created thereafter,[2] and, on the death of surviving trustees, vested the estate in the (Supreme)[3] Court as an unexecuted trust.[4] But such section has no application to implied or constructive trusts.[5] It applies only to unexecuted express trusts,[6] where the estate vests in, or devolves on, the court, and not in a new trustee appointed by the court.[7] The same construction applies to this section of the present act.[8]

The Quantum of Trustees' Estate under this Statute. The nature of the legal estate of a trustee of the four express trusts has been before considered, and stated to be a base or determinable fee.[9] If there is more than one trustee, the estate is in joint tenancy, and on the death of one vests in, or devolves on, the survivor or sur-

[1] Repealed, chap. 547, Laws of 1896.

[2] P. 297, *supra;* Anderson v. Mather, 44 N. Y. 249; Hawley v. Ross, 7 Paige, 107; Berrien v. McLean, Hoff. Ch. 420.

[3] Invested by the Constitution of 1846 with the powers and jurisdiction of the chancellor. *Vide infra*, under next section.

[4] Matter of Petition of Waring, 99 N. Y. 114; Clark v. Crego, 47 Barb. 599; affd., 51 N. Y. 646; Brater v. Hopper, 77 Hun, 244.

[5] Johnson v. Fleet, 14 Wend. 176.

[6] Matter of Petition of Waring, 99 N. Y. 114.

[7] Brater v. Hopper, 77 Hun, 244.

[8] The Real Prop. Law, § 91.

[9] *Supra*, pp. 180, 181, 274.

vivors.[1] The above section provides only for the devolution of the legal estate in the event of the death of the sole surviving trustee. It is a "vesting act." If the trust is executed, and reversioners extinct, the trustees' estate does not escheat if *cestuis que trustent* all die, without representatives, but becomes absolute.

Where one Nominated Trustee Declines. Where one of several trustees disclaims, the other is sole trustee,[2] and, on his death, the estate vests in the court under the above section.[3]

The Supreme Court as Trustee. In the absence of a trustee the Supreme Court has inherent power to execute a trust, and will take upon itself its execution.[4] A trustee, successor to the court is bound by the proceedings taken by the court before his appointment.[5] But the above section of this act (§ 91) provides only for the vesting, or devolution, of title in one event only, the death of a surviving trustee of an unexecuted trust.[6]

Trustees of Mortgages. Formerly, on the death of a sole surviving trustee of a mortgage, the mortgage security did not vest in the Supreme Court, it being personal property.[7] But this is now changed by statute, and the same rule obtains as in respect of a trust of real property.[8]

Power of Sale in Trust. How far a power of sale passes to an administrator with the will annexed is discussed elsewhere.[9]

Notice. Remaindermen are entitled to notice under this section.[10]

[1] § 56, The Real Prop. Law, *supra*.

[2] King v. Donnelly, 5 Paige, 45; Clemens v. Clemens, 60 Barb, 636; Burrill v. Sheil, 2 id. 457; *cf.* Stewart v. Ackley, 52 id. 283. This was so at common law. In the Matter of Stevenson, 3 Paige, 420.

[3] McCosker v. Brady, 1 Barb. Ch. 329; Mulry v. Mulry, 89 Hun, 531. See remarks on "Vesting Acts" under the next section.

[4] Matter of Reinisch, 20 App. Div. 416; Rogers v. Rogers, 111 N. Y. 228; Greenland v. Waddell, 116 id. 234, 242; Kirk v. Kirk, 137 id. 510; Farmers' Loan & Trust Co. v. Hughes, 11 Hun, 130. And see next section of this act.

[5] Kirk v. Kirk, 137 N. Y. 510.

[6] Brater v. Hopper, 77 Hun, 244.

[7] Bucklin v. Bucklin, 1 Abb. Ct. App. Dec. 242.

[8] Chap. 185, Laws of 1882.

[9] P. 305; Campbell v. Jennings, 22 Misc. Rep. 406, and cases cited.

[10] Matter of Welch, 20 App. Div. 412.

§ 92. **Resignation or removal of trustee and appointment of successor.**— The supreme court has power, subject to the regulations established for the purpose in the general rules of practice:

1. On his application by petition or action, to accept the resignation of a trustee, and to discharge him from the trust on such terms as are just.

2. In an action brought, or on a petition presented, by any person interested in the trust, to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust.

3. In case of the resignation or removal of a trustee, to appoint a new trustee in his place, and in the meantime, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction. This section shall not apply to a trust arising or resulting by implication of law, nor where other provision is specially made by law, for the resignation or removal of a trustee or the appointment of a new trustee.

Formerly 1 Revised Statutes, 730, sections 69, 70 and 71, and 1 Revised Statutes, 731, section 72:

§ 69. Upon the petition of any trustee, the court of chancery may accept his resignation, and discharge him from the trust, under such regulations as shall be established by the court for that purpose, and upon such terms, as the rights and interests of the persons interested in the execution of the trust, may require.[1]

§ 70. Upon the petition or bill of any person interested in the execution of a trust, and under such regulations as for that purpose shall be established, the court of chancery may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the trust.[2]

§ 71. The chancellor shall have full power to appoint a new trustee, in place of a trustee resigned or removed; and when, in consequence of such resignation or removal, there shall be no acting trustee, the court, in its discretion, may appoint new trustees, or cause the trust to be executed by one of its officers, under its direction.[3]

§ 72. The three last sections shall extend only to cases of express trusts.[3]

Resignation of Trustees. The section relative to resignation of trustees relates only to cases where the trustee has become vested

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] Repealed, chap. 547, Laws of 1896.

with the trust estate, or has accepted the trusts, and not to cases where nominees do not accept trusts confided to them.[1]

Discharge of Trustees. Where a trustee applies to be discharged, assigning no cause, but a wish to be relieved, the court will impose terms as a condition of discharge, such as costs of the petition and of appointment of a new trustee, and that the outgoing trustee be not allowed commissions.[2] Where trustee has already received a legacy and commissions, it is improper to accept his resignation without good and sufficient cause shown.[3] A trustee having accepted the trusts cannot discharge himself from liability by a resignation merely. He must either be discharged from the trust by virtue of a special provision in the instrument creating the trusts, or by the order or decree of the court, or with the general consent of all persons interested in the execution of the trust.[4]

Resignation of Testamentary Trustee. A testamentary trustee may, under certain circumstances, resign and be discharged in the Surrogates' Courts.[5]

Compensation of Trustees. Although trustees who serve to the end of a trust are entitled to the statutory compensation, where a trustee is permitted to resign before completion of the trust, he must accept the discharge on such terms as the court in its discretion imposes.[6]

Removal of Trustee. The Court of Chancery had, independently of statute, jurisdiction to remove trustees who became disqualified[7] or who had misbehaved.[8] The Revised Statutes in this respect did not confer a new judicial power, but declared the pre-existing law.[9] Under the Constitution of 1846[10] the Supreme Court

[1] In the Matter of Stevenson, 3 Paige, 420; *cf.* King v. Donnelly, 5 id. 46, and Estate of Gilbert, 3 N. Y. St. Repr. 208, as to surrogate's practice.

[2] Matter of Jones, 4 Sandf. Ch. 615.

[3] Craig v. Craig, 3 Barb. Ch. 76, 100.

[4] Cruger v. Halliday, 11 Paige, 314; Gilchrist v. Stevenson, 9 Barb. 9; Thatcher v. Candee, 4 Abb. Ct. App. Dec. 387.

[5] Code Civ. Proc. § 2814; chap. 359, Laws of 1870; chap. 406, Laws of 1879.

[6] Matter of Allen, 96 N. Y. 327; Parker v. Allen, 36 N. Y. St. Repr. 671; S. C., 14 N. Y. Supp. 265.

[7] Lake v. De Lambert, 4 Ves. 492; May v. May, 167 U. S. 324.

[8] Ex parte Reynolds, 5 Ves. 707; Millard v. Eyre, 2 Ves. Jr. 94; Story, Eq. Juris. §§ 1287, 1289; Hill, Trustees, 191; The People v. Norton, 9 N. Y. 176.

[9] In the Matter of the Mechanics' Bank, 2 Barb. 446; Wood v. Brown, 34 N. Y. 337, 341; *cf.* Revisers' note with 1 R. S. 730, § 69.

[10] Const. of 1846, art. VI.

received the jurisdiction in equity formerly exercised by the chancellors.[1] The removal of any trustee may be obtained in a proceeding based on a petition to the Supreme Court[2] or in an action.[3]

Removal of Testamentary Trustees. Testamentary trustees may be removed under certain circumstances by the surrogates.[4] Where the same person is both executor and trustee he may be removed from his trusteeship by the Supreme Court, even though his duties of executor were not ended or disturbed.[5] The removal of a mere executor is not concurrent, but vested exclusively in the surrogates in the first instance.[6]

Causes of Removal. A trustee will not be removed for every violation of duty or even breach of trust, if the fund is in no danger. The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the court.[7]

Appointment of New Trustee. The jurisdiction of the Court of Chancery, before the Revised Statutes, extended to both the removal and the appointment of new trustees.[8] Under this section the present judicial power is explicit.[9] But the power does not extend to a case where a sole surviving trustee dies and the estate devolves on the court to execute the trust under the preceding section of this act.[10]

Appointment by Surrogate. Where a sole testamentary trustee dies, becomes lunatic, or is removed or allowed to resign, the surrogates also have the jurisdiction to appoint a successor trustee.[11]

[1] Const. of 1895, art. VI; 2 R. S. 173, § 36; chap. 280, Laws of 1847.

[2] § 92, *supra*; Quackenboss v. Southwick, 41 N. Y. 117; Matter of Livingston, 34 id. 555; Bronson v. Bronson, 48 How. Pr. 481.

[3] § 92, *supra*; Leggett v. Hunter, 19 N. Y. 445; *cf.* In re Van Wyck, 1 Barb. Ch. 565; King v. Donnelly, 5 Paige. 46, as to old practice.

[4] Chap. 482, Laws of 1871; Code Civ. Proc. §§ 2817, 2818; Matter of McGillivray, 138 N. Y. 308; Matter of Havemeyer, 3 App. Div. 519; Matter of Smith, 26 N. Y. St. Repr. 235; S. C., 7 N. Y. Supp. 327.

[5] Quackenboss v. Southwick, 41 N. Y. 117; *cf.* Wood v. Brown, 34 id. 337, 340; Leggett v. Hunter, 25 Barb. 81; S. C., 19 N. Y. 445.

[6] Greenland v. Waddell, 116 N. Y. at p. 243.

[7] Elias v. Schweyer, 13 App. Div. 336, 340; Dow v. Dow, 45 N. Y. St. Repr. 5; S. C., 18 N. Y. Supp. 222; *cf.* Matter of Petition of Morgan, 63 Barb. 621.

[8] *Supra*, p. 302; People v. Norton, 9 N. Y. 176.

[9] Quackenboss v. Southwick, 41 N. Y. 117, 121; *cf.* May v. May, 167 U. S. 310, as to general equitable power of courts.

[10] § 91, *supra*; Brater v. Hopper, 77 Hun, 244.

[11] Code Civ. Proc. § 2818.

Section 92 Does not Apply to Implied or Constructive Trusts. This section has no application to trustees of implied [1] or constructive [2] trusts.[3]

Trust Cannot Fail for Want of a Designated Trustee. As a trust is never allowed to fail for want of a trustee,[4] a case may arise, not under this section, where all the persons named as trustees are absent, or refuse to accept the office. In such a case the Supreme Court, under its general jurisdiction, has power to execute the trust or to appoint new trustees;[5] so it has in a case where the settlor fails to nominate any trustee.[6] But where a nominee renounces and never accepts a trust, it seems he cannot recall his renunciation but must be reappointed *de novo*.[7]

Conveyance from Outgoing Trustee. How far a conveyance from an outgoing trustee to one designated by an order of the Supreme Court as his successor, is now necessary in order to carry the legal title to the new trustee, is not declared in this statute. At common law "an order or decree of the Court of Chancery (appointing a new trustee) did not have the effect to transfer the legal title to land or real estate."[8] To remedy the inconvenience attached to this rule, the so-called "vesting acts" were passed in England,[9] generally dispensing with an actual conveyance. Formerly the practice in New York was to have the outgoing trustee convey to his successor,[10] and not to rely solely on an order or judgment of the court substituting one trustee for another. But it seems now to be assumed oftentimes, that the order substituting one

[1] Implied trusts, *supra*, p. 242.

[2] Constructive trusts, *supra*, p. 242.

[3] Matter of Livingston, 34 N. Y. 555; Quackenboss v. Southwick, 41 id. 117, 121.

[4] McCartee v. Orphan Asylum, 9 Cow. at p. 484; Downing v. Marshall, 23 N. Y. at p. 382; Levy v. Levy, 33 id. at p. 102; Holland v. Alcock, 108 id. at p. 330; Kirk v. Kirk, 125 id. 506; Rose v. Hatch, Id. 427; Cross v. U. S. Trust Co., 131 id. 330, 350; Woodward v. James, 115 id. 346, 357; Greenland v. Waddell, 116 id. 234, 242.

[5] King v. Donnelly, 5 Paige, 46; Rogers v. Rogers, 111 N. Y. 228; Greenland v. Waddell, 116 id. 234, 242; Kirk v. Kirk, 137 id. 510.

[6] De Barante v. Gott, 6 Barb. 492.

[7] In the Matter of Van Schoonhoven, 5 Paige, 559.

[8] Williams, Real Prop. 172; Lewin, Trusts (1st ed.), 602 *et seq*; *per* Walworth, C., In the Matter of Van Wyck, 1 Barb. Ch. 569, 570; Wilson v. Wilson, Id. 592, 594; *cf.* Albany City Bank v. Schermerhorn, Clarke, 297; Union Nat. Bank of Albany v. Warner, 12 Hun, 306; Chautauque Co. Bank v. Risley, 19 N. Y. 369, 374.

[9] 7 Anne, chap. 19, 6 Geo. IV, chap. 16; 11 id. chap. 60, and many similar acts of later date; 15 & 16 Vict. chap. 55, §§ 8, 9; 13 & 14 id. chap. 60. See Williams, Real Prop. 172.

[10] Leggett v. Hunter, 19 N. Y. at p. 448; Perry, Trusts, § 284.

trustee for another is sufficient to carry title without any conveyance from the outgoing trustee.[1] Where a sole trustee dies the statute vests the estate in the court under the 91st section of this act; that section is a vesting act.

When Trustee's Act Requires Concurrence of All. Where the concurrent decision or action by two or more trustees is directed by a settlor of an estate, part of the trustees cannot do the act, and on the removal of one, his place must be supplied.[2]

Power of Sale, if Imperative, Passes to New Trustee; Otherwise if Discretionary. If a power of sale is discretionary, it does not pass to an administrator with the will annexed. Otherwise if imperative.[3]

[1] *Cf.* § 89, *supra*, as to estate of outgoing trustee, and Farrar v. McCue, 89 N. Y. at p. 144.

[2] Per Walworth, C., In the Matter of Van Wyck, 1 Barb. Ch. 569, 570; cited, Greenland v. Waddell, 116 N. Y. at p. 243; *cf.* Burrell v. Sheil, 2 Barb. 457; King v. Donnelly, 5 Paige, 46.

[3] *Vide infra*, under § 162, The Real Prop. Law.

§ 93. **Grants and devises of real property for charitable purposes.**— A conveyance or devise of real property for religious, educational, charitable or benevolent uses, which is in other respects valid, is not to be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument making such conveyance or devise. If in such instrument, a trustee is named to execute the same, the legal title to the real property granted or devised shall vest in such trustee. If no person is named as trustee, the title to such real property vests in the supreme court, and such court shall have control thereof. The attorney-general shall represent the beneficiaries in such cases and enforce such trusts by proper proceedings.

Taken from chapter 701, Laws of 1893, as follows:

CHAP. 701.

AN ACT to regulate gifts for charitable purposes.

Approved by the Governor May 13, 1893. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in the trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court.

§ 2. The supreme court shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act. The attorney-general shall represent the beneficiaries in all such cases and it shall be his duty to enforce such trusts by proper proceedings in the court.

§ 3. This act shall take effect immediately.[1]

Effect of Section 93, Supra. The insertion of this portion of the act of 1893 in the article on Uses and Trusts seems designed to restore the charitable uses of the common law; for, the uses authorized and modified by this article are declared not abolished by the sections abolishing other uses.[2] If charitable uses are not abolished, such uses must be those which existed at common law and independently of the Statute of Charitable Uses (43 Eliz. chap. 4);

[1] Not repealed by chap. 547, Laws of 1896.

[2] See The Real Prop. Law, §§ 71, 72, 73, *supra*, and the remarks on pp. 232, 233; Allen v. Stevens, 22 Misc. Rep. 158.

for that statute fell with the other English statutes not re-enacted in the New York Revision by Jones and Varick.[1] While that statute was in force, it was assumed to define all charitable uses.[2] But the term "charitable use" at common law was much more extensive than it was under the Statute of Elizabeth. At common law it was equivalent to "pious," "public" and "charitable" uses.[3] In this section of this present act, a charitable use must be that of the common law; not that of 43 Elizabeth, chapter 4.

Religious and Pious Uses. A religious or pious use was, before the Statute of Superstitious Uses, a "charitable use."[4] Now, as "superstitious uses" are unknown to our law,[5] such are become clearly "religious uses" within the meaning of this section.[6]

Educational Uses. "Educational uses" are *quondam* charitable uses. "Benevolent uses" indicate a larger scheme than charitable uses formerly denoted.[8] What uses are now within this section must, one by one, be determined by the courts, for none other may be indefinite under the law of trusts[9] as it stood prior to the act of 1893.

What Limitations Saved by this Section. This section refers to conveyances and devises valid in all respects save the specified one.[10] As the law stood, when the act of 1893 was passed, no trust was valid unless there was (1) a definite and certain beneficiary;[11] (2) a use or trust clearly worked out by the settlor;[12] (3) a limitation valid

[1] Laws of 1788, chap. 46; 2 J. & V. 282; Levy v. McCartee, 6 Pet. 102, 110; Ayres v. Meth. Epis. Church, 3 Sandf. 351, 367; Potter v. Chapin, 6 Paige, 639, 650.

[2] 1 Spence, Eq. Juris. 591; and see pp. 36, 37, 107 of my Essay on Charitable Uses.

[3] See Magill v. Brown, 16 Fed. Cas. at p. 429, and note to p. 437, for a list of public and charitable uses independent of 43 Eliz. chap. 4.

[4] Shelford, Law of Mortmain, 61; 2 Perry, Trusts, § 701.

[5] Ayres v. The Meth. Church, 3 Sandf. at pp. 377, 378; Holland v. Alcock, 108 N. Y. at p. 329; 3 Sharsw. & Budd, Lead. Cas. Real Prop. 325; 12 Abb. N. C. 427, note.

[6] See cases cited by Fowler, Char. Uses, at p. 108.

[7] 2 Perry, Trusts, § 700.

[8] Thompson's Exr. v. Norris, 20 N. J. Eq. 489; Chamberlain v. Stearns, 111 Mass. 267; People v. Powers, 147 N. Y. 104, 110.

[9] *Cf.* Levy v. Levy, 33 N. Y. at foot of p. 115; 2 Perry, Trusts, § 706.

[10] *Supra*, § 93.

[11] Downing v. Marshall, 23 N. Y. 368, 382; O'Hara v. Dudley, 95 id. 403; Riker v. Leo, 115 id. 93; Holland v. Alcock, 108 id. 312; Tilden v. Green, 130 id. 29; Read v. Williams, 125 id. 560.

[12] Owens v. Miss. Soc. Meth. Epis. Church, 14 N. Y. 380, 406; Bascomb v. Albertson, 34 id. 584, 592; Prichard v. Thompson, 95 id. 76, 81; Adams v. Perry, 43 id. 498.

under the section regulating perpetuities;[1] for, no express trust or power in trust, even if for charity,[2] could violate that section and yet stand.[3] Consequently this section saves only those charitable donations which would have formerly failed because of the uncertainty of the beneficiaries.

Effect of the Act of 1893. The act of 1893[4] changed the Law of Uses and Trusts in one material respect only. It abrogated the rule requiring charitable uses to have as objects certain and definite beneficiaries. It did not relieve such uses from the operation of the rule against perpetuities, nor did it restore the express principle of construction to the realm of charity. How far the act of 1893 also affected sections 55,[5] 58,[6] 59[7] of the Revised Statutes on Trusts, so as to create another order of express trusts besides those enumerated in section 55, is not clear. The act of 1893 provides that, where there is a definite trustee of a charitable use, the legal title shall vest in such trustee.

Is a Charitable Trust Well Limited now an Express Trust? Before the act of 1893 a trust for a charity was usually valid only as a power in trust,[8] where the title to the lands descended to the heirs of testator, or remained in the heirs of grantor, subject to the execution of the trust as a power.[9] By reason of the language of the act of 1893, and more particularly of this section of The Real Property Law, a question arises whether a use specified in this section is not now become an express trust where there is a designated trustee, and no longer a power in trust, notwithstanding sections 76 and 79 of this act.[10] But for all the purposes of the trust, it matters little whether a charitable use is classed as an express trust under section 76 of this act or as a power in trust.[11]

[1] Levy v. Levy, 33 N. Y. at p. 124; Bascomb v. Albertson, 34 id. 584; Cottman v. Grace, 112 id. 299, 306, 307; Cruikshank v. Home for the Friendless, 113 id. 337, 350; People v. Simonson, 126 id. 299, 307.

[2] Tilden v. Green, 130 N. Y. 29, *et vide* cases cited, *supra*, under this section.

[3] Holland v. Alcock, 108 N. Y. 312.

[4] Laws of 1893, chap. 701, *supra*, p. 306.

[5] 1 R. S. 728.

[6] 1 R. S. 729.

[7] 1 R. S. 729.

[8] Laws of 1893, chap. 701; 1 R. S. 729, § 55; Downing v. Marshall, 23 N. Y. 366, 380; Adams v. Perry, 43 id. 487; Cottman v. Grace, 112 id. 299, 306, 307; Erwin v. Hurd, 13 Abb. N. C. 91; Read v. Williams, 125 N. Y. 560, 568; Tilden v. Green, 130 id. 29, 49, 53.

[9] 1 R. S. 729, § 55.

[10] Allen v. Stevens, 22 Misc. Rep. 158; S. C., 33 App. Div. 485.

[11] Brandow v. Brandow, 66 N. Y. 401, 406; Cruikshank v. Home for the Friendless, 113 id. at p. 351; Read v. Williams, 125 id. at p. 568.

Effect of Recent Legislation on the Law of Charities. It is to be observed that this section of The Real Property Law changes the language of the "act to regulate gifts for charitable purposes,[1] and strengthens the argument, that the statute is now designed not only to permit uncertainty in respect of the beneficiaries of a public or charitable use, but also to tolerate those charitable or public uses which would be void in respect of non-charitable uses, because of an undue suspension of the power of alienation.[2] Whether this view will ultimately prevail remains, however, to be seen.[3]

This Section Declaratory in Part. The part of the above section addressed to the case of a donor's failure to nominate a trustee of a charitable use was declaratory.[4]

Attorney-General to Represent Indefinite Beneficiaries. Where the beneficiaries of the uses mentioned in this section are uncertain or indefinite, "*personæ incertæ*," the Attorney-General shall represent them and enforce the trusts.[5]

[1] Chap. 701, Laws of 1893.

[2] Allen v. Stevens, 22 Misc. Rep. 158. See Preface to the writer's Essay on Charitable Uses, New York, 1896.

[3] Allen v. Stevens, *supra*, is now under review.

[4] Downing v. Marshall, 23 N. Y. at p. 382; Levy v. Levy, 33 id. at p. 102; Holland v. Alcock, 108 id. at p. 330; Kirk v. Kirk, 137 id. 510, 514; Phelps v. Pond, 23 id. 69, 77; Woodward v. James, 115 id. 346, 357.

[5] *Supra*, § 93; chap. 683, Laws of 1892; chap. 701, Laws of 1893; chap. 821, Laws of 1895; *cf.* Code Civ. Proc. §§ 1797–1804; People v. Powers, 83 Hun, 449; S. C., 147 N. Y. 104.

ARTICLE IV.

Powers.

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SECTION 110. **Effect of article.**— Powers, as they existed by law on the thirty-first day of December, eighteen hundred and twenty-nine, have been abolished. Hereafter the creation, construction and execution of powers, affecting real property, shall be subject to the provisions of this article; but this article does not extend to a simple power of attorney, to convey real property in the name, and for the benefit of the owner.

Formerly 1 Revised Statutes, 732, section 73, and 1 Revised Statutes, 738, section 134:

§ 73. Powers, as they now exist by law, are abolished; and from the time this Chapter shall be in force, the creation, construction and execution of powers, shall be governed by the provisions of this Article.[1]

§ 134. The provisions of this Article shall not extend to a simple power of attorney, to convey lands in the name, and for the benefit, of the owner.[2]

Comment on Section 110. This section, in its original form, abolished the common-law rules concerning powers over estates in lands.[3] It is obvious that not all *powers* are so abolished, but those only which were connected with property or estates; in other words, technical "powers" or the powers of the lawyers, not the "powers" of the laymen, are affected by this legislation. Before taking up our consideration in detail of this article[4] in both its original and amended forms, let us briefly consider what was meant by "powers" and the place which they occupied in the common law of estates in lands.

"Powers" before 27 Henry VIII. Prior to the Statute of Uses (27 Hen. VIII, chap. 10) "powers" were known only in equity. The feudal law of land which then prevailed in the law courts took no notice of them.[5] But in equity, where land was conveyed to

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] As the Revised Statutes are repealed, it is now this section which abolishes the common law touching "Powers." Why then is it stated in a preterite tense?

[4] The Article on Powers.

[5] Powell, Pow. 1; *cf.* Chance, Pow. 3; Gilb. Uses, 140; Lewin, Trusts (1st ed), 431, note.

feoffees for uses, the donor or feoffor might reserve a power to himself to declare or appoint the future uses, or he might even grant this power to a stranger, and these powers equity would enforce, for such powers were in the nature of trusts.[1] The common law of land was thus again evaded by a refinement.[2]

"Powers" after the Statute of Uses. When the Statute of Uses finally fastened the legal estate to the equitable use, with all its varied incidents, the equitable doctrines of powers passed into the common law of estates in lands.[3] These equitable doctrines were much amplified in course of time, by judicial exposition and decisions, and finally "powers" became the most abstruse branch of legal learning.[4] Even Sugden's masterly treatise, published in this century, failed to make the learning on powers easy of acquisition. The difficulty lay in the application of particular doctrines to complex settlements; for nearly every settlement in England, between 1691 and 1800, contained a power of revocation or a power of appointment.[5] Sir Edward Coke states that powers of revocation were common in his time.[6]

Powers of Revocation. Powers of revocation, which were in use in voluntary settlements prior to the Statute of Uses,[7] then originated prior to the Statute of Uses.[8] But after the Statute of 27 Elizabeth, chapter 4, made powers of revocation fraudulent, as to purchasers, they fell into disuse in voluntary settlements.[9] Powers of appointment, or those powers which limited future uses, continued to prevail in practice. In settlements founded on a good or valuable consideration, or not fraudulent under the statutes, powers of revocation were and still are in use.[10]

Introduction of "Powers" in New York. When the English law of estates and the socage tenure were introduced in New York in

[1] See Sugden's Introduct. to Gilb. Uses, 43; Powell, Pow. (ed. of 1799) 3.

[2] See observations on the mode in which the common law was subverted by uses, pp. 25–32.

[3] Sugden, Introduct. to Gilb. Uses, 43; Chance, Pow. 6; Whart. Conv. 422.

[4] See note of Revisers, with article on Powers, 1 R. S. 731; Jennings v. Conboy, 73 N. Y. 230, 233. The revival of learning in England, a part of the general European renaissance, caused a very similar awakening in the legal profession, and, after the reign of Elizabeth, a very much more involved system of conveyancing, including powers. *Supra*, pp. 2, 27.

[5] See Mr. Booth's opinion on the Doctrine of Executory Fees, 1 Harg. Collect. Jurid. 421, 423.

[6] Co. Litt. 237a.

[7] Cruise, Dig. tit. 11, chap. 2, § 34; *cf.* Crabbe, Real Prop. § 2065, citing Sugden.

[8] Co. Litt. 237a.

[9] 1 Sand. Uses, 171, 172.

[10] Belmont v. O'Brien, 12 N. Y. 394, 404.

the year 1664, powers were probably much less used in settlements of estates in England than they were a half-century later.[1] As the Statute of Uses was in force in New York, the contemporaneous English law of powers was distinctly relevant to all estates held by the socage tenure, and consequently there was nothing to prevent the application of the law of powers to settlements in New York.[2] But in a new country the refinements of conveyancing are rarely resorted to, as the tendency of all colonies and new settlements is to resort to primitive social conditions and, consequently, to the more primitive stages of the national law. Thus, we find it generally admitted by the early law writers of this country that the English law concerning powers was less frequently applied in America, in practice, than any other doctrine of the English common law.[3] That this remained true of New York, even in 1829, there can be no doubt, for the fact was so publicly stated by the original revisers of the present statute in their note to the Article on Powers.[4] Yet, as powers were a part of the common law of estates prior to the Revised Statutes, such common law of powers was, in legal theory, made a part of the common law of the State of New York by the provisions of the successive State Constitutions.[5] The Article on Powers in the Revised Statutes was substituted in the place of the relevant portions of the common law concerning Powers.

Powers before the Revised Statutes. Let us next consider, briefly, the nature of the powers thus swept away by the Revised Statutes. At the common law, "powers" were commonly divided into (1) common-law powers, (2) equitable powers, (3) powers operating under the Statute of Uses.[6] *Common-law powers* were authorities given to one person by another to do an act for the donor. Powers of attorney[7] and powers conferred by acts of the Legisla-

[1] *Supra*, p. 39.

[2] Prior to the War of Independence, and for some time after, all estates were of this tenure in New York. *Vide supra*, p. 39, and Cutting v. Cutting, 86 N. Y. at p. 529.

[3] 4 Greenl. Cruise, 181, note; 4 Kent, Comm. 315.

[4] See that note *infra*, Appendix II. Even in 1855 Mr. Lalor refers to the little practical importance of the law of powers. Lalor, Real Prop. 206.

[5] Const. of 1777, § 35; Const. of 1821–1823, art. VII; Cutting v. Cutting, 86 N. Y. 522, 529.

[6] This is the classification of the editors of Coke on Littleton, than whom there is no higher authority. See index to their Notes on Powers.

[7] It is the execution of powers of attorney, not their creation, which effects the transmutation of estates. Hence, they are mere common-law authorities, not "powers," in a technical sense.

ture[1] were common-law powers. *Equitable powers* referred wholly to powers over equitable interests.[2]

Powers Operating under the Statute of Uses. Powers operating under the Statute of Uses were either powers to declare future uses or to revoke existing uses.[3] When such future uses were duly declared, or duly revoked, the uses themselves were executed in possession by force of the Statute of Uses.[4] The last class of powers then are those intended to be swept away or abolished by the Revised Statutes, although Chancellor Kent states that the Revised Statutes abolished even common-law powers.[5] But it will be observed that powers of attorney were and are expressly excepted from the operation of the Article on Powers,[6] while powers conferred by an act of the Legislature have never been subjected in practice to the Revised Statutes.[7] So that it may, perhaps, be not quite accurate to assume that common-law powers were disturbed by either the Revised Statutes, or this article of the present law.

Powers of Appointment and Revocation. Powers deriving their effect from the Statute of Uses were *powers of appointment* or *powers of revocation*.[8] But as a power of appointment was thought strictly to be a power of revocation as it both displaced existing estates and substituted new ones, powers operating under the Statute of Uses are sometimes termed powers of appointment *and* revocation.[9] A conveyance to "A." and his heirs to such uses as "B." may appoint, and in default of any appointment to the use of "C." and his heirs, gave the latter a vested estate subject to be divested by the exercise of the power.[10] Such is an example of the power in question. Powers were classified as: (1) *Appendant or appurtenant.* (2) *Collateral or in gross.* (3) *Simply collateral*, which

[1] *Cf.* 1 Chance, Pow. 2; Whart. Conv. 419; Farw. Pow. 1, 2; 1 Sugd. Pow. 1; Crabb, Law Real Prop. § 1959.

[2] Farw. Pow. 2, such as were enforced in equity but not executed by the Statute of Uses.

[3] 1 Sugd. Pow. 2; *cf.* 1 Chance, Pow. 3.

[4] Wadhams v. Amer. Home Miss. Society, 12 N. Y. 415, 421.

[5] 4 Kent, Comm. 318, note.

[6] *Supra*, § 110, The Real Prop. Law; 1 R. S. 734, § 134.

[7] *E. g.*, People ex rel. Schanck v. Green, 64 N. Y. 499; Powell v. Tuttle, 3 N. Y. 396.

[8] *Cf.* Read v. Williams, 125 N. Y. at p. 569, as to present classes of powers under Revised Statutes.

[9] Cruise, Dig. tit. 32, chap. 13, § 3; 4 Kent, Comm. 315. But a power of revocation is distinct from a power of appointment, 1 Sugd. Pow. 441; 1 Chance, Pow. 441.

[10] *Cf.* § 31, The Real Prop. Law.

are again either: (a) *General.* (b) *Special. Powers appendant* were authorities to limit an estate out of the estate of the donee of the power. Powers collateral, or in gross, were authorities given to those who had an interest in the estate at the time of the execution of the deed, but they enable them to create such estates only as will not attach on their own interest, such as a power to tenant for life to appoint the estate after his death.[1] Powers of the third kind were given to those not having any estate in the lands at any time; such as power to a stranger to revoke a settlement and appoint new uses: (*a*) generally or to any one he likes; (*b*) specially or to appointees particularly named.[2]

Classes of Powers Might Overlap. These classes of powers might overlap, for a power might belong to several classes at the same time. Thus, when the donee had an estate for life, with power to jointure after his death, and also a contingent remainder in fee, the power to jointure was collateral as to the life estate and appendant as to the estate in fee. No two systems of classifications of powers have agreed in all respects.[3] But systems of classification are important only in respect of the donee's ability to suspend, extinguish or merge the power.[4] The classification given above was the more common, and even Mr. Chance, who criticised it, was forced to resort to it as an appropriate plan for the chapters of his admirable treatise on Powers. This generally-received classification has also the advantage of being ancient.[5]

Former Learning on Powers. The common-law learning on powers embraced such subjects as the "creation of powers;" their "delegation" and "forfeiture;" their "execution;" "estates, lawfully created under powers;" "the suspension," "extinguishment," "barring" and "merger of powers," and, possibly, equitable relief in cases of defective execution of powers, although strictly the last subject comes under the learning on equitable jurisdiction. It will be seen that the Revised Statutes and the present article on Powers attempt to embrace most of these topics. The changes thus instituted in particular doctrines of the common law of powers may be referred to the appropriate sections of The Real Property Law.[6]

[1] Wilson v. Troup, 2 Cow. 195.

[2] Whart. Conv. 425, 426; 1 Sugd. Pow. 474.

[3] Whart. Conv. 424; 1 Chance, Pow. 9; Farw. Pow. 8; 4 Kent, Comm. 317; 1 Sugd. Pow. 43.

[4] Powell, Pow. 6, 12; 1 Sugd. Pow. 43; 1 Chance, Pow. 9; 4 Kent, Comm. 317.

[5] See Gilb. Uses, 141.

[6] *Infra.*

Changes Instituted by the Revised Statutes. This very brief retrospect has prepared us for an examination, in more detail, of the changes wrought by the New York statutes dealing with powers. Unquestionably both equitable powers and powers deriving their effect from the Statute of Uses are abolished by such legislation, which governs not only the creation but also the construction and execution of powers.[1] This article of the statute has become the Alpha and Omega of the existing law of powers over estates in lands. The common-law learning is stated to have since become either untrustworthy or else simply illustrative, rather than cogent.[2] Not all the old learning on powers was, however, completely swept away by the Revised Statutes, for we find the courts since resorting to the common law to resolve questions not satisfactorily provided for by the statute, such as the execution of powers under certain circumstances;[3] their lawful delegation,[4] and the quantity of estates well created under powers.[5] It must be confessed, though, that the old learning is always subordinated to the statute which is controlling. The common-law rules relating to common-law powers are still applicable to common-law powers and to powers of attorney, by express reservation of the statute.[6] It is never well to infer that the completed edifice of the common law can shed no light on the present learning of powers deriving their effect from this statute, for such an inference will not be accurate in all cases.[7] The fact that the object of a power at common law remains the object of a power under our present system, must perpetuate the relevancy of the old law. But this Statute, or Code, of Powers, has made a new learning, simpler to comprehend and apply than the old.

Comment on Section 110 and its Original Section. We have seen that the Statute of Uses (27 Hen. VIII, chap. 10) survives, in a

[1] Jackson v. Edwards, 7 Paige, 382, 399; Coster v. Lorillard, 14 Wend. 265, 314; Jennings v. Conboy, 73 N. Y. 230, 233; Cutting v. Cutting, 86 id. 522, 530; Delaney v. McCormack, 88 id. 174, 180; Hutton v. Benkard, 92 id. 295, 304; Sweeney v. Warren, 127 id. 426, 432; § 110, The Real Prop. Law, *quoadam;* 1 R. S. 732, § 73, *supra.*

[2] Cases *supra*, and particularly Jennings v. Conboy, 73 N. Y. 230, 233.

[3] Mutual Life Ins. Co. v. Shipman, 119 N. Y. 324, 328, 329; Barber v. Carey, 11 id. 397, 402; Belmont v. O'Brien, 12 id. 394, 404; Sweeney v. Warren, 127 id. 426, 433; White v. Hicks, 33 id. 383.

[4] Mayor v. Stuyvesant, 17 N. Y. 4, 40.

[5] Root v. Stuyvesant, 18 Wend. 257, 272; Darling v. Rogers, 22 id. 483, 495, 496.

[6] *Supra*, § 110.

[7] Dominick v. Sayre, 3 Sandf. 555.

perfected form, in the present statute.[1] Is it, then, wholly accurate to say that powers deriving their effect from the Statute of Uses have been eradicated, when all technical powers now derive both their existence and their effect from the present statute, which includes the Statute of Uses? The fact is, that the effect of the New York legislation has not been altogether to abolish the common law of powers, but rather to fix certain phases and essentials of that system in a more concrete and inelastic form. It is more doubtful than is generally supposed whether the statutory changes are not often verbal.[2] Certainly had it not been for the common law of powers the Revised Statutes would have assumed a totally different form, and Powers have been relegated to that department of a Code which treats of agency; for, all powers are, to some extent, mere agencies, or delegations, emanating from some one possessing an adequate dominion over an estate. Therefore, it was proper to insert the proviso in the foregoing section, to the effect that a power must always be an authority to do what the donor might himself lawfully do.[3]

Effect of Section 110. While this section of The Real Property Law declares "powers" abolished, it does not declare that the common law, concerning powers, is abolished; so that whenever the common law remains relevant to the powers deriving their force or effect from this article, that common law is still made applicable by constitutional reservation. Consequently, as this article legislates nothing of consequence upon the rules touching the extinguishment, the suspension or the merger of powers, those branches of the law of powers must be still governed by the fundamental law of the State.

[1] *Supra*, pp. 121, 236, 237.

[2] *Cf.* opinion Bronson, J., Root v. Stuyvesant, 18 Wend. at pp. 283, 284; Dominick v. Sayre, 3 Sandf. 555.

[3] And see § 119, The Real Prop. Law.

§ 111. **Definition of a power.**— A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform.

Formerly 1 Revised Statutes, 732, section 74:

§ 74. A power is 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.[1]

Definition of a "Power." Common-law jurisprudents differ in their definition of a power.[2] But it is apprehended that such differences are neither wide nor essential. They all agree that a power is a liberty or an authority reserved by or limited to a person, enabling him to dispose of real or personal property for his own benefit or the benefit of another, and operating upon an estate or interest vested either in himself or in some other person; the liberty or authority, however, not being derived out of such derivative estate or interest, but over-reaching it or superseding it either wholly or partially.[3] The word "power" is generally used as a technical term. It may be said to denote an inseparable attribute of complete dominion over property, according to the rules of the common law. Crabb, adopting a definition of Wilmot,[4] states that powers differ from trusts in that powers are never imperative; they leave the act to be done at the will of the party to whom they were given.[5] But even at common law there were *mere* powers which were not trusts and powers in the nature of trusts,[6] and the latter powers were imperative.[7] This division was not, however, exhaustive, as there were powers compounded of both classes, as where there was a trust to be effected by a power.[8]

Definition of the Statute. The above definition, by the Revised Statutes,[9] of a technical "power" does not differ materially from that known to the common law. Yet it is wide enough to define

[1] Repealed, chap. 547, Laws of 1896.

[2] Will. Real Est. & Conv. 249.

[3] 1 Chance, Pow. 1; Whart. Conv. 419; 1 Sugd. Pow. 1; Crabb, Real Prop. § 1959.

[4] Wilmot's Opin. 23.

[5] Crabb, Real Prop. § 1059.

[6] 2 Sugd. Pow. 158; Farw. Pow. 463; Towler v. Towler, 142 N. Y. 371, 376; Cutting v. Cutting, 20 Hun, 360, 369.

[7] Farw. Pow. 463; Brown v. Higgs, 8 Ves. 561; Harding v. Glyn, 1 Atk. 469; 2 Sugd. Pow. 158.

[8] 2 Sugd. Pow. 158.

[9] See this section 111, *supra*; 1 R. S. 732, § 74, *supra*.

an express trust which includes a power and more.[1] A power under this act must always be such as the donor, or grantor, might himself lawfully perform.[2] It is also indispensable to its creation that the object or objects to be accomplished by a power shall be specified in the instrument of its creation.[3] The essential similarity between powers since the Revised Statutes and powers before the Revised Statutes is then apparent. Both are either powers of appointment or powers of revocation. Both are either "*restraining powers*," *i. e.*, powers reserved to owners; or "*enabling powers*," *i. e.*, powers enabling persons not enjoying a right of dominion to exercise a dominion *sub modo*.

What Acts now Valid as "Powers." What acts may be valid as powers, the Article on Powers does not attempt to specify.[4]

What Words Necessary to Create Powers. No set form of words is necessary to create or reserve a power,[5] and such was the rule at common law.[6]

Powers cannot Suspend Alienation Unlawfully. Powers are subject to the rule against perpetuities,[7] and for the purpose of computing the time in which alienation may be lawfully suspended by a power, the power relates back to the time when the instrument creating it took legal inception.[8]

What "Powers" can be Delegated. As all powers are cut out of that aggregation or bundle of rights, known in the English common law as a "fee," both the doctrines of relation (whereby an estate created under a power relates back, in point of time, to the instrument creating the power[9]) and of agency apply to "Powers."[10] It is a principle of the law of agency, "*delegata potestas non pot-*

[1] Selden v. Vermilya, 3 N. Y. 525, 536.

[2] Woerz v. Rademacher, 120 N. Y. 62, 68; Hillen v. Iselin, 144 id. at p. 380; Root v. Stuyvesant, 18 Wend. at p. 265.

[3] Sweeney v. Warren, 127 N. Y. 426.

[4] Downing v. Marshall, 23 N. Y. at p. 380; Belmont v. O'Brien, 12 id. at p. 403; Read v. Williams, 125 id. at p. 569; Hillen v. Iselin, 144 id. at p. 380.

[5] Dorland v. Dorland, 2 Barb. 63, 80; Hubbard v. Gilbert, 25 Hun, 596; Goetz v. Ballou, 64 id. 490; Towler v. Towler, 142 N. Y. 371, 374; Cahill v. Russell, 140 id. 402; Meehan v. Brennen, 16 App. Div. 396; *cf.* Jennings v. Conboy, 73 N. Y. at p. 234, as to powers created by deed, and see pp. 271, 327, as to powers in trust.

[6] 1 Chance, Pow. 31; 1 Sugd. Pow. 117; Farw. Pow. 48.

[7] *Vide infra*, under § 117 of this act.

[8] Genet v. Hunt, 113 N. Y. 158; Townshend v. Frommer, 125 id. 460, 461; Salmon v. Stuyvesant, 16 Wend. 324; 1 R. S. 737, § 128, now § 158, The Real Prop. Law, *q. v.*

[9] § 158, The Real Prop. Law.

[10] Hillen v. Iselin, 144 N. Y. at p. 374.

est delegare," or, as otherwise expressed, "*vicarius non habet vicarium*.[1] This principle applies to the execution of those "powers" which repose a personal trust or confidence in the donee of the power.[2] But this doctrine does not apply to those powers which, in their nature, are neither personal nor a trust or confidence, for the execution of such may be delegated.[3]

[1] Broom, Leg. Max. (ed. 1848, Lond.) 665.

[2] 1 Sugd. Pow. 213; Newton v. Bronson, 13 N. Y. 587, 593; Coleman v. Beach, 97 id. 545, 559; Campbell v. Jennings, 22 Misc. Rep. 406.

[3] Crooke v. County of Kings, 97 N. Y. 421, 453; Frear v. Pugsley, 9 Misc. Rep. 316; Mayor of N. Y. v. Stuyvesant, 17 N. Y. 34, 42.

§ 112. **Definitions of grantor, grantee.**—The word "grantor" is used in this article, in connection with a power, as designating the person by whom the power is created, whether by grant or by devise; and the word "grantee" is so used as designating the person in whom the power is vested, whether by grant, devise or reservation.

Formerly 1 Revised Statutes, 738, section 135:

§ 135. The term "grantor of a power" is used in this article as designating the person by whom a power is created, whether by grant or devise; and the term "grantee of a power," is used as designating the person in whom a power is vested, whether by grant, devise or reservation.[1]

Comment on Section 112, Supra. At common law a grantor of a power was called a "donor" and the grantee a "donee" of a power.[2] The change being purely verbal is inconsequential. Where a settlor reserves to himself a power of revocation, he is both a "grantor" and a "grantee" of a power under this section. But the case is provided for elsewhere in the statute, and the person thus reserving to himself is made subject to all those provisions of the article applicable to grantees of powers.[3]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Cf.* Sugd. Pow. and Chance, Pow. Prop. Law. *passim.*

[3] 1 R. S. 735, § 105; § 124, The Real

§ 113. **Division of powers.**— A power, as authorized in this article, is either general or special, and either beneficial or in trust.

Formerly 1 Revised Statutes, 732, section 76:

§ 76. Powers, as authorized in this Article, are general or special, and beneficial or in trust.[1]

Comment on Section 113. Under section 110 it was stated that powers, simply collateral, were formerly subdivided into *general* and *special*, according as the appointees were unlimited or limited to particular persons, by the donor of the power.[2] This division is so extremely natural that it was often employed by text writers,[3] and was suggested as a proper classification for a reformed code of powers, long prior to the Revised Statutes.[4] A division of powers into "beneficial powers" and "powers in trust" had not been employed by text writers on powers, but it was a well-known division of gifts and voluntary settlements, and was equally applicable to powers.[5] The statutory definitions of these various kinds of powers follow in the succeeding sections of "The Real Property Law."[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, p. 315.

[3] Powell, Pow. *passim;* 4 Kent Comm. 318; Crabb, Real Prop. § 1960.

[4] Humph. Observ. Real Prop. (2d ed. 1827) pp. 88–91.

[5] *Cf.* Humph. Id. p. 315; 2 Sugd. Pow. 27.

[6] Chap. 547, Laws of 1896.

§ 114. **General power.**—A power is general, where it authorizes the transfer or encumbrance of a fee, by either a conveyance or a will of or a charge on the property embraced in the power, to any grantee whatever.

Formerly 1 Revised Statutes, 732, section 77:

§ 77. A power is general, where it authorizes the alienation in fee, by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever.[1]

General Powers. As stated above, a general power was the same at the common law,[2] but the former definition had reference to the appointees, not to the subject-matter upon which the power acted. In construing powers the end and design of the parties is to govern, and where the intention requires it, a special power has been construed as general, and a general power deemed to be special.[3] But a power created by deed must be more formal than one created by will.[4]

Execution of General Powers. A general power of appointment is well executed by appointing to trustees on valid trusts.[5] But as certain trusts, in New York, suspend the power of alienation,[6] and the estate created under the power has relation back to the instrument creating the power, care must be taken not to violate the rule against perpetuity[7] in an appointment to trustees.

Execution of General Beneficial "Powers." A general beneficial power is well executed by an appointment of the grantee of the power to himself.[8]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, p. 315; Farw. Pow. 7; Whart. Conv. 427; Crabb, Real Prop. § 1960; Humph. Observ. Real Prop. 88–91; Kinnier v. Rogers, 42 N. Y. 531, 534; Crooke v. County of Kings, 97 id. 421, 448; Coleman v. Beach, Id. 545, 558; Hume v. Randall, 141 id. 499, 503.

[3] Note to Van Vechten v. Van Veghten, 8 Paige, at p. 124; Landon v. Walmuth, 76 Hun, 271.

[4] Jennings v. Conboy, 73 N. Y. at p. 234.

[5] Maitland v. Baldwin, 70 Hun, 267; Frear v. Pugsley, 9 Misc. Rep. 316.

[6] *Supra*, pp. 254, 257, 259, 260.

[7] § 32, The Real Prop. Law; Frear v. Pugsley, 9 Misc. Rep. 316, to the contrary, is not an authority on that point; Chapl. Ex. Trusts & Pow. § 679; Maitland v. Baldwin, 70 Hun, at pp. 271, 272.

[8] Hubbard v. Gilbert, 25 Hun, 596.

§ 115. **Special power.**— A power is special where either:

1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated; or,

2. The power authorizes the transfer or encumbrance, by a conveyance, will or charge, of any estate less than a fee.

Formerly 1 Revised Statutes, 732, section 78:

§ 78. A power is special,

1. Where the persons or class of persons, to whom the disposition of the lands under the power is to be made, are designated:

2. Where the power authorizes the alienation, by means of a conveyance, will or charge, of a particular estate or interest less than a fee.[1]

Special Power. This definition of the statute is more restricted than the definition of the common law. At common law the term applied only where appointees were special,[2] and had no reference to the quantity of the estate to which the power referred. The present section makes an authority to alienate an estate less than a fee a *special power*,[3] although appointees may be general. But in the construction of these powers the courts will take into consideration their end as designed by the donor of the power.[4] A power created by deed must be more formal than one created by will.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] Co. Litt. 271b, note 1, § 7; Crabb, Real Prop. § 1960; Whart. Conv. 426; Farw. Pow. 7; Wright v. Tallmadge, 12 N. Y. 307.

[3] Leggett v. Perkins, 2 N. Y. 297, 317; Cutting v. Cutting, 86 id. 522, 531; Delaney v. McCormack, 88 id. 174, 181.

[4] *Supra*, under § 114, The Real Prop. Law, p. 323, *supra*.

[5] Jennings v. Conboy, 73 N. Y. at p. 234.

§ 116. **Beneficial power.**— A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article, is void.

Formerly 1 Revised Statutes, 732, section 79, and 1 Revised Statutes, 733, section 92:

§ 79. A general or special power is beneficial, when no person other than the grantee has, by the terms of its creation, any interest in its execution.[1]

§ 92. No beneficial power, general or special, hereafter to be created, other than such as are already enumerated and defined in this Article, shall be valid.[2]

Beneficial "Powers." The common-law writers did not classify powers with reference to appointees, other than as already indicated, into general and special or particular.[3] But, as also stated above, the subdivisions "*beneficial*" and "*in trust*," were both logical and convenient.[4] All powers connected with estates must now be either *beneficial* or *in trust*.[5] A power is beneficial when no one else besides the grantee of the power takes any interest, which the law recognizes, in its execution.[6] Thus, when a power is conferred on one who is not a trustee, it is beneficial,[7] and so when the limitation is legally silent as to the persons to be benefited by its execution,[8] unless the limitation is otherwise void as a trust.[9]

What Beneficial Powers are now Authorized. No beneficial power is valid unless it is one specified in this article. Thus, a leasing power to life tenants to make leases for more than twenty-one years was formerly altogether bad, if a beneficial power.[10] It will be readily observed that the condemnation of this section does not, however, extend to powers in trust. Nor would it seem to

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] *Supra*, p. 315; *cf.* Farw. Pow. 186; 2 Sugd. Pow. 27.

[4] *Supra*, p. 322.

[5] Jennings v. Conboy, 73 N. Y. 230; Cutting v. Cutting, 86 id. 522, 532, 536; Sweeney v. Warren, 127 id. 426, 434; *cf.* Towler v. Towler, 142 id. 371.

[6] Jackson v. Edwards, 7 Paige, 386, 400; Barber v. Carey, 11 N. Y. 397, 402; Wright v. Tallmadge, 15 id. 307; Cutting v. Cutting, 86 id. 522, 531; Sweeney v. Warren, 127 id. 426, 434; Hume v. Randall, 141 id. 499, 503; Deegan v. Wade, 144 id. 573, 578.

[7] Smith v. Floyd, 140 N. Y. 337; Sweeney v. Warren, 127 id. at p. 434; *cf.* Towler v. Towler, 142 id. 371.

[8] Jennings v. Conboy, 73 N. Y. 230.

[9] Tilden v. Green, 130 N. Y. 29.

[10] Root v. Stuyvesant, 18 Wend. 257; Salmon v. Stuyvesant, 16 id. 321, 325. Changed now so as to avoid only excess. § 123, The Real Prop. Law; *cf.* § 86, *supra*.

extend to leasing powers of trustees of an express trust.[1] If trustees of the four express trusts take an estate *pur autre vie*, as other life tenants, they are subject to section 123 of this act, if the power to lease is a special beneficial one.[2] Among the beneficial powers, valid under this article, are comprised a power to a married woman to dispose, during her marriage, of lands conveyed to her;[3] a power to a tenant for life to devise generally,[4] and a power to tenants for life to make leases for twenty-one years.[5] What others are valid beneficial powers[6] it is not always easy to determine; but a general power of appointment, granted by a will or settlement, to a beneficiary of a trust, is a valid general beneficial power,[7] although a beneficiary of a trust is not a life tenant.[8] In determining what beneficial powers were valid under the Revised Statutes,[9] the court has placed a liberal construction on the word "enumerated" in the particular sentence declaring beneficial powers not *enumerated* void.[10] The language of the present section is open, at least, to as liberal a construction as its prototype, for no change was thereby intended.[11] Powers of revocation, reserved to settlors, are beneficial powers, and valid under this statute.[12]

Execution of a Beneficial and General Power. A beneficial and general power is well executed if the grantee of the power appoint to himself.[13]

Advancements under a Beneficial Power. This subject is controlled by a subsequent section of this act.[14]

[1] See under § 86, *supra*, and under § 76, concerning quantity of the estate of trustees of an express trust.

[2] But, as a power to trustees to lease is not, ordinarily, a beneficial power, query, are not leases beyond twenty-one years, valid, independently of § 123 of this act.

[3] 1 R. S. 733, § 87; § 123, The Real Prop. Law.

[4] 1 R. S. 733, § 84; § 132, The Real Prop. Law.

[5] 1 R. S. 733, § 87; § 123, The Real Prop. Law; Cutting v. Cutting, 86 N. Y. at p. 533.

[6] See section 116 of this act, and note that a beneficial power is an "advancement" to a child, under § 295 of this act.

[7] Cutting v. Cutting, 86 N. Y. 522; and see Genet v. Hunt, 113 id. 158, as to a power of appointment reserved in a settlement.

[8] § 80, The Real Prop. Law.

[9] 1 R. S. 733, § 92, now incorporated in § 116, *supra*.

[10] Cutting v. Cutting, 86 N. Y. at p. 535, and see, *infra*, discussion under § 124 of this act.

[11] Note to section 116 of this act by Commissioners of Statutory Revision.

[12] See the cases cited, *infra*, under § 125, this act.

[13] Hubbard v. Gilbert, 25 Hun, 596.

[14] The Real Prop. Law, § 295.

§ 117. **General power in trust.**—A general power is in trust, where any person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution.

Formerly 1 Revised Statutes, 734, section 94:

§ 94. 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.[1]

Powers in Trust. Powers in trust have been to some extent considered above under other sections of this act,[2] and what is there said need not again be repeated. In our practice *powers in trust* may be powers of revocation and appointment, powers of *distribution* or powers of *selection*. Powers are in trust when the disposition authorized excludes from its enjoyment the grantee of the power,[3] or includes others besides himself.[4] Both a power and a trust are necessary to constitute a power in trust.[5] As was said in an early case under the Revised Statutes, "a power in trust is a mere authority to limit a use, and to constitute it there must always be a person other than the donee, or grantee of the power, called the appointee, answering to the *cestui que trust* in a simple trust. * * * A power in trust is to be understood in contradistinction to an estate in trust. * * *" A power in trust involves the idea of a trust as much as a trust estate.[6]

What Trusts Valid as Powers. What trust purposes are valid as powers, this act does not (as it does in the case of the four trusts lawful[7]) attempt to specify.[8] But powers in trust certainly exclude the four purposes specified in the 76th section of this act, and if such are bad as trusts, they are not validated as powers.[9] The purposes which may be carried out as trust powers are the

[1] Repealed, chap. 547, Laws of 1896.

[2] *Vide* under §§ 77, 79, *supra*.

[3] Downing v. Marshall, 23 N. Y. 366, 379.

[4] Smith v. Bowen, 35 N. Y. 83, 89; *cf.* Towler v. Towler, 142 id. 371.

[5] Sweeney v. Warren, 127 N. Y. at p. 434; Delaney v. McCormack, 88 id. at p. 181.

[6] Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 613; Towler v. Towler, 142 N. Y. 371.

[7] *Supra*, § 76, The Real Prop. Law.

[8] Downing v. Marshall, 23 N. Y. at p. 380; Belmont v. O'Brien, 12 id. at p. 403; Selden v. Vermilya, 3 id. at p. 536; Read v. Williams, 125 id. at p. 569; Hillen v. Iselin, 144 id. at p. 380.

[9] *Supra*, pp. 270, 272, under § 79; Trowbridge v. Metcalf, 5 App. Div.

trusts lawful at the common law;[1] but now they must be active in their nature and not mere passive trusts.[2] Where the title to lands is in the person beneficially entitled, a valid power in trust cannot be given to a trustee to receive the rents and profits for the benefit of such person.[3] A perpetuity can never be accomplished by means of a power any more than by one of the express statutory trusts;[4] nor can a trust purpose, effected by a power, contravene public policy[5] or violate equity or good morals.[6]

Construction Favors Powers in Trust. An intention to create an express trust will not be implied when the purpose may be accomplished as a power.[7] Thus, in construction, powers in trust are preferred to the four trusts lawful by the 76th section.

Beneficiaries of Powers in Trust. In order to make an express[8] trust valid as a power in trust, there must be a definite and certain beneficiary entitled to enforce the use or trust,[9] unless the limitation is to a charitable, educational, religious or benevolent use, when certain ancient and more liberal rules are now directed to be applied by statute.[10]

Rule against Perpetuities. Trusts, operative as powers, are subject to the rule against perpetuities, for the same reasons stated in reference to the four trusts lawful,[11] or because they suspend the vesting of the ultimate fee.[12] The trustee of a power cannot alienate in contravention of the trust,[13] and the rule against a perpe-

318; citing Garvey v. McDevitt, 72 N. Y. 556; Lang v. Ropke, 5 Sandf. at p. 372.

[1] Downing v. Marshall, 23 N. Y. 366, 377; Holly v. Hirsch, 135 id. 590, 594.

[2] Townshend v. Frommer, 125 N. Y. 446, 457, 468; DePeyster v. Clendinning, 8 Paige, 295, 303.

[3] Wood v. Wood, 5 Paige, 596; *cf.* Jennings v. Conboy, 73 N. Y. 230.

[4] Belmont v. O'Brien, 12 N. Y. 395, 403; Everitt v. Everitt, 29 id. 39, 78; Read v. Williams, 125 id. 560, 569; Booth v. Baptist Church, 126 id. 215; Sweeney v. Warren, 127 id. 426, 433; Tilden v. Green, 130 id. 29, 54; Hillen v. Iselin, 144 id. at p. 380.

[5] Belmont v. O'Brien, 12 N. Y. at p. 403; Tilden v. Green, 130 id. 29, 54; Van Vechten v. Van Veghten, 8 Paige, 104, 124.

[6] Read v. Williams, 125 N. Y. 560, 569; Sweeney v. Warren, 127 id. 426; Hillen v. Iselin, 144 id. at p. 380.

[7] Heermans v. Robertson, 64 N. Y. 332; Henderson v. Henderson, 113 id. 1, 11.

[8] Express is here used in its ordinary meaning. *Vide supra*, p. 273, note 2.

[9] Tilden v. Green, 130 N. Y. 29; Prichard v. Smith, 95 id. 76; Matter of O'Hara, Id. at p. 418; Read v. Williams, 125 id. 560.

[10] Chap. 701, Laws of 1893; § 93, The Real Prop. Law.

[11] *Supra*, pp. 260, 261.

[12] Dana v. Murray, 122 N. Y. 604, 613; Booth v. Baptist Church, 126 id. 215, 239, 240.

[13] Dana v. Murray, 122 N. Y. 604; Matter of Will of Butterfield, 133 id. 473.

tuity, therefore, applies with full force to trusts intended to be operative as powers, whenever the power of alienation by the trustee is unduly suspended.[1] A power in trust is as imperative as any express trust created under the 76th section.[2] While a peremptory power of sale does not, *per se*, suspend the power of alienation,[3] a power to sell and distribute does not unnecessarily relieve a trust limitation, otherwise invalid, from the effect of suspending the power of alienation.[4] So if the execution of even a power of sale is, by any limitation, unduly postponed, such limitation violates the rule against a perpetuity, and is void,[5] unless the power is of such a nature as to be presently extinguished or merged.[6] So where the power may be released by a person entirely *sui juris*, it would seem not to create a perpetuity.[7]

Power Created by Deed. A power created by deed is limited to the creation of such estates and acts as the donor of the power could lawfully create or perform.[8] For the purposes of the rule against perpetuities a power relates back to the taking effect of the instrument creating it.[9]

Power in Trust, when General, when Special. A general power in trust is contradistinguished from a special power in trust.[10] A power in trust is general when any person other than the grantee is designated as entitled to the proceeds.[11] A general power in trust can never be executed for the benefit of the donee of the power.[12] In this respect it partakes of the nature of all trusts.[13]

[1] Booth v. Baptist Church, 126 N. Y. 215; Matter of Will of Butterfield, 133 N. Y. 473.

[2] § 137, The Real Prop. Law.

[3] Garvey v. McDevitt, 72 N. Y. 556, 563; Blanchard v. Blanchard, 4 Hun, 287, 291; Henderson v. Henderson, 113 N. Y. 1, 12; Deegan v. Wade, 144 id. 573; Eells v. Lynch, 8 Bosw. 465, 481.

[4] Allen v. Allen, 149 N. Y. 280; Brewer v. Brewer, 11 Hun, 147; Hobson v. Hale, 95 N. Y. 588.

[5] Matter of Will of Butterfield, 133 N. Y. 473.

[6] Hetzel v. Barber, 69 N. Y. 1; Garvey v. McDevitt, 72 id. 556, 563.

[7] Garvey v. McDevitt, 72 N. Y. at p. 563.

[8] Salmon v. Stuyvesant, 16 Wend. 324; Genet v. Hunt, 113 N. Y. 158.

[9] Genet v. Hunt, 113 N. Y. at p. 170; Townshend v. Frommer, 125 id. at pp. 461, 462; 1 R. S. 737, § 128, now § 158, The Real Prop. Law.

[10] See next section.

[11] Russell v. Russell, 36 N. Y. 581; Kinnier v. Rogers, 42 id. 531, 535; Dana v. Murray, 122 id. 604, 613; Delaney v. McCormack, 88 id. 174, 181; Wright v. Trustees Meth. Epis. Church, 1 Hoff. Ch. 201.

[12] Garvey v. McDevitt, 72 N. Y. 556, 563.

[13] *Cf.* Farw. Pow. chap. 12.

Precatory or Implied Powers in Trust. The cases where property is given to any one with a wish or entreaty to dispose of it in favor of another, may fall under powers in trust.[1]

Advancements under a Power in Trust. This subject is treated of under a subsequent section of this act.[2]

[1] *Supra*, pp. 242, 243, 271 ; *cf.* Leggett v. Firth, 132 N. Y. 7, 11; Thomas v. Wolford, 49 Hun, 145; Wells v. Seeley, 47 id. 109, 112.

[2] § 295, The Real Prop. Law.

§ 118. **Special power in trust.**— A special power is in trust, where either,

1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or,

2. A 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.[1]

Formerly 1 Revised Statutes, 734, section 95:

§ 95. 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, entitled to the proceeds or any portion of the proceeds, or other benefit to result from the execution of the 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.[2]

Comment on Section 118, Supra. Having outlined the nature of all powers in trust under prior sections of this act, the reader is referred to what is there said for the commoner principles.[3] This section 118 does not alter the essentials of the common law relative to special powers in trust.[4] A power in trust being granted to one who had no estate in the lands affected by the power, was a power simply collateral at the common law,[5] but one in the nature of a trust.[6]

Special Powers in Trust. Powers of sale and distribution among the heirs of the testator, exclusive of one of the donees of the power, are special powers in trust under this section.[7]

Advancements under a Power in Trust. This subject is provided for in a subsequent section of this act.[8]

[1] *Cf.* § 115, *supra.*

[2] Repealed, chap. 547, Laws of 1896.

[3] §§ 77, 79, 117, The Real Prop. Law, pp. 269, 327, 329, *supra.*

[4] Dominick v. Sayre, 3 Sandf. 555.

[5] Root v. Stuyvesant, 18 Wend. at p. 284.

[6] 2 Sugd. Pow. 158.

[7] Smith v. Bowen, 35 N. Y. 83, 89; Cutting v. Cutting, 86 id. 522, 536.

[8] § 295, The Real Prop. Law.

§ 119. **Capacity to grant a power.**— A person is not capable of granting a power, who is not, at the same time, capable of transferring an interest in the property to which the power relates.

Formerly 1 Revised Statutes, 732, section 75:

§ 75. 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.[1]

Comment on this Section. The rule stated in this section of The Real Property Law applies to all departments of the law of principal and agent. The grantor of a power must have the necessary legal dominion over the property to be affected by the power, and also the legal right to delegate an authority in respect of such dominion.[2]

Alien cannot Grant a Power. As an alien cannot hold property as against the State, he would appear to be within the condemnation of this section, but whether before office found is a question of some refinement.[3]

[1] Repealed, chap. 547, Laws of 1896.

[2] Selden v. Vermilya, 3 N. Y. 525, 536; Boasberg v. Cronan, 30 N. Y. St. Repr. 483; 9 N. Y. Supp. 664.

[3] *Cf.* Co. Litt. 52a; 1 Chance, Pow. §§ 600, 601.

§ 120. **How power may be granted.**—A power may be granted either:

1. By a suitable clause, contained in an instrument sufficient to pass an estate in the real property, to which the power relates; or,

2. By a devise contained in a will.

Formerly 1 Revised Statutes, 735, section 106:

§ 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.[1]

This Section does not Apply to Reservation or Revocation of Powers. This section does not relate either to a reservation or a revocation of powers, both acts being provided for below.[2]

Old Law Relating to Creation of Powers. In the ancient law of England powers were known in connection with uses only, and were enforced solely in equity.[3] After the Statute of Uses, powers deriving their effect from that statute might be inserted in almost any instrument of conveyance good under that statute.[4] But there were some subtle exceptions in reference to certain powers created by instruments not operating by transmutation of possession, bargains and sales and covenants to stand seised.[5] These exceptions it is unnecessary now to mention at large.

Powers Created by Will. A power might also be created by will after the Statute of Wills.[6] The Statute of Wills being enacted after the Statute of Uses, there was at first some doubt in England whether a use created by will was affected by the Statute of Uses.[7] The eminent conveyancing counsel, Mr. Booth, was,[8] consequently, once of the opinion that powers under wills did not operate by way of use, and "that the execution of a power under a devise is not the limitation of an use; no not when the devise is to uses."[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] The Real Prop. Law, §§ 124, 125, 128.

[3] *Supra*, pp. 311, 312.

[4] Certainly in declarations of uses of fines and recoveries, and in releases. Farw. Pow. 3; Cruise, Dig. tit. 22, chap. 13, § 13; *cf.* 1 Sand. Uses, 163, *seq.*, as to powers over estates perfected by a common-law conveyance; *et vide infra*, for powers created by will.

[5] 1 Chance, Pow. 22–26; 1 Sugd. Pow. 158, *seq.*; Gilb. Uses, 46.

[6] 1 Sugd. Pow. 171 *seq.*; Crabb, § 1966; Farw. Pow. 6, *et vide infra*.

[7] 1 Sugd. Pow. 172.

[8] The great lawyer to whom Fearne dedicated his book. Probably after Bridgeman, Mr. Booth was the most learned of the conveyancing counsel of England.

[9] See 1 Harg. Collect. Jurid. 427, case in the Law of Uses.

This opinion, Sugden states, Mr. Booth subsequently retracted.[1] The fact is that all powers created by will were not common-law powers. Common-law powers were created by will, and so were powers deriving their effect from the Statute of Uses, for ultimately the Statute of Uses was held to operate on wills creating uses; *e. g.*, devise to A. to the use of B.[2] But where there was no seisin to serve the power, but the testator devised "that A., the executor, shall sell," this was a common-law authority or power,[3] and not a power deriving its effect from the Statute of Uses.[4]

The Revised Statutes. The Revised Statutes, therefore, instituted no innovation in authorizing a power to be created by will.

No Particular Language Necessary to Create a Power. It has been already stated that no particular language was necessary in order to create a power.[5]

What Instruments Power May be Created by. In view of the prior discussion concerning the validity of certain instruments creating powers, it was desirable to specify in the Revised Statutes in what instruments powers might be granted. Hence the original of this section,[6] which, however, is always to be read in connection with a cognate section.[7]

Comment on Section 120, Supra. Section 120 of The Real Property Law has apparently changed the Revised Statutes,[8] as it does not seem to require a power to be contained in an actual conveyance, but in an instrument sufficient to pass an estate in real property.[9] Yet the Commissioners of Statutory Revision, in their note on this section, state that the Revised Statutes are "unchanged in substance." Where there were a series of instruments *inter vivos*, entitled to be read together, and one of the instruments was a conveyance and the others not, it was held that a power might, under the Revised Statutes, be contained in any one of them,[10] and this is *a fortiori* true under the present section. But it has not otherwise been held that the power may be created by a separate instrument

[1] 1 Sugd. Pow. 239.

[2] 1 Sand. Uses, 195; 2 Foub. Eq. 24; 1 Jarm. Pow. Dev. 214, note 2; 217, note 3; Ram, Wills, 254.

[3] 1 Sugd. Pow. 240.

[4] It is so stated, with the authorities, in my Essay on Charitable Uses, at p. 142, and *cf.*, under § 77, *supra*, The Real Prop. Law.

[5] *Supra*, p. 319.

[6] 1 R. S. 735, § 106.

[7] 2 R. S. 134, § 6; Id. 135, § 7, as amended by chap. 922, Laws of 1860, now in § 207, The Real Prop. Law.

[8] 1 R. S. 735, § 106.

[9] *Cf.* Fellows v. Heermans, 4 Lans. 230.

[10] Selden v. Vermilya, 2 Sandf. 568, 580.

Power Created by Will. When we now come to the consideration of powers created by a will, *i. e.*, contained in a devise,[1] several questions suggest themselves: (1) Whether, if the particular devise in which the power is contained is void, the power may stand? (2) Whether, if the devise is to the heirs of the testator, as tenants in common, with a naked power of sale to executors, the power may be said to be good? At common law, where a devise is to an heir he is in by descent and not by the will.[2] As this continues the law since the Revised Statutes, the power in question might be claimed to be bad, as the devise is not in fact a devise, for there is no devise where there is no estate except by descent. In regard to the first question stated above, a devise may certainly be bad as a trust, and yet good as a power; but this is so by statute.[3] A like answer may, in substance, be made to the second question.[4] The language of this section evidently contemplates that a power may be "devised" by itself without an estate, and that it need not be contained in a devise of an estate in lands.[5] It is not infrequent to make a will in this State simply nominating executors and leaving the estate to descend according to the existing canon of descents. It can hardly be claimed that a power of sale in such a will would not be a devise of a power, or that it was not granted by a devise contained in a will.

[1] Sometimes called "a devise of a power."

[2] Cruise, Dig. tit. 38, chap. 8, § 2.

[3] *Supra*, § 79, The Real Prop. Law; Tucker v. Tucker, 5 N. Y. 408; *et supra*, pp. 251, 270.

[4] *Supra*, § 77, The Real Prop. Law; *et supra*, p. 266.

[5] *Cf.* Cutting v. Cutting, 86 N. Y. at p. 530.

§ 121. **Capacity to take and execute a power.**— A power may be vested in any person capable in law of holding, but cannot be exercised by a person not capable of transferring real property.

Formerly 1 Revised Statutes, 735, sections 109, 111:

§ 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 single case mentioned in the next section.[1]

§ 111. No power vested in a married woman, during her infancy, can be exercised by her, until she attains full age.[2]

The Common Law. At common law a power might be vested in any person who might hold and dispose of an estate.[3] A married woman, though deprived of her dominion by marriage, might execute a power over an estate, whether a power appendant, in gross, or simply collateral;[4] an infant, not an alien, might execute a power simply collateral, but not a power appendant.[5] There were some other questions made at common law about the right of persons *non compotes mentis* or *civiliter mortui* to execute powers, but which do not concern this section even remotely.[6]

Infants. The questions which arose at common law concerning an infant's capacity to execute a power, are not, by this section, so explicitly put at rest as they might be, for many transfers by infants were not absolutely void at the common law; they were simply voidable. If an infant levied a fine and executed a deed to declare uses, the declaration was good until reversed, and so his deeds, and in many cases the infant's execution of powers.[7] Can an infant then be said to be a person not capable of transferring real property?[8] In some cases an infant might transfer real property at common law. In New York an infant female could not irrevocably settle her property by way of marriage settlement,[9] though this principle was sometimes doubted.[10] Such

[1] Repealed, chap. 547, Laws of 1896. The next section here referred to was one relating to the execution of a power by a *feme covert*, then under the common-law disability in regard to her own estate.

[2] Repealed, chap. 547, Laws of 1896.

[3] 1 Sugd. Pow. 180; Farw. Pow. 116.

[4] 1 Chance, Pow. chap. 7; 1 Sugd. Pow. 180, *seq.*

[5] 1 Sugd. Pow. 211; 1 Chance, Pow. 213–225; Farw. Pow. 125.

[6] *Cf.* 1 Chance, Pow. 225, 226.

[7] McPherson, Infants (Am. ed. 1843), 475.

[8] *Vide supra*, § 3, The Real Prop. Law, pp. 61, 62.

[9] Temple v. Hawley, 1 Sandf. Ch. 153.

[10] Atherly, Marriage Settlements, 28, 41.

a settlement was not, however, void,[1] and this was so as to male infants. Yet he was sometimes bound by the female infant's ante-nuptial settlement. An infant might, by custom of London, devise to her husband,[2] and it is well known that the customs of London were very influential in settling the common law of the British colonies. It is almost impossible to affirm, therefore, that an infant may not, under certain circumstances, transfer real property by the common law of New York.

[1] Temple v. Hawley, 1 Sandf. Ch. 153.

[2] Hargrave's note 4, Co. Litt. 111b; 5 Com. Dig. 14.

§ 122. **Capacity of married woman to take power.**— A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee.

Formerly 1 Revised Statutes, 732, section 80, and 1 Revised Statutes, 735, section 110, and 1 Revised Statutes, 736, section 117:

§ 80. 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.[1]

§ 110. A married woman may execute a power during her marriage, by grant or devise, as may be authorized by the power, without the concurrence of her husband, unless by the terms of the power its execution by her, during marriage, is expressly or impliedly prohibited.[2]

§ 117. If a married woman execute a power by grant, the concurrence of her husband, as a party, shall not be requisite, but the grant shall not be a valid execution of the power, unless it be acknowledged by her on a private examination, in the manner prescribed in the third Chapter of this Act, in relation to conveyances by married women.[3]

The Common Law. While at the common law a married woman was *sub postestate viri*, and could not dispose of her own estate except by a fine or a recovery (or in the English colonies by a deed, separately acknowledged, after the custom of London),[4] yet, as an attorney for another, or by means of a power, she could convey an estate in the same manner as her principal, because the conveyance was considered the deed of the principal, and not of the attorney.[5] But by means of settlements in trust and conveyances to her separate use, the ancient law had been much modified before the Revised Statutes of 1830.[6]

The Revised Statutes. At the date of their taking effect,[7] the Revised Statutes made little change in the then existing legal *status* of a married woman, or in her ability to execute powers.[8] Long before 1830, and the subsequent Married Women's Enabling Acts, she had come, either at law or in equity, to have dominion over property limited in trust or to her sole and separate use. She might also execute all powers, appendant or collateral, as a *feme*

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] Repealed, chap. 547, Laws of 1896.
[4] *Supra*, p. 337, *et vide infra*, under art. VIII, § 251, The Real Prop. Law.
[5] 1 Sugd. Pow. 181.
[6] Macqueen, Husband & Wife, chap. 3, pt. 2.
[7] Jan. 1, 1830.
[8] Wright v. Tallmadge, 15 N.Y. 307, 313; *cf.* Wadhams v. Amer. Home Miss. So., 12 id. 415, 423; Leavitt v. Pell, 25 id. 474, 478.

sole; at least, provided a settlement contained an express dispensation of the disabilities then attending her coverture.[1]

Object of 1 Revised Statutes, 732, Section 80. It is said that the object of 1 Revised Statutes, 732, section 80,[2] was to prevent the husband's common-law rights by curtesy attaching on an absolute conveyance in fee to the wife.[3]

1 Revised Statutes, 735, Section 110, and 1 Revised Statutes, 736, Section 117. 1 Revised Statutes, 735, section 110,[4] and 1 Revised Statutes, 736, section 117,[5] generally stated the common-law rules. Such legislation was not an innovation on the common law,[6] excepting, perhaps, as to the mode in which a *feme covert* should acknowledge a deed in execution of her power, and this acknowledgment was to be in precise conformity to existing law, which in turn was founded on the old law of the province of New York relating to conveyances, and the custom of old London. By the terms of a settlement the execution of a wife's power might always be made to depend on the husband's assent, as stated in 1 Revised Statutes, 735, section 110.

Under the Revised Statutes. Under the Revised Statutes, at least prior to 1848,[7] it was held that a married woman might not execute a power over her personal estate by will.[8] If such a rule was intentional it was a departure of the revisers from the common law, and in a wrong direction.[9] The legislative amendment of 1867, in any event, finally provided that every female might bequeath her personal estate,[10] thus explicitly removing any disability of a *feme covert* to execute a power of appointment or disposition by will of her personal estate.

Married Women's Acts. It was not until after the Constitution of 1846 that a series of acts, beginning with the year 1848, placed a married woman's separate estate on the same basis as the estate of *feme sole.*[11] These acts made a married woman's power of disposition of her estate as absolute as that of a man's over his

[1] 1 Chance, Pow. 181; 1 Sugd. Pow. 181, 191; Roper, Husb. & W. chaps. 19, 21; Macqueen, Husb. & W. chap. 3, pt. 2; Richardson v. Pulver, 63 Barb. 67.

[2] *Supra*, p. 338.

[3] Wright v. Tallmadge, 15 N. Y. 307, 313.

[4] *Supra*, p. 338.

[5] 1 Sugd. Pow. 191.

[6] *Supra*, p. 338, *et infra*, § 251, The Real Prop. Law.

[7] Chap. 200, Laws of 1848; chap. 375, Laws of 1849; 2 R. S. 60, § 21.

[8] 2 R. S. 60, § 21; Wadhams v. The Amer. Home Miss. So., 12 N. Y. 415.

[9] Strong v. Wilkin, 1 Barb. Ch. 9; Moehring v. Mitchell, Id. 264.

[10] Chap. 782, Laws of 1867.

[11] Chap. 200, Laws of 1848; chap. 576, Laws of 1853; chap. 375, Laws of 1849; chap. 90, Laws of 1860; repealed by chap. 172, Laws of 1862;

estate; indeed, they left her in a better position, for his curtesy initiate can now be defeated by her conveyance or will without her husband's assent,[1] whereas he cannot thus defeat her dower inchoate. Under the present law the separate acknowledgment of a married woman in any case is unnecessary.[2] This was in accordance with pre-existing law.[3]

Effect of Section 122, Supra. In view of the status of a *feme covert* in the present law,[4] it is extremely improbable that this section of The Real Property Law now serves any end, except that of a declaration of the law otherwise stated.

chap. 249, Laws of 1879, as amd. by chap. 300, Laws of 1880; chap. 472, Laws of 1880; chap. 381, Laws of 1884; chap. 537, Laws of 1887; chap. 594, Laws of 1892; and see chap. 616, Laws of 1892, as to release of dower by divorced woman. See now "The Domestic Relations Law," chap. 48, General Laws.

[1] Hatfield v. Sneden, 54 N. Y. 280, 287.

[2] § 251, The Real Prop. Law.

[3] Chap. 249, Laws of 1879; chap. 300, Laws of 1880; Richardson v. Pulver, 63 Barb. 67.

[4] The Domestic Relations Law, constituting chap. 48 of the General Laws; chap. 272, Laws of 1896.

§ 123. **Capacity to take a special and beneficial power.**—A special and beneficial power may be granted,

1. To a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her, in the property to which the power relates; or,

2. To a tenant for life, of the real property embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life; and such a power is valid to authorize a lease for that period but is void as to the excess.

Formerly 1 Revised Statutes, 733, section 87:

§ 87 A special and beneficial power may be granted,

1. To a married woman, 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:

2. To a tenant for life of the lands embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life.[1]

Comment on Section 123. In regard to the first subdivision of this section it should be remembered that the husband's common-law power to make leases of the wife's estate, and to take the rents and profits,[2] has now been entirely taken away by the Married Women's Acts.[3] Prior to those acts, and when the Revised Statutes were enacted, it was common practice for a settlor of an estate on a female to empower her, when a married woman, to make leases. Even where the property was limited to her separate use a *feme covert* could not at common law dispose of it during the marriage otherwise than by fine or recovery; nor could she lease it unless a power to do so was given her by the settlement.[4] When she was thus empowered to make leases the husband's concurrence to her appointment was unnecessary.[5] When such a power was contained in a settlement, Sugden's opinion generally was that the husband's consent was not necessary in any case to the wife's appointment, assuming the power to be well limited to her.[6]

Section 123, Supra. This section, it will be observed, confines the grant of a special beneficial power to a married woman to such

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 Roper, Husb. & W. 55, 90; 2 Kent, Comm. 130, 133.

[3] *Supra*, p. 339, n. 11.

[4] 2 Roper, Husb. & W. 182; Cruise, Dig. tit. 32, chap. 5, § 73; and id. tit. 32, §§ 34, 35; *cf.* Macqueen, Husb. & W. 33, 295.

[5] 1 Sugd. Pow. 191.

[6] 1 Sugd. Pow. 191.

powers as were formerly denominated appendant. It does not in terms authorize or prohibit the giving to her of a special and beneficial power to dispose of an estate or interest not limited to her.[1] The first subdivision of this section was originally drawn at a time when a married woman's power of disposition over her own estate was limited. The express retention of this section in this act was, therefore, not indispensable.[2] The first subdivision of this section has no relation to powers in trust,[3] or to general beneficial powers.[4] It is very common to give a married woman a special or general power in trust, or a general beneficial power, such as a power to appoint estates in fee to her children or husband, or generally to her right heirs at her own will; and such powers need not be appendant or appurtenant, or, in other words, need not depend on the estate of the grantee of the power.[5]

Tenant for Life's Leasing Power. In regard to the second subdivision of this section, we should recall that, without statutory authority or the grant of a power, tenants for life had no right to make leases beyond their own lives. They had no authority to bind estates in remainder or reversion.[6] A statute in the time of King Henry VIII first gave tenants in tail, and a husband, seised in right of his wife (provided the latter's wife joined), power to make leases for definite terms of twenty-one years to commence in possession.[7] Where a general power was granted to make leases, it was always construed to authorize leases in possession and not in reversion.[8] But a settlor of an estate might, independently of statute, grant a power to make leases, as well in possession as in reversion, and a lease to bind the reversion was then good.[9] In such cases the rents followed the reversion or remainder.[10]

Leases by Trustees of the Statutory Trusts. A most interesting question also arises since the Revised Statutes, concerning leases by trustees of the express or statutory trusts. They are expressly declared to have the whole estate or a fee simple,[11] yet in several

[1] Jackson v. Edwards, 7 Paige, 386, 400; affd., 22 Wend. 498; Cutting v. Cutting, 86 N. Y. 522, 533.

[2] See under preceding section.

[3] The Real Prop. Law, § 117.

[4] Jackson v. Edwards, 22 Wend. 498, 508.

[5] Jackson v. Edwards, 22 Wend. 498, 508; Kane v. Astor's Exrs., 9 N. Y. 113; Cutting v. Cutting, 86 id. 522, 532; and see Genet v. Hunt, 113 id. 170, as to power there mentioned in first settlement conceded valid.

[6] Smith, Real & Pers. Prop. 528; Taylor, Landl. & Ten. § 113.

[7] 32 Henry VIII, chap. 28.

[8] Cruise, Dig. tit. 32, chap. 15, § 24.

[9] Cruise, Dig. tit. 32, chap. 15, § 41; 2 Sugd. Pow. 338; Farw. Pow. (1st ed.) 481.

[10] 2 Chance, Pow. 220.

[11] *Vide supra*, pp. 180, 274, 289.

cases they are treated as tenants *pur autre vie*. If a trustee of an express trust, mentioned in the 76th section of this act, has then an estate *pur autre vie*,[1] leases by such tenant are, by this section, confined to terms of twenty-one years, to commence in possession. But it is obvious that this section had originally no relation to estates of trustees, and that it referred wholly to limitations of estates for life of grantee, for it confines the leases to twenty-one years to commence in possession during the life of tenant for life. This cannot refer to an estate *pur autre vie*.

Leases by Life Tenants in Excess of One and Twenty Years. Before The Real Property Law it was also intimated that leases by life tenant beyond twenty-one years were, under the Revised Statutes, void *in toto*, and not as to the excess only.[2] The Commissioners of Statutory Revision have remodeled the section so as to make the term in excess of twenty-one years only void.[3]

Leasing Power not Separately Assignable. It is to be observed that the power of a life tenant to make leases is not assignable as a separate interest.[4] But a mortgage by life tenant does not extinguish a leasing power.[5]

Leases of Agricultural Lands. A power to make leases for twenty-one years under this section is now overridden by the Constitution in case of rental leases of agricultural lands.[6]

[1] *Supra*, pp. 180, 274, 289; *cf.* Matter of McCaffrey, 50 Hun, 371, 374; Gomez v. Gomez, 147 N. Y. 195, 200; Matter of Hoysradt, 20 Misc. Rep. 265, 270.

[2] Root v. Stuyvesant, 18 Wend. 257; *cf.* Matter of McCaffrey, 50 Hun, 371.

[3] See the note to this section by Commissioners of Statutory Revision, Appendix I, *infra*.

[4] *Infra*, § 135, The Real Prop. Law.

[5] *Infra*, § 136, The Real Prop. Law.

[6] Art. I, Const. 1846; art. I, Const. 1894–5, § 13. *Vide supra*, pp. 45, 87.

§ 124. **Reservation of a power.**—The grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and a power thus reserved, shall be subject to the provisions of this article, in the same manner as if granted to another.

Formerly 1 Revised Statutes, 735, section 105:

§ 105. 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 this Article, in the same manner as if granted to another.[1]

Old Law Concerning Powers of Revocation. At common law a power of revocation could not be reserved or granted, for it was deemed repugnant to the grant.[2] But after the Statute of Uses, powers of revocation might be reserved in almost any conveyance,[3] except bargains and sales and covenants to stand seised, which were not effected by transmutation of possession.[4] When the statute of 27 Elizabeth, chapter 4, made instruments containing powers of revocation reserved to settlors fraudulent as against subsequent purchasers of the settlor, they fell into disuse in voluntary settlements.[5] But they remained in common use in connection with powers of appointment in settlements not voluntary and in wills.[6] The likeness between powers of revocation and conditions in deed is sometimes noticed.[7] The power most usually reserved to a settlor was formerly a power of revocation, and this power may be reserved in settlements since the Revised Statutes.[8] Thus a conveyance by intending husband to trustees for the benefit of a future wife, with power to settlor to revoke in case the contemplated marriage shall not take place, is a valid reservation.[9] It does not avoid the whole settlement as to creditors of the husband,[10] for marriage is the highest consideration known to the law, even as against creditors, and under the statutes against

[1] Repealed, chap. 547, Laws of 1896.

[2] Co. Litt. 237a.

[3] *Supra*, p. 312, under § 110, The Real Prop. Law.

[4] 1 Sugd. Pow. 160, 177.

[5] *Supra*, p. 312, under § 110, The Real Prop. Law.

[6] *Supra*, pp. 312, 314.

[7] 1 Chance, Pow. 106.

[8] Belmont v. O'Brien, 12 N. Y. 394, 404; Van Cott v. Prentice, 104 id. 45; Von Hesse v. MacKaye, 136 id. 114; Locke v. F. L. & T. Co., 140 id. 135, 142; Campbell v. Low, 9 Barb. 585; *cf.* § 231, The Real Prop. Law.

[9] This is a "beneficial power," but as it is one mentioned in this article of this law it is not void under § 116, *supra;* Marvin v. Smith, 56 Barb. at p. 605.

[10] *Cf.* § 125, The Real Prop. Law.

fraudulent conveyances. Consequently the power is not absolute in a marriage settlement.

Powers of Appointment. Powers of appointment may certainly be granted under this article, as under the Revised Statutes,[1] and, therefore, may, according to this section, be reserved to grantors in conveyances, unless such powers are purely beneficial and condemned by section 116 of this act.[2]

Usual Powers in Settlements of Estates. The powers which formerly overrode most settlements of estates were leasing powers, powers of sale, powers to charge generally, powers to jointure, and powers to make advancements to children. It is apprehended that most of these powers may be lawfully granted under this article, and, therefore, may be lawfully reserved to a grantor.[3] This would be very clear were it not that all powers are now declared either beneficial or in trust;[4] and beneficial powers not authorized by this article are declared void.[5] But in the case of Cutting v. Cutting,[6] it is to be observed that the court declined to place the very narrow construction there contended for, on the word "enumerated" in the section declaring certain beneficial powers void.[7]

Leasing Power in Trust. A leasing power, if in trust, is now valid as an express statutory trust,[8] or as a power in trust,[9] in some cases. So a special beneficial power to make leases may be given to a life tenant.[10] Whether a settlor of an estate may now reserve to himself a power to make leases, and receive the rents for his own benefit, where he does not reserve a life estate, is another question. Such a power is certainly a special beneficial power under the 116th section.[11] The reservation of such a power would, however, be tantamount to the reservation of a life estate, or the grant of a remainder, both valid limitations. The distinction between a reservation of a power and the reservation of an estate is not always clear at the present day.[12] A leasing power at common law was nothing but a declaration of a future use,[13] and the

[1] *Supra*, p. 314; Read v. Williams, 125 N. Y. at p. 569.

[2] *Supra*, § 116, The Real Prop. Law; 4 Kent, Comm. 337.

[3] 4 Kent, Comm. 336, 337.

[4] *Supra*, pp. 322, 325.

[5] *Supra*, § 116, The Real Prop. Law.

[6] 86 N. Y. at p. 535.

[7] 1 R. S. 733, § 92.

[8] § 76, The Real Prop. Law.

[9] § 77, The Real Prop. Law.

[10] § 123, The Real Prop. Law.

[11] *Cf.* Root v. Stuyvesant, 18 Wend. 257. In the case of Fitzgerald v. Fauconberge, Fitz. 207; 3 Bro. P. C. 543, a general leasing power was reserved to settlor, and treated as good at common law. But see § 153, The Real Prop. Law.

[12] Towler v. Towler, 142 N. Y. 371.

[13] 2 Chance, Pow. 219.

reservation of a leasing power with the right to take the rents would now be a declaration of a use to the grantor, which, if not good as a power, would be good as the reservation of an estate, if less than a fee.[1]

Reservation of a Power to Mortgage. A reservation of a power to mortgage or convey may be valid. It is but a power of revocation,[2] which, if absolute, is void as to creditors, purchasers and debtors only, under subsequent sections of this act.[3]

Power to Charge Generally. A power to charge generally,[4] and a power to jointure,[5] may be granted to another, and, therefore, may be reserved under this section, and as between grantor and grantee of the power, such a power to charge generally is valid, and *sub modo* it is valid as to the limitation in remainder.[6] A power of sale to be exercised only with the consent of the grantor, and to be manifested by the grantor's joining in the deed, constitutes a valid reservation,[7] for such a power may be granted to another.[8]

[1] Towler v. Towler, 142 N. Y. 371, 376. How far a power and a fee may coexist in the same person, considered: 1 Chance, Pow. 16, 17; Farw. Pow. (1st ed.) 27; 4 Kent, Comm. 348.

[2] Campbell v. Low, 9 Barb. 585, 592, 593; Marvin v. Smith, 56 id. 600.

[3] *Vide infra*, §§ 125, 129, 130, 131, 132, 133 and 139, The Real Prop. Law

[4] Jackson v. Edwards, 22 Wend. 498, 508.

[5] Towler v. Towler, 142 N. Y. 371.

[6] *Vide infra*, §§ 125, 129, 130, 131, 132, 133, 139, The Real Prop. Law.

[7] Kissam v. Dierkes, 49 N. Y. 602; § 153, The Real Prop. Law, and cases there cited.

[8] Stokes v. Hyde, 14 App. Div. 530; Phillips v. Davies, 92 N. Y. 199.

§ 125. **Effect of power to revoke.**— Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

Formerly 1 Revised Statutes, 733, section 86:

§ 86. Where the grantor in any conveyance shall reserve to himself, for his own benefit, an absolute power of revocation, such grantor shall be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.[1]

Reservation of a Power of Revocation. A reservation of a power of revocation long before the Revised Statutes endangered the instrument containing it, after the statute of 27 Elizabeth, chapter 4, at least in a voluntary settlement and as to subsequent purchasers.[2] While the statute (13 Eliz. chap. 5) did not expressly avoid such instruments as to creditors, a power of revocation to a settlor was deemed a badge of fraud, as he thereby remained the owner of the property.[3] These statutes were, in substance, re-enacted in New York,[4] and the Revised Statutes made them only more explicit as to powers of revocation.[5]

Effect of Section 125. The present section (125) of this act likewise avoids instruments containing absolute powers of revocation, but only as to creditors and subsequent purchasers. Its construction depends on the principles long animating the adjudications on the statutes directed against fraudulent conveyances. An instrument reserving or creating an absolute power of revocation to settlor may be valid *inter partes*[6] and void as to creditors and purchasers prejudiced.[7]

Reservation of Power of Revocation in Marriage Settlements. But a reservation of a power of revocation in a settlement made

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 Chance, Pow. 150; Sugd. Vend. 479; Riggs v. Murray, 2 Johns. Ch. 565, 579, 580; *cf.* § 231, *infra*, The Real Prop. Law.

[3] Peacock v. Monk, 1 Ves. Sr. 132; 2 Chance, Pow. 162 *seq.*

[4] 2 J. & V. 88; 1 R. L. 75, and *vide infra*, under §§ 226, 231, The Real Prop. Law.

[5] 1 R. S. 733, § 86; 2 R. S. 114, § 3.

[6] Conkling v. Davies, 14 Abb. N. C. 499; Belmont v. O'Brien, 12 N. Y. 394, 404; Van Cott v. Prentice, 104 id. 45; Von Hesse v. MacKaye, 136 id. 114; Locke v. F. L. & T. Co., 140 id. 135, 142; Gilman v. McArdle, 99 id. 451, 457; Lore v. Dierkes, 16 Abb. N. C. 47, 54; The Real Prop. Law, §§ 226, 227, 228.

[7] Id. *supra;* Von Hesse v. MacKaye, 136 N. Y. 114; The Real Prop. Law, § 231.

in contemplation of marriage, in the event that the marriage do not take place, is not an absolute power of revocation within the meaning of this section.[1] Where the reservation of a power absolute is contained in a covenant to stand seised, or where the fee results to the donor of the power for want of limitation, a question may arise how far a fee and a power in the grantor may co-exist.[2]

Power of Revocation Appropriate in some Settlements. Not only does the reservation of a power of revocation not invalidate the instrument in which it is contained in all cases, but such a power is regarded oftentimes as most appropriate, and its omission will be remedied at the suit of the settlor.[3]

Creditors. As to the mode in which a power of revocation may be enforced by creditors, see section 139;[4] and as to its effect against subsequent purchasers, see section 231.[5]

[1] *Cf.* Belmont v. O'Brien, 12 N. Y. 394, 404.

[2] 1 Chance, Pow. 16, 17; Farw. Pow. (1st ed.) 27.

[3] Conkling v. Davies, 14 Abb. N. C. 499; Barnard v. Gantz, 140 N. Y. 249.

[4] *Infra*, The Real Prop. Law.

[5] *Infra*, The Real Prop. Law.

§ 126. **Power to sell in a mortgage.**— Where a power to sell real property is given to a mortgagee, or to the grantee in any other conveyance intended to secure the payment of money, the power is deemed a part of the security, and vests in, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid.

Formerly 1 Revised Statutes, 737, section 133:

§ 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.[1]

Comment on Section 126. At common law, if a power of sale was limited to a mortgagee, his heirs and assigns, the transferee of the mortgage might exercise the power.[2] But otherwise it was doubtful.[3] The Revised Statutes dispensed with the necessity of a formal limitation to the assignees or heirs of the mortgagee. The assignment of the security now always carries with it the power of sale, contrary to the maxim *delegatus non potest delegare*,[4] and without the necessity of any limitation of the power of sale to the assigns or heirs of the original mortgagee. It is a power coupled with an interest.[5]

Powers Coupled with Interest. It is a general rule that 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. Chancellor Kent was of the opinion that even before the Revised Statutes, a power of sale in a mortgage was a power with an interest.[6] The Revised Statutes put an end to all doubt upon the subject.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 Chance, Pow. 262; Shaw v. Summers, 3 Moo. 196; Bergen v. Bennett, 1 Caines Cas. 1; Wilson v. Troup, 2 Cow. 195, 236.

[3] An assignment might carry the power of sale in equity. *Cf.* 1 Jones, Mort. § 826.

[4] Waterman v. Webster, 108 N. Y. 157, 164.

[5] Bergen v. Bennett, 1 Caines Cas. 1, 15; Houghtaling v. Marvin, 7 Barb. 412.

[6] Bergen v. Bennett, 1 Cai. Cas. at p. 15.

[7] 1 R. S. 737, § 133, *supra*.

§ 127. **When power is a lien.**—A power is a lien or charge on the real property which it embraces, as against creditors, purchasers and encumbrancers in good faith and without notice, of or from a person having an estate in the property, only from the time the instrument containing the power is duly recorded. As against all other persons, the power is a lien from the time the instrument in which it is contained takes effect.

Formerly 1 Revised Statutes, 735, section 107:

§ 107. Every power shall be a lien or charge upon the lands which it embraces, as against creditors and 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 the 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.[1]

Recording Acts. This section is a part of the systematic legislation relating to the recording of certain instruments in public record offices.[2] In principle it is cumulative, as every deed must be recorded to be good as against persons without notice,[3] and every will probated, and a power can be created in these instruments only.[4] What applies to the entire instrument must apply to a part of it. When an instrument containing a power is recorded the record operates only according to the legal effect of the limitation. It cannot revive an extinguished power.[5]

Effect of Recording on Extinguished Power. This section has no application to a case where a power is extinguished even by consent of the parties in interest. In Prentice v. Jansen a will directed certain real estate to be converted into money and the proceeds distributed. The parties beneficially interested in the execution of the power elected to take the land, which extinguished the power. It was held in substance that this section had no application to such a case, as the mere act of recording the instrument in which a power was granted could not revive an extinguished power.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Infra*, art. VIII, The Real Prop. Law.

[3] *Infra*, § 241, The Real Prop. Law.

[4] *Supra*, § 120, The Real Prop. Law.

[5] Prentice v. Jansen, 79 N. Y. 478, 486.

[6] Prentice v. Jansen, 79 N. Y. 478.

§ 128. **When power is irrevocable.**—A power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power.

Formerly 1 Revised Statutes, 735, section 108:

§ 108. Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it, is granted or reserved in the instrument creating the power.[1]

Comment on Section 128. This section relates to the construction of original limitations of powers. It establishes a uniform rule. In so far as deeds creating powers were concerned, before the Revised Statutes, some grants of powers were in their nature revocable, others not.[5] Chancellor Kent states that the Revised Statutes[3] gave due stability to the rules of construction by declaring grants of powers irrevocable, unless an authority to revoke them be expressly granted or reserved.[4]

Powers of Attorney. But this rule has no relation to common-law powers of attorney,[5] which remain in their nature revocable, unless coupled with an interest.[5]

Powers in the Nature of Uses. Powers in the nature of uses, operating under this article, if created by deed, are no longer revocable, unless an authority to revoke them be contained in the deed.[7] It is otherwise as to powers created by wills which are revocable, for it is the nature of a will to be ambulatory until the death of the testator or until revoked by a subsequent will.[8]

This Section does not Apply, when. The rule stated in this section does not apply in the construction of deeds in execution of a power.[9] Prior to the Revised Statutes, a deed in execution of a power of revocation and new appointment, must contain a similar power of revocation, or it was executed once and for all and was irrevocable,[10] notwithstanding a power to revoke might ordinarily be executed *toties quoties*, if it was so reserved in the

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 Chance, Pow. 175, 473.

[3] 1 R. S. 735, § 108, now this section.

[4] 4 Kent, Comm. 337.

[5] § 110, The Real Prop. Law; Hutchins v. Hebbard, 34 N. Y. 24; Heermans v. Burt, 78 id. at p. 267.

[6] 1 Chance, Pow. 105; Hutchins v. Hebbard, 34 N. Y. 24; Morgan v. Raynor, 5 Alb. Law Jour. 109.

[7] *Supra*, § 128, The Real Prop. Law; Marvin v. Smith, 46 N. Y. 571, 577.

[8] 4 Kent, Comm. 336; *cf.* Conover v. Hoffman, 1 Abb. Ct. App. Dec. 429.

[9] The section, in terms, refers to instruments creating powers, not to those executing them.

[10] Farw. Pow. 271; 1 Sugd. Pow. 462.

deed of execution.[1] This must still be the rule. So, where a power is to be executed by will, and is so executed, it still may be revoked by a subsequent will or codicil, without any reservation, and as before the Revised Statutes.[2]

Covenant not to Execute Power of Revocation. A present power of revocation might by the common law be released,[3] and no doubt in equity a covenant not to exercise such a power may in certain cases be still good. Certainly before the Revised Statutes "covenants not to exercise powers in particular events or without the consent of others were not infrequent, and probably such a covenant operated, at least in some cases, as a legal defeasance or restraint of the power."[4]

[1] Farw. Pow. 269; 1 Sugd. Pow. 462.

[2] Austin v. Oakes, 117 N. Y. 577, 593, 594; *vide infra*, § 147, The Real Prop. Law.

[3] 2 Chance, Pow. 591.

[4] 2 Chance, Pow. 591.

§ 129. **When estate for life or years is changed into a fee.**—Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

Formerly 1 Revised Statutes, 732, section 81:

§ 81. Where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for a 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.[1]

Comment on Section 129. The Commissioners of Statutory Revision disclaim any intention to change the rule established by the Revised Statutes,[2] although they have introduced the word "encumbrancers." Sections 131, 132 and 133 of this article are *in pari materia* and are to be read in connection with this section.

Former Law of Powers of Disposition. Chancellor Kent laid it down as an incontrovertible proposition at the common law, that 'where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases. Tomlinson v. Dighton, 1 Salk. 239; 1 P. Wms. 149, etc."[3] A distinction was, however, made between a devise and a deed in this respect. In a conveyance such a limitation would merely confer a power on the party and not give him an estate in fee.[4] The distinction was slight between a gift for life with a power of disposition added and a gift to a person indefinitely, with a superadded power

[1] Repealed, chap. 547, Laws of 1896.

[2] Note to this section of The Real Prop. Law.

[3] Jackson ex dem. Livingston v. Robins, 16 Johns. 537, 588; Helmer v. Shoemaker, 22 Wend. 137; Germond v. Jones, 2 Hill, 569; 4 Kent, Comm. 535, 536.

[4] 1 Sugd. Pow. 121.

to dispose by deed or will. A gift to A., and to such person as he shall appoint, is absolute property in A. without an appointment; but if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle him to anything.[1] It is to be noticed that Sugden attempts to reconcile the cases on this point.[2]

The Revised Statutes. The Revised Statutes also recognized that a plenary power of disposition of an estate in fee was the highest attribute of absolute dominion, and ought to pass a fee, whether the donee of the power had,[3] or had not,[4] an estate in the lands subjected to the power. They made no distinction between a case where such a power was given by deed and one where it was given by devise. Sections 129 to 135 of this act now embody the same principles formulated in the Revised Statutes.

Absolute Power of Disposition. The gift of a power to be exercised on certain contingencies only, is not an absolute power of disposition within the meaning of this section, so as to carry a fee.[5] The power, to be "absolute," must be unqualified.[6]

When Section 129, Supra, does not Apply to Trust Estates. This section[7] applies to a limitation whereby a grantee has a legal estate in the lands, but not to a mere power to dispose, by will, of a trust estate vested in trustees.[8] Cutting v. Cutting is the leading case on this point, and will be next considered, as it now furnishes a rule of property in this State.

Cutting v. Cutting. In the case of Cutting v. Cutting, there was an effort to subject to the claims of creditors a fund held in trust, where the beneficiary had also a general beneficial power of appointment by will and had exercised it.[9] At common law the execution of a general power of appointment subjected the property to the claims of the creditors of the donee of the power.[10] But this rule was abrogated by the Revised Statutes, and it was held that the exercise of the power of appointment by will over

[1] Sir W. Grant, Bradly v. Westcott, 13 Ves. Jr. at p. 453.

[2] 1 Sugd. Pow. 124.

[3] § 129, *supra*.

[4] § 130, The Real Prop. Law; 1 R. S. 732, § 82; Cutting v. Cutting, 86 N. Y. at p. 538.

[5] Jackson v. Edwards, 22 Wend. 498, 509; affg. Jackson v. Edwards, 7 Paige, 386, and see below under this section 129, for other cases.

[6] *Vide infra*, p. 355.

[7] § 129, *supra*.

[8] Cutting v. Cutting, 86 N. Y. at p. 532; Hume v. Randall, 141 id. at p. 505.

[9] 86 N. Y. 522.

[10] See Johnson v. Cushing, 4 Sharsw. & Budd's Lead. Cas. Real Prop. 5; and Id. note p. 26; 2 Sugd. Pow. 128.

the trust estate did not subject the *corpus* of the trust estate to the claims of the creditors of the grantee of the power, and that the power was well executed.[1]

Effect of Absolute Power of Disposition. Where an absolute power of disposition, not in trust,[2] is annexed to a legal estate for life, or years, the power now passes a fee absolute as to creditors and purchasers (and encumbrancers),[3] whether the power is to be executed by deed or will, and whether it is, or it is not, exercised.[4] This rule is subject, however, to the proviso that if the power is not executed, or the rights of creditors and purchasers do not prevent, estates limited after such life estate, or estate for years, shall vest according to the original limitation.[5] In order to change the estate, dominated by a power of disposition, into a fee absolute as to creditors, purchasers and encumbrancers of the grantee of the power, the power of disposition must be absolute, not qualified.[6]

If Powers not Executed, Remainders how Affected. In case such an absolute power of disposition is not executed,[7] and not involuntarily subjected to the claims of creditors of the grantee of the powers,[8] original limitations, by way of remainder, take effect after the grantee's estate expires by effluxion of time.[9]

Life Tenant's Power to Dispose of, or Spend, Corpus. It is reasonably well settled in this State that a limitation over, after a devise or bequest in fee, where the primary taker has the absolute power of disposition is void.[10] But if the *jus disponendi* of such first taker

[1] Cutting v. Cutting, 86 N. Y. 522.

[2] As to what is an absolute power of disposition by devise or deed, see §§ 132, 133, The Real Prop. Law.

[3] *Vide supra*, this section.

[4] Hume v. Randall, 141 N. Y. 499; Deegan v. Wade, 144 id. 573, 577; Van Horne v. Campbell, 100 id. 287. And this is so even as to executors. Kinnier v. Rogers, 42 N. Y. 531, 534; *cf.* Rose v. Hatch, 125 id. 427.

[5] *Supra*, § 129, The Real Prop. Law.

[6] Waring v. Waring, 17 Barb. 555; Jackson v. Edwards, 7 Paige, 386, 400; S. C., 22 Wend. 498, 509; Ackerman v. Gorton, 67 N. Y. 63, 66; Crooke v. County of Kings, 97 id. 421, 433; Coleman v. Beach, Id. 545, 558; Simmons v. Taylor, 10 App. Div. 499; Matter of Fernbacher, 17 Abb. N. C. 339, 350; Swarthout v. Ranier, 143 N. Y. 499; Rose v. Hatch, 125 id. 427, and see §§ 132, 133, The Real Prop. Law.

[7] Freeborn v. Wagner, 2 Abb. Ct. App. Dec. 175.

[8] § 139, The Real Prop. Law.

[9] § 129, *supra*.

[10] Jackson v. Robbins, 16 Johns. 537; Campbell v. Beaumont, 91 N. Y. 464, 468; Van Horne v. Campbell, 100 id. 287; Crozier v. Bray, 120 id. at p. 373.

is partial or qualified, then the limitation over is not repugnant and not void,[1] even though its enjoyment in possession may be defeated by such first taker's exercise of the power.[2]

[1] Rose v. Hatch, 125 N. Y. 427; Matter of Cager, 111 id. 343, 349; Crozier v. Bray, 120 id. 366, 375; Cole v. Gourlay, 9 Hun, 453; Bell v. Warn, 4 id. 406; Greyston v. Clark, 41 id. 125; Thomas v. Wolford, 49 id. 145; Simpson v. French, 6 Dem. 108; Matter of Westcott, 16 N. Y. St. Repr. 286, 289.

[2] Swarthout v. Ranier, 143 N. Y. 499; Van Axte v. Fisher, 117 id. 401; Matter of Gardner, 140 id. 122; Wells v. Seeley, 47 Hun, 109; Greyston v. Clark, 41 id. 125; Douglass v. Hazen, 8 App. Div. 25; Simmons v. Taylor, 10 id. 499; Schmeig v. Kochsberger, 18 Misc. Rep. 617; Matter of Haskeel, 19 id. 206; Blauvelt v. Gallagher, 22 id. 565; and see Coleman v. Beach, 97 N. Y. at p. 553, as to inconsistent provisions standing.

§ 130. **Certain powers create a fee.**— Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and encumbrancers.

Formerly 1 Revised Statutes, 732, section 82:

§ 82. Where a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute, in respect to creditors and purchasers.[1]

Comment on Section 130, Supra. An "absolute power of disposition," within this section, is a general beneficial power to devise[2] given to a tenant for life or years, or a general beneficial power to appoint by deed in the lifetime of the grantee of the power.[3]

Application of Section 130, Supra. This section provides for a case where the grantee of the absolute power of disposition takes no estate whatever in the lands subjected to the power. At common law, such a power was a power simply collateral.[4] The beneficial interest a man took under the execution of a power simply collateral, formed part of his estate at common law, and was subject to his debts like other property.[5] But where a power simply collateral was a power in the nature of a trust, it was not, of course, a beneficial power at the common law. This distinction is preserved in this section of The Real Property Law. Under this section a grant of an absolutely beneficial power carries a fee even where no estate is given to the grantee of the power.[6] But a general beneficial power of appointment to be executed by will, given to a beneficiary of a trust fund, it seems, is not within this section, and the same rule applies where the trust is of lands.[7]

Certain Limitations over Saved. This section does not, however avoid the vesting of any original limitation over, to take effect in defeasance of the base fee which the statute has thus carried to the grantee of such a power, unless the rights of his

[1] Repealed, chap. 547, Laws of 1896.

[2] § 132, The Real Prop. Law, *et supra*, p. 354.

[3] § 133, The Real Prop. Law, *et supra*, p. 355.

[4] *Supra*, p. 315.

[5] 1 Sugd. Pow. 27.

[6] Kinnier v. Rogers, 42 N. Y. 531, 534; Taggart v. Murray, 53 id. 233, 238; Crooke v. County of Kings, 97 id. 421, 450.

[7] Cutting v. Cutting, 86 N. Y. 522; Hume v. Randall, 141 id. at p. 550; *et vide supra*, pp. 355, 356.

creditors, purchasers and encumbrancers have supervened.[1] Whether such rights shall or shall not arise is always within the control of the grantee of an absolute and general power, or the power would not be absolute and general. Future estates, overridden by such a power, are thus made contingent upon the exercise of the power,[2] but a limitation of such estates does not necessarily suspend the power of alienation unless the estates are limited to persons not in being.[3] It must be obvious that no ulterior limitation, which may be defeated at the will of an owner of a prior estate in fee, can now be said to suspend the power of alienation.[4] Such a limitation resembles a limitation of a remainder after an estate in fee tail. At common law a remainder on a fee tail was not void, because it could always be barred.[5]

[1] Query, are not encumbrancers creditors?

[2] Freeborn v. Wagner, 2 Abb. Ct. App. Dec. 175.

[3] *Supra*, pp. 168, 172.

[4] *Supra*, pp. 158, 159.

[5] *Supra*, p. 155.

§ 131. **When grantee of power has absolute fee.** — Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.[1]

Formerly 1 Revised Statutes, 733, section 83:

§ 83. In all cases, where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee shall be entitled to an absolute fee. [2]

Former Law. Prior to the Revised Statutes a simple devise or bequest "to the discretion" of another, who had no prior life interest, passed a fee.[3] But where a life interest, or a remainder, was limited, the devise was held to be a devise of a power, not of an interest.[4] These were cases of informal disposition by wills, and many like cases arose, difficult of construction.

The Revised Statutes. The Revised Statutes carefully defined the instances where the donation of a power passes a fee, and these instances this statute perpetuates.[5]

The Present Act. Section 129[6] provides for a case where the grantee of the power has an estate in the lands. Section 130[7] provides for a case where the grantee of the power has no estate in the lands. This section[8] furnishes a rule of construction of a limitation containing no special grant of an estate to the donee of such a power, and no grant of a remainder. In such a case an estate might result to the grantor of the power at common law. But, under the circumstances specified in this present section, no estate now results, but the mere gift of the power passes a fee to donee of the power.[10] The absence of any limitation by way of remainder is thus now made conclusive evidence that the donee of the power takes an interest, and not a mere power. The gift passes a fee not only as to creditors, purchasers and encumbrancers, but as to all the world.[11]

[1] An absolute or general beneficent power within §§ 132, 133, The Real Prop. Law; see *supra*, p. 353, *et infra*, pp. 361, 362.

[2] Repealed, chap. 547, Laws of 1896.

[3] Whiskon v. Cleyton, 1 Leon. 156.

[4] Harrington v. Harte, 1 Cox, 131; *cf.* Smith v. Floyd, 140 N. Y. 337.

[5] §§ 129 to 133, The Real Prop. Law.

[6] *Supra*, The Real Prop. Law.

[7] *Supra*, The Real Prop. Law.

[8] § 131, *supra*.

[9] Sir E. Cleve's Case, 1 R. 3, chap. 1; Co. Litt. 111b, 271b.

[10] Jennings v. Conboy, 73 N. Y. 230, 237; Taggart v. Murray, 53 id. 233, 238.

[11] Taggart v. Murray, 53 N. Y. at p. 238; *cf.* Swarthout v. Ranier, 143 id. 499, and § 577, Chapl. Express Trusts & Pow.

General Beneficial Power of Appointment. Under a general and beneficial power of appointment, the grantee may appoint to himself or to any one else he pleases.[1] Under such circumstances an absolute power of disposition ought to carry the estate in fee simple absolute, where no remainder is limited by the settlor.

[1] Hubbard v. Gilbert, 25 Hun, 596; Matter of Moehring, 154 N. Y. 423, 427.

§ 132. **Effect of power to devise in certain cases.**— Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections.

Formerly 1 Revised Statutes, 733, section 84:

§ 84. Where a general and beneficial power, to devise the inheritance, shall be given to a tenant for a 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.[1]

Section 132, Supra. This section, on its face, is complementary of the provisions contained in the three preceding sections.[2] It points out when a power to devise is an absolute power of disposition within the meaning of those sections. A power to devise must be both beneficial[3] and general,[4] in order to be an absolute power of disposition within such sections, and it must be given to one who has a legal estate for life, or for years, in the property subject to the power.[5] Where there was a devise to one for life with a general power to devise, *but not to convey*, it was held that the devisee took an absolute fee under this section.[6] But where there is a trust estate and a power to devise generally given to a beneficiary of the trusts, such power is not within this section, for the grantee of the power has no estate.[7]

Power in Trust Excluded. A limitation to C., for life, with power to appoint estates in fee to specified persons, is not, however, within the meaning of this section; for such a power is a power in trust and not a general and beneficial power.[8] In reality, such a limitation is one by way of remainder.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] The Real Prop. Law, §§ 129, 130, 131.

[3] *Supra*, The Real Prop. Law, § 116.

[4] The Real Prop. Law, § 114, and see the cases cited on p. 354, *supra*, on absolute power of disposition, § 129.

[5] Freeborn v. Wagner, 2 Abb. Ct. App. Dec. 175, 178; Cutting v. Cutting, 86 N. Y. 522, 532; Hume v. Randall, 141 id. at p. 505.

[6] Deegan v. Van Glahn, 75 Hun, 39; Deegan v. Wade, 144 N. Y. 573; *cf.* Taggart v. Murray, 53 id. at p. 238.

[7] Cutting v. Cutting, 86 N. Y. 522. See, where a limitation of a remainder to beneficiary was held not within this section, Cass v. Cass, 15 App. Div. 235; *et vide supra*, pp. 354, 355.

[8] Smith v. Floyd, 140 N. Y. 337.

[9] *Vide infra*, under § 137, The Real Prop. Law.

§ 133. **When power of disposition absolute.**— Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.

Formerly 1 Revised Statutes, 733, section 85:

§ 85. Every power of disposition shall be deemed absolute, by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee, for his own benefit.[1]

Section 133, Supra. A gift of a general beneficial power of disposition by will, if given to a tenant for years or life, has just been stated in the last preceding section to pass a fee to the grantee of the power.[2] This section goes still farther, and provides that every beneficial power to dispose of a fee shall be deemed "absolute;" or, in other words, shall be deemed to pass a fee to the grantee of the power, whether he takes an express estate in the lands or not. This section is a defining section only, and it must be read in connection with sections 129, 130 and 131 of this act. A gift of a general beneficial power to dispose of a fee is a gift of the property itself,[3] without regard to the mere naked title to the lands, as is declared by sections 129 and 130 of this act.[4] This section shows that an absolute power of disposition is a general[5] beneficial[6] power.[7]

[1] Repealed, chap. 547, Laws of 1896.
[2] § 132, The Real Prop. Law.
[3] *Supra*, p. 353.
[4] *Supra*, pp. 353, 357.
[5] *Supra*, § 114, The Real Prop. Law.
[6] *Supra*, § 116, The Real Prop. Law.
[7] *Vide* the cases cited *supra*, under § 129, The Real Prop. Law.

§ 134. **Power subject to condition.**—A general and beneficial power may be created subject to a condition precedent or subsequent, and until the power become absolutely vested it is not subject to any provision of the last four sections.

Section 134, Supra. This section is new to the Article on Powers, although the revisers assert that no change is made thereby in the pre-existing law,[1] and such is undoubtedly the fact.[2] A devise or gift of a power is like any other gift or devise of property, for powers are the essentials of property, and all powers combined make a fee. Therefore, a devise or gift of a power may be subject to a condition precedent,[3] and extinguished or defeated by a condition subsequent, if so limited in the deed of settlement.[4] Powers are always inserted in marriage settlements, and they usually vest only on the solemnization of the marriage in the donees or grantees of the power.[5]

Marriage Settlement. Marriage settlements may be either *ante* or *post* nuptial. In the latter case, to be supported as against prior creditors of the settlor, they must be pursuant to an ante-nuptial agreement. In the former case the settlements usually contain powers to be executed on conditions: Thus, conveyance to A. as trustee until the solemnization of the marriage, and thereafter to hold, etc., with power to exchange, sell, etc. And if the marriage be not solemnized, then the powers are not to be executed, but the estate conveyed is to revert to the settlor, his heirs or assigns. Such powers are subject to conditions, and are supported in numerous cases, and even in New York under the Revised Statutes and its revisions.

[1] Note to this section by the Commissioners of Statutory Revision, citing Taggart v. Murray, 53 N. Y. 238; Wright v. Tallmadge, 15 id. 309.

[2] Van Axte v. Fisher, 117 N. Y. at p. 403.

[3] 1 Chance, Pow. 10, § 23.

[4] *Cf.* 1 Sugd. Pow. 90.

[5] Belmont v. O'Brien, 12 N. Y. 394, 395.

§ 135. **Power of life tenant to make leases.**—The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a grant of such estate unless specially excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished.

Formerly 1 Revised Statutes, 733, sections 88, 89:

§ 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 any such conveyance, it is extinguished.[1]

§ 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.[2]

Extinguishment of Leasing Power by Tenant for Life. It was stated that at common law the received classification of powers was important only in respect of the donee's ability to suspend, extinguish or merge the power.[3] A power simply collateral could not be extinguished or suspended by any act of the donee.[4] The classification adopted by the Revised Statutes and perpetuated in The Real Property Law had, however, an additional object, viz., to determine primarily the validity of powers connected with estates.[5] This section of the present act now provides, that a valid special beneficial power, mentioned in section 123,[6] shall not be assigned separately from the estate, and how such a power may be extinguished.

The Revised Statutes. At common law there was some uncertainty about how far a tenant for life, with a leasing power, might assign his estate and reserve the power to make leases. It was, however, generally determined that a total alienation of the estate suspended or extinguished the power where it could not be exercised without defeating the interest granted.[7] The Revised Statutes first provided very clearly for the extinguishment of such a leasing power, and that the power should always be annexed to the estate and pass with it.

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] *Supra*, p. 315.
[4] Farw. Pow. (1st ed.) 10.
[5] § 110, The Real Prop. Law.
[6] *Supra*, p. 341; Marvin v. Smith, 56 Barb. at p. 605.
[7] Long v. Rankin, 1 Sugd. Pow. 58; *sed cf.* 2 Chance, Pow. 598, 599, and Ren ex rel. Hall v. Bulkeley, 1 Doug. 291.
[8] 2 Chance, Pow. 595, 1 Sugd. Pow. 56. *Cf.* Revisers' note to Article of the Revised Statutes on Powers.

Power to Life Tenant to Make Leases. A power to a life tenant to make leases was formerly a power appendant so far as it attached to the estate of tenant for life and a power collateral or in gross in so far as its execution might overlap that estate and fasten on to the remainder.[1] The Revised Statutes provide for the extinguishment of a leasing power given to tenant for life, or negatively for its non-extinguishment or suspension in a single case.[2] The other rules relating to the extinguishment, suspension and merger of the powers, made lawful under this article, are controlled by the common law.[3]

[1] Whart. Conv. 425, 426.

[2] § 136, The Real Prop. Law.

[3] *Vide supra*, pp. 316, 317, § 110; *et infra*, p. 369, § 137, relating to extinguishment of powers in trusts.

§ 136. **Effect of mortgage by grantee.**—A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein, and the effects on the power of such lien by mortgage are:

1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires; and,

2. That any subsequent estate, created by the owner, in execution of the power, becomes subject to the mortgage as if in terms embraced therein.

Formerly 1 Revised Statutes, 733, sections 90, 91:

§ 90. A mortgage executed by a tenant for life having a power to make leases, or by a married woman, by virtue of any beneficial power, does not extinguish or suspend the power; but the power is bound by the mortgage, in the same manner as the lands embraced therein.[1]

§ 91. The effects of such a lien by mortgage 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.[2]

Section 136, Supra. The original revisers of the Revised Statutes, in their note to the Article on Powers, explain very fully the object of the legislation, now embodied in this section under consideration.[3] Referring to an old edition of Sugden on Powers, they reported to the Legislature that a mortgage operated by the common law to extinguish a leasing power, etc., etc. The statement thus referred to, Sir Edward Sugden himself altered in a more recent edition of his work.[4] But the appropriate character of the New York legislation was thereby made only more apparent. This section refers only to beneficial powers.[5] The tendency of the decision on the extinguishment of powers was formerly carried to an unreasonable extent.[6] But at present the courts are inclined to be more liberal in their construction of powers given to life tenants.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] See their note to the Original Article on Powers.

[4] 2 Chance, Pow. 599.

[5] *Supra*, § 116, The Real Prop. Law; 56 Barb. 605.

[6] 2 Chance, Pow. 598.

[7] Swarthout v. Ranier, 143 N. Y. 499.

§ 137. **When a trust power is imperative.**— A trust power, unless its execution or nonexecution 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 for the benefit of the person interested. 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 beneficiaries of the trust.

Formerly 1 Revised Statutes, 734, sections 96, 97:

§ 96. 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.[1]

§ 97. 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.[2]

Powers in Trust Imperative. In the course of the observations under sections 77[3] and 79[4] of this act, the history of the separation of a particular power from the devolution of the title to the estate itself was briefly outlined. The Revised Statutes accentuated this separation, and some trusts which had thitherto required a legal estate in the trustees were made powers in trust,[5] although some former powers in trust were converted into active trusts.[6] In Belmont v. O'Brien[7] it was intimated that a statutory trust and a power in trust may now coexist in the same person. But a merely passive use, which does not direct or authorize the performance of some act by the trustee, may not be validated as a power in trust.[8]

The Revised Statutes. Powers in the nature of trusts were, at the common law, imperative, and, in the case of their non-execution, they devolved on the court.[9] The Revised Statutes gave

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] *Supra*, p. 265.

[4] *Supra*, p. 269.

[5] Belmont v. O'Brien, 12 N. Y. 394, 404; Downing v. Marshall, 23 id. 366; Gilman v. Reddington, 24 id. 9, 15; Townshend v. Frommer, 125 id. at p. 459; Farmers' Loan & Trust Co. v. Carroll, 5 Barb. at p. 653; Arnold v. Gilbert, Id. 190; Van Boskerck v. Herrick, 65 id. 250.

[6] 2 Sugd. Pow. 158, 171; Downing v. Marshall, 23 N. Y. at p. 380.

[7] 12 N. Y. at p. 404; Crooke v. County of Kings, 97 id. 421, 446.

[8] Townshend v. Frommer, 125 N. Y. 446, 457, 468; De Peyster v. Clendining, 8 Paige, 295, 303.

[9] Harding v. Glyn, 1 Atk. 469; 2 Sugd. Pow. 160; 2 Chance, Pow, 555; Dominick v. Sayre, 3 Sandf. 555, 559.

emphatic expression to this principle, and it is now embodied in this section of The Real Property Law. All trust powers not wholly discretionary, by express limitation, are now as imperative as active trusts.[1]

What Trusts Valid as Powers in Trust. What trust purposes are valid as powers in trust, the statute does not attempt to enumerate.[2] But there are some general restrictions applicable to this character of trusts. No trust, operative as a power, may contravene any principle of public policy,[3] violate the principles of equity or good morals,[4] create a perpetuity,[5] or authorize an act which the grantor of the power could not himself do.[6]

Power in Trust, when Imperative. A power does not cease to be imperative because the grantee has the right to exclude certain persons, designated by the settlor as appointees,[7] unless the grantor may exclude, in his discretion, all the persons so designated as possible beneficiaries.[8] How far a power which is a quasi-trust power may be outside of this principle, and not imperative, it is not always easy to discern.[9]

Execution of Imperative Trust Power, how Enforced. When a trust power is imperative its execution will be enforced in equity, or by judgment of a court of proper jurisdiction.[10] A trust created through the medium of a power in trust is as much the subject of equity cognizance as an express trust where the legal title is in

[1] Allen v. De Witt, 3 N. Y. 276, 280; Downing v. Marshall, 23 id. at p. 380; Moncrief v. Ross, 50 id. 431, 436; Delaney v. McCormack, 88 id. 174; Coleman v. Beach, 97 id. 545; Matter of Gantert, 136 id. 106, 110; Smith v. Floyd, 140 id. 337, 342; Farmers' Loan & Trust Co. v. Carroll, 5 Barb. at p. 653; Towler v. Towler, 142 N. Y. 371; Dominick v. Sayre, 3 Sandf. 555; Van Boskerck v. Herrick, 65 Barb. 250; Hughes v. Mackin, 16 App. Div. 291, 295.

[2] Downing v. Marshall, 23 N. Y. at p. 380; Belmont v. O'Brien, 12 id. at p. 403; Read v. Williams, 125 id. at p. 569.

[3] Tilden v. Green, 130 N. Y. 29, 54; Belmont v. O'Brien, 12 id. at p. 403.

[4] Read v. Williams, 125 N. Y. 560, 569; Sweeney v. Warren, 127 id. 426.

[5] Belmont v. O'Brien, 12 N. Y. 394, 403; Everitt v. Everitt, 29 id. 39, 78; Booth v. Bap. Church, 126 id. at p. 239.

[6] Booth v. Stuyvesant, 18 Wend. at p. 265; Genet v. Hunt, 113 N. Y. 158, 170.

[7] Delaney v. McCormack, 88 N. Y. 174, 182; Holland v. Alcock, 108 id. 312, 320; Power v. Cassidy, 79 id. 602, 613.

[8] *Supra*, § 137, The Real Prop. Law; Tilden v. Green, 130 N. Y. 29, 54; Coleman v. Beach, 97 id. 545; Matter of Bierbaum, 40 Hun, 504, 506, 507; Austin v. Oakes, 117 N. Y. 577, 590.

[9] Towler v. Towler, 142 N. Y. 371, 375.

[10] Haight v. Brisbane, 96 N. Y. 132; Chapl. Ex. Trusts & Pow, § 583; *cf.* as to powers of sale Mellen v. Mellen, 139 N. Y. 210.

the trustee. But a court of equity has no inherent jurisdiction to construe a will, unless there is a trust of some kind.[1]

Power in Trust does not Fail for Want of a Trustee. A trust power so far partakes of the nature of a trust as not to fail, for want of the designation of a trustee,[2] or even by reason of the death of the grantee of the power.[3] So while a peremptory power of sale is a trust power and imperative, the beneficiaries may elect to take the lands and extinguish the power.[4]

Power in Trust, how Extinguished. The resemblance between express trusts under the 76th section of this act and powers in trust is further exemplied by the general application of the doctrine, that when the trust purpose ceases the estate or power of the trustee ceases.[5] In the Revised Statutes this principle was expressly applied to powers.[6] While no such explicit cross-reference is contained in this act,[7] the general doctrine relating to the extinguishment of powers of this nature is sufficient in itself to continue the application of the principle stated in the article on trusts.[8]

Power to Appoint, or Select, Uncertain Beneficiaries. A power of selecting certain beneficiaries is often annexed to legacies, and even devises for charity, and is a power in trust.[9] At the present day an appointment under such a power to a charitable use may be presumably indefinite or uncertain, and still be enforcible as a charity.[10] A trustee of a power of this kind may appoint to persons not in being at the time the power is created.[11]

[1] Mellen v. Mellen, 139 N. Y. 210; Dell v. Wisner, 88 id. 153, 160; *cf.* § 1866, Code Civ. Pro.

[2] *Infra*, § 141, The Real Prop. Law.

[3] § 162, The Real Prop. Law.

[4] Hetzel v. Barber, 69 N. Y. 11; Mellen v. Mellen, 139 id. 210; Smith v. A. D. Farmer Type F. Co., 18 Misc. Rep. 434.

[5] Manier v. Phelps, 15 Abb. N. C. 123, 137; Brumer v. Meigs, 64 N. Y. 506; Hetzel v. Barber, 69 id. 1; Prentice v. Jansen, 79 id. 478, 486; Harvey v. Brisben, 50 Hun, 376; § 89, The Real Prop. Law.

[6] 1 R. S. 730, § 67; Id. 734, § 102.

[7] § 162, The Real Prop. Law.

[8] § 89, The Real Prop. Law; Sweeney v. Warren, 127 N. Y. 426; Herriott v. Prime, 87 Hun, 95; Roberts v. Carey, 84 id. 328, and see *supra*, p. 364, under § 135, The Real Prop. Law; Meldon v. Devlin, 31 App. Div. 146, 156.

[9] Power v. Cassidy, 79 N. Y. 602; Prichard v. Smith, 95 id. 76; Matter of O'Hara, Id. 403; Holland v. Alcock, 108 id. 312; Tilden v. Green, 130 id. 29; People v. Powers, 147 id. 104; Willets v. Willets, 20 Abb. N. C. 471; Livingston v. Gordon, 7 id. 53.

[10] Chap. 701, Laws of 1893; *et vide supra*, § 93, The Real Prop. Law; *cf.* 1 Sugd. Pow. 254.

[11] Meldon v. Devlin, 20 Misc. Rep. 56, 59; 31 App. Div. 146.

Certain Powers in Trust in the Nature of Remainders. A power in trust is, under certain circumstances, in the nature of a remainder.[1] Thus, where an estate was settled in trust for the life of "A.," with power to "A." to devise the inheritance to his issue, and if he had no issue then to the settlor's right heirs, and in default of such appointment remainder over, etc., etc., and "A." exercised the power, the limitation was held to be a remainder expectant on a life estate,[2] and this is *a fortiori* true now, since a power of this nature has become a power in trust,[3] and peremptory.[4] Whether such a remainder is vested or contingent[5] would depend on the frame of the power of appointment, *e. g.*, to appoint the inheritance "to any one or more" of his issue by, etc., etc.[6] If the donee has power to exclude one child or descendant, the remainder is certainly contingent, at least until the power is executed, and then it becomes vested, but subject to be divested by the execution of a subsequent will.[7]

[1] And this, though not within the letter of Lord Coke's definition, or the definition of this act. *Supra*, § 28, The Real Prop. Law; 2 Chance, Pow. 34.

[2] 2 Chance, Pow. 33.

[3] Smith v. Floyd, 140 N. Y. 337; Gilman v. Reddington, 24 id. 9, 17, 18.

[4] *Supra*, § 137, The Real Prop. Law.

[5] *Supra*, § 30, The Real Prop. Law.

[6] *Cf.* Goebel v. Wolf, 113 N. Y. 405.

[7] *Cf.* Van Axte v. Fisher, 117 N. Y. at p. 403; Sayles v. Best, 140 id. 368.

§ 138. **Distribution when more than one beneficiary.**—Where a disposition under a power is directed to be made to, among, or between, two or more 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; but when the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others.

Formerly 1 Revised Statutes, 734, sections 98, 99:

§ 98. Where a disposition under a power is directed to be made to, or among or between 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.[1]

§ 99. But when the terms of the power import that the estate or fund is to be distributed between the persons so designated, in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the other.[2]

Illusory Appointments. At common law a donee of a power to appoint to a class in such shares as he chose, might make purely illusory or nominal appointments among some of the appointees, reserving the substantial balance for any other of the class.[3] But in equity it was at first held that each of the class was entitled to a "*substantial*" share, and not an "*illusory*" one. This uncertain judicial rule only led to protracted litigations, and finally illusory or nominal appointments were upheld in equity.[4] In 1830 the common law was altered by statute in England,[5] so as to require the settlor to specify the amount of the shares designed, and otherwise leaving it to the discretion of the donee of the power, provided he gave something, however small, to each of the appointees. The most trifling amount would satisfy the statute.[6]

The Revised Statutes. The original revisers of the statutes of New York took up this branch of the law at a time when its reform was greatly mooted, but before the passage of "Sugden's Act" in England. It will be seen that they solved the difficulty

[1] Repealed, chap. 547, Laws of 1896. note to R. S. on Powers, Appendix II.

[2] Repealed, chap. 547, Laws of 1896.

[3] Appendix, 2 Sugd. Pow. 363.

[4] Farw. Pow. (1st ed.) 302; Humphrey Real Prop. (2d ed.) 105; Revisers'

[5] 11 Geo. IV, and 1 Will. IV, chap. 46.

[6] Farw. Pow. 304.

in New York much in the same way that it was solved in England.[1] Unless the settlor expressly left it to the donee of the power to determine the amount of a share, the Revised Statutes required equality of division.[2]

Appointment to a Class. The basis of the execution of all powers of selection or appointment to a class is now equality, unless the settlor leave the amount or share to the absolute discretion of the grantee of the power.[3] In construing such a power the presumption is in favor of equality; and a limitation, to the donee of of the power of a discretion as to shares or amounts, must be clear.[4] Where a power is given by devise to a donee to appoint property to "all, any or either" of several persons named, or to all, any or either of their lawful issue, the word "or," in the absence of any indication of a contrary intent, has a discretionary, not a substitutional import,[5] and the word issue includes grandchildren as well as children.[6]

[1] 1 R. S. 734, §§ 98, 99, now § 138, The Real Prop. Law.

[2] See notes of Revisers of the Revised Statutes on the originals of this section of the Real Prop. Law, and § 140, The Real Prop. Law.

[3] The Real Prop. Law, § 140; Conner v. Watson, 1 App. Div. 54; Austin v. Oakes, 117 N. Y. 577, 590; Meldon v. Devlin, 31 App. Div. 146, 157.

[4] Matter of Conner, 6 App. Div. 594; Jones v. Jones, 8 Misc. Rep. 660; Shannon v. Pickell, 2 N. Y. St. Repr. 160; Re Extension of Church Street, 49 Barb. 555; *cf.* The Real Prop. Law, § 140.

[5] Drake v. Drake, 134 N. Y. 220.

[6] Drake v. Drake, 134 N. Y. 220.

§ 139. **Beneficial power subject to creditors.**— A special and beneficial power is liable to the claims of creditors in the same manner as other interests that cannot be reached by execution; and the execution of the power may be adjudged for the benefit of the creditors entitled.

Formerly 1 Revised Statutes, 734, section 93:

§ 93. Every special and beneficial power is 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.[1]

Comment on Section 139, Supra. The beneficial interest a man took under the execution of a power formed a part of his estate before the Revised Statutes.[2] But the creditor's remedy was not clear.[3] The Revised Statutes declared that certain beneficial powers were estates in fee. Where a conversion of a power into a fee now takes place by operation of the statute, this section is not relevant, as the creditor's remedy is plainly against the legal estate by execution. But where such a conversion does not take place, and the power is special, beneficial and vested, the creditors of the grantee of such power may then resort to this section, and have the delinquent judgment debtor decreed to execute the power for the benefit of creditors.[5]

Married Women. A married woman, since the Married Women's Acts,[6] stands in the same position in respect of a beneficial power under this section as a *feme sole*. Prior to those acts her restricted power over her separate estate, by the common law, placed her in a peculiar juristic *status*, and while equity was more liberal than the legal tribunals in affording relief to her creditors, the chancellor could not compel a wife to execute a beneficial power, except under some circumstances.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 Sugd. Pow. 27; Cutting v. Cutting, 86 N. Y. 522.

[3] 2 Sugd. Pow. 158.

[4] 1 R. S. 732, §§ 81, 82, 83, 84, 85, now §§ 129, 130, 131, 132, 133, The Real Prop. Law.

[5] Cutting v. Cutting, 86 N. Y. 522, 536; Kinnan v. Guernsey, 64 How. Pr. 253, 259; *cf.* Harvey v. Brisbin, 143 N. Y. 151.

[6] *Supra*, p. 339, note 11.

[7] *Cf.* L'Amoreux v. Van Rensselaer, 1 Barb. Ch. 34, 37; Rogers v. Ludlow, 3 Sandf. Ch. 104, 109; Marvin v. Smith, 56 Barb. 600, 608; S. C., 46 N. Y. 571.

§ 140. **Execution of power on death of trustee.**— If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust.

Formerly 1 Revised Statutes, 734, section 100:

§ 100. If the trustee of a power, with the right of selection, shall 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.[1]

Comment on Section 140. Before the Revised Statutes it was said that if the donee of a power was a trustee, and the court acquired jurisdiction of the power, it always decreed an equal distribution, for, although the trustee of the power might exclude some of the appointees, the court could not.[2] The design of the original revisers was to abrogate the law sanctioning illusory appointments and to effect equality of appointments as far as possible.[3] The devolution of a trust power was, therefore, expressly made to conform to the devolution of estates held by trustees. That a power in the nature of a trust vested in the chancellor upon the death of a trustee, even before the Revised Statutes, was the opinion of one of the revisers.[4] The statute made this point clear in every event,[5] and, in addition, expressly directed equality of selection and appointment, without regard to the terms of the original limitation, if the trustee of the power die before its execution.[6] This was, however, Sugden's conception of the pre-existing law. Obviously in his opinion the maxim "equality is equity" was to be applied, independently of statute, in all cases where a power devolved on a court of equity.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Sed cf.* 2 Chance, Pow. 561, criticising Sugden to this effect.

[3] *Vide supra*, p. 371, § 138.

[4] Dominick v. Sayre, 3 Sandf. at p. 559.

[5] The Real Prop. Law, §§ 91, 162; Hoey v. Kenny, 25 Barb. 396.

[6] Dominick v. Sayre, 3 Sandf. 555; Leggett v. Hunter, 19 N. Y. at p. 459; Delaney v. McCormack, 88 id. 174, 182; Greenland v. Waddell, 116 id. 234, 242; Smith v. Floyd, 140 id. 337; Meldon v. Devlin, 31 App. Div. 46, 157.

[7] Quoted in 2 Chance, Pow. 561, and criticised.

§ 141. **When power devolves on court.**—Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution devolves on the supreme court.

Formerly 1 Revised Statutes, 734, section 101:

§ 101. Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the court of chancery.[1]

Comment. This section furnishes another analogy between trusts, and powers in trust, under this statute. The section is really a rule of construction in cases where a limitation of a power is defective. The *cy pres* doctrine in relation to powers does not prevail in this State,[2] yet the grant of a power may now arise by implication;[3] and where the person by whom the power is to be executed is impliedly designed, the courts will not interfere.[4] But the trust purpose, under this section, must be one enforcible as a power[5] before the court can act.[6]

Read v. Williams. The case of Read v. Williams, cited in the notes to this page,[7] was however a charity case decided before the recent amendments to the law of Charitable Uses in this State.[8] But the principle stated in our text, that only valid trust powers, and not invalid trust powers, can fall under this section of The Real Property Law, must be too obvious to require any citation of authority whatever. Only those powers which are recognized as valid in law or equity can devolve by operation of law on the death of the grantee of the power; for devolution of title by operation of law is always *sub modo.*

[1] Repealed, chap. 547, Laws of 1896.

[2] Hillen v. Iselin, 144 N. Y. 365, 374.

[3] Bogert v. Hertell, 4 Hill, 492; Dorland v. Dorland, 2 Barb. 63; Meakings v. Cromwell, 5 N. Y. 136, 139; Holland v. Alcock, 108 id. 312; S. C., 20 Abb. N. C. 447, 453.

[4] Meakings v. Cromwell, 2 Sandf. 512; *cf.* Crocheron v. Jacques, 3 Edw. Ch. 207.

[5] *Vide supra*, under §§ 117, 137, The Real Prop. Law.

[6] Read v. Williams, 125 N. Y. at p. 569.

[7] Note, *supra.*

[8] § 93, The Real Prop. Law; chap. 701, Laws of 1893.

§ 142. **When creditors may compel execution of trust power.**— The execution, wholly or partly, of a trust power may be adjudged for the benefit of the creditors or assignees of a person entitled as a beneficiary of the trust, to compel its execution, where his interest is assignable.

Formerly 1 Revised Statutes, 735, section 103:

§ 103. 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.[1]

Construction of Section 142, Supra. This section places the creditors of the beneficiary of a trust power in the shoes of the beneficiary, when the interest of such beneficiary is a sum in gross or assignable.[2] Before the Revised Statutes powers in trust were imperative[3] and might be enforced in equity for the benefit of all entitled persons "*indiscriminately.*"[4] But no trusts other than charitable uses are enforcible in this State, unless the trust purpose is one recognized as equitable, and there is a definite beneficiary entitled to enforce the trust.[5] If a debtor is not entitled to the benefit of an execution of a power, it is very clear that this section confers no greater right on his creditors.[6] So the creditor's claim must be one established by law, and not one in contention, in order to fall under this section.[7]

Creditors Aided when Execution Defective. If an execution of a trust power is defective it is clear that creditors, under this section, have a right to the aid of a court of equity, although the following section of this act[8] might, from its present juxtaposition, appear to exclude them.

[1] Repealed, chap. 547, Laws of 1896.

[2] § 83, The Real Prop. Law; Matter of Gantert, 136 N. Y. 106.

[3] 2 Chance, Pow. 555.

[4] 2 Chance, Pow. 557, citing Butler's note to Co. Litt. 290b.

[5] Read v. Williams, 125 N. Y. 560, 569; *cf.* § 93, The Real Prop. Law, *supra.*

[6] Clark v. Crego, 47 Barb. 599, 614; Marvin v. Smith, 56 id. 600, 606; Cutting v. Cutting, 20 Hun, 360, 369.

[7] Marvin v. Smith, 56 Barb. at p. 607; Harvey v. Brisbin, 143 N. Y. 151.

[8] § 143, The Real Prop. Law.

§ 143. **Defective execution of trust power.**—Where the execution of a power in trust is defective, wholly or partly, under the provisions of this article, its proper execution may be adjudged in favor of the person designated as the beneficiary of the trust.

Formerly 1 Revised Statutes, 737, section 131:

§ 131. Where the execution of a power in trust shall be defective, in whole or in part, under the provisions of this Article, its proper execution may be decreed, in equity, in favor of the persons designated as the objects of the trust.[1]

Defective Execution of Powers. At law, defective executions of powers were nugatory. In equity the case was different as to certain persons and relief was given in favor of general classes of persons: (1) Purchasers;[2] (2) creditors;[3] (3) wife;[4] (4) legitimate children;[5] (5) charity.[6] The original revisers of the statutes cannot have contemplated limiting the classes of persons entitled to resort to equity for aid of a defective execution.[7] Nor at the time the Revised Statutes was enacted could the Legislature thus have detracted from the equitable jurisdiction of the chancellor who was a constitutional officer. It is rather to be presumed that this section will receive a wider construction so as to aid all, of whatever class, who have any valid interest in the enforcement of the trust power.[8]

Void or Defective Execution. The distinction between a void and a defective execution of powers is not changed by this section.[9]

Defective Execution Aided. Where the power is not a trust power the ordinary equitable rules relating to defective executions continue to apply, as the equitable jurisdiction remains unaffected by statutory or constitutional changes.

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 Chance, Pow. 494; 2 Sugd. Pow. 93; Schenck v. Ellingwood, 3 Edw. Ch. 175.

[4] 2 Chance, Pow. 494.

[3] 2 Sugd. Pow. 93.

[5] 2 Sugd. Pow. 94.

[6] 2 Chance, Pow. 497.

[7] *Cf.* §§ 137, 160, The Real Prop. Law.

[8] *Cf.* § 137, The Real Prop. Law; Matter of Gantert, 136 N. Y. 106; Marvin v. Smith, 56 Barb. 600, 606; Bostwick v. Beach, 103 N. Y. 414, 421; and see § 160, The Real Prop. Law, as to purchasers.

[9] Austin v. Oakes, 48 Hun, 492; S. C., 117 N. Y. 577; Hillen v. Iselin, 144 id. at p. 365; *cf.* Farw. Pow. (1st ed.) 262 *seq.*

§ 144. **Effect of insolvent assignment.**— A beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass, respectively, to a trustee or committee of the estate of the person in whom the power or interest is vested, or an assignee for the benefit of creditors.

Formerly 1 Revised Statutes, 735, section 104:

§ 104. Every beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass to the assignees of the estate and effects of the person in whom such power or interest is vested, under any assignment authorized by the provisions of the fifth Chapter of this Act.[1]

English Acts. The early Bankrupt Acts of England[2] provided for the devolution or execution of certain powers in favor of creditors of the donee of the power.[3]

The Revised Statutes. The Revised Statutes adopted the same general principles,[4] with modifications as to the assignment of certain contingent interests not vesting in possession or interest within three years.[5]

Committee of Lunatics. Committees of persons adjudged incapable of administering their own affairs fall under this section of The Real Property Law, and are entitled to execute a beneficial power vested in the insane or incompetent grantee of the power. As a beneficial power is property of the grantee as much as any visible or tangible thing can be, it is obvious that this section of this act must be liberally construed, even as against persons entitled in contingent remainder to the subject-matter of the power.

[1] R. S. pt. 2, chap. 5, relating to assignments of estate; repealed, chap. 245, Laws of 1880; 1 R. S. 735, § 104; repealed, chap. 547, Laws of 1896.

[2] 13 Eliz. chap. 7; 21 Jac. I, chap. 19.

[3] 1 Sugd. Pow. 224.

[4] Clark v. Crego, 47 Barb. 599, 614; Marvin v. Smith, 56 id. 600, 606; S. C., 46 N. Y. 571.

[5] Cutting v. Cutting, 86 N. Y. at p. 543; S. C. below, 20 Hun, 360, 369.

§ 145. **How power must be executed.**— A power can be executed only by a written instrument, which would be sufficient to pass the estate, or interest, intended to pass under the power, if the person executing the power were the actual owner.[1]

Formerly 1 Revised Statutes, 735, section 113:

§ 113. No power can be executed except by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power, if the person executing the power were the actual owner.[2]

Intent of Section 145, Supra. The former involved rules relating to the execution of powers[3] were intended to be reduced by the Revised Statutes to a few simple principles. An execution of powers by informal instruments was intended to be done away with, and the instruments in execution of powers were reduced to two, a deed[4] and a will.[5] To these Mr. Chaplin, in his work on Powers, adds a third instrument, a contract.[6] But a contract in this sense where it is sufficient to comply with the present Statutes of Frauds and Uses, is a conveyance or deed; and it is apprehended that a merely executory contract is not an execution of the power.[7]

The Revised Statutes. In the Revised Statutes the foregoing section was supplemented by 1 Revised Statutes, 736, section 114: "Every instrument, except a will, in execution of a power, and, although the power may be a power of revocation only, shall be deemed a conveyance within the meaning and subject to the provisions of the third chapter of this act."[8] The latter section is not re-enacted in the article on Powers of The Real Property Law, but purports to be contained in article VIII of this act,[9] so that a mere power of revocation may be recorded, although strictly it is not a deed of conveyance.

[1] *Vide* 2 R. S. 134, § 6, now § 207, The Real Prop. Law.

[2] Repealed, chap. 547, Laws of 1896.

[3] Chap. 6, Sugd. Pow.; Chap. 9, Chance, Pow.

[4] *Supra*, §§ 145, 207, The Real Prop. Law; Barber v. Cary, 11 N. Y. 397.

[5] §§ 147, 148, 207, The Real Prop. Law; Matter of Gardner, 140 N.Y. 122.

[6] § 625, Ex. Trusts & Pow., citing Bostwick v. Beach, 103 N. Y. 414, 421; *cf.* Whitlock v. Washburn, 62 Hun, 369; Demarest v. Ray, 29 Barb. 563.

[7] Bostwick v. Beach, 103 N. Y. at p. 421; Whitlock v. Washburn, 62 Hun, 369; Demarest v. Ray, 29 Barb. 563.

[8] The chapter relating to the Proof and Recording of Conveyances of Real Estate.

[9] § 240, The Real Prop. Law.

Construction of Section 145, Supra. This section of The Real Property Law strictly refers to deeds or instruments of conveyance *inter vivos* and not to wills in execution of powers. If a power is to be executed by deed it must be executed by an instrument good as a conveyance under the law of New York.[1]

Married Women. Formerly a married woman executing a power by deed must be separately examined in order to execute the power well by deed.[2] But this is no longer necessary.[3]

Power — How Executed. Where the power is directed to be "executed by writing," either a deed or will is a good execution.[4]

[1] Barber v. Cary, 11 N. Y. 397, 398; Jackson v. Edwards, 22 Wend. at p. 508; see § 148, The Real Prop. Law; Coleman v. Beach, 97 N. Y. 545, 556.

[2] Jackson v. Edwards, 22 Wend. 508; 1 R. S. 736, § 117.

[3] Chap. 249, Laws of 1879; as amended, chap. 300, Laws of 1880.

[4] 1 Sugd. Pow. 262; In Matter of Gardner, 140 N. Y. 122.

§ 146. **Execution by survivors.** — Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors.

Formerly 1 Revised Statutes, 735, section 112:

§ 112. Where a power is vested in several persons, all must unite in its execution; but if previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors.[1]

Former Law Re-enacted. At common law, if a naked power was vested in two, or more,[2] nominative, without any reference to an office liable to survive as an executorship is, it, without doubt, would be a contradiction of the general rule, to allow the power to survive.[3] By Statute in England (21 Hen. VIII, chap. 4), a part of executors were allowed to execute a power created by will, when others refused to accept the charge. This statute was re-enacted in New York,[4] and in the Revised Statutes.[5]

Construction of Section 146, Supra. This section of the present act does not, however, authorize the execution of a power by some of the donees of a power, except in the event it specifies — the death of one or more before execution.[6] Thus, if all the executors qualify all must execute a power of sale given *nominatim* to executors,[7] and it is even said that if one of the grantees of a power resign the court must supply the vacancy in order to make a good execution of a power.[8]

Power of Sale. How far a power of sale is personal, or how far in trust, is often the question in cases where a grantee of a power die before execution.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] But where power was to three, *or any of them*, a sale by two held good. Townesend v. Walley, Moore, 341.

[3] Note, Co. Litt, 113a, cited in Sinclair v. Jackson, 8 Cow. 543, 554; 1 Sugd. Pow. 143; Taylor v. Morris, 1 N. Y. 341, 358; Osgood v. Franklin, 2 Johns. Ch. 1, 19; Niles v. Stevens, 4 Den. 399; Roseboom v. Mosher, 2 id. 62.

[4] 2 J. & V. 96; 2 R. L. 366.

[5] 1 R. S. 735, § 112; 2 id. 109, § 55; Ogden v. Smith, 2 Paige, 175; Niles v. Stevens, 4 Den. 399.

[6] Herriott v. Prime, 87 Hun, 95.

[7] In the Matter of Van Wyck, 1 Barb. Ch. 565; Berger v. Duff, 4 Johns, Ch. 368; Wilder v. Ranney, 95 N. Y. 7, *et vide infra*, under this section.

[8] In the Matter of Van Wyck, 1 Barb. Ch. 565, *sed cf.* § 637, Chapl. Express Trusts & Pow. and cases cited

[9] Niles v. Stevens, 4 Den. 399, 404; Mott v. Ackerman, 92 N. Y. 539, 552, Greenland v. Waddell, 116 id. 234, 240; Boyce v. Adams, 123 id. 402; *cf.* Gilchrist v. Rea, 9 Paige, 72; Dominick v. Michael, 4 Sandf. 374; Conklin v. Egerton, 21 Wend. 430.

Where Executors of a Power Refuse to Qualify. Where certain of the designated executors refuse to qualify, a testamentary power may now be executed by those who do qualify,[1] although before the Revised Statutes the rule was otherwise, unless the power was coupled with an interest or was in trust.[2] But at present all who so qualify must, under this section, unite in the execution of the power, unless, in the grant of the power, it is otherwise expressly provided.[3]

Power in Trust, how to be Framed. In framing a grant or limitation of a power in trust, it is desirable to provide (1) for the refusal of any of the grantees to accept the trust, and (2) for their several deaths or removal, and (3) for the resignation of any of them, although in the case of powers to executors or testamentary trustees the statute may provide for several of such contingencies. This section of the act applies to both a settlement *inter vivos* and one by will.

[1] Code Civ. Proc. § 2642; 2 R. S. 109, § 55; Ogden v. Smith, 2 Paige, 197; Taylor v. Morris, 1 N. Y. 341, 358; Bunner v. Storm, 1 Sandf. Ch. 358; Sharp v. Pratt, 15 Wend. 610; Dominick v. Michael, 4 Sandf. 374; Meakings v. Cromwell, 2 id. 512; affd., 5 N. Y. 136; Leggett v. Hunter, 19 id. 445, 455.

[2] Franklin v. Osgood, 14 Johns. 527; S. C., 2 Johns. Ch. 1; Niles v. Stevens, 4 Den. 399.

[3] Berger v. Duff, 4 Johns. Ch. 368; Wilder v. Ranney, 95 N. Y. 7; Fleming v. Burnham, 100 id. 1; *cf.* Whitlock v. Washburn, 62 Hun, 369, 372.

§ 147. **Execution of power to dispose by devise.**— Where a power to dispose of real property is confined to a disposition by devise or will, the instrument must be a written will, executed as required by law.

Formerly 1 Revised Statutes, 736, section 115:

§ 115. 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 sixth Chapter of this Act.[1]

Comment on Section 147, Supra. By the common law, if a will is required a power may not be executed by deed.[2] This statute has not, in this respect, changed the former law of powers. But it has put an end to informal testamentary executions. Under the above section of this act a will in execution of a power must comply with the statute relating to wills,[3] if the power is executed in this State or relates to real estate situate here.[4] If executed in another State the maxim "*locus regit actum*" may also apply.[5]

How far Prior Will an Execution. How far a prior will may now be regarded as an execution of a power subsequently granted, query.[6] Farwell, in his treatise on Powers, is of the opinion that at common law a general power of appointment may be well executed by a will executed previously to the creation of the power.[7] Mr. Chaplin is of the opinion that whether this be so in New York, depends on the construction of the New York Statute of Wills.[8] It would seem that unless the Statute of Wills was very clearly against the former rule, the common law should prevail.[9]

[1] 2 R. S. 56 *seq.* (Chap. VI); 1 id. 736, § 115, repealed, chap. 547, Laws of 1896.

[2] 1 Sugd. Pow. 255, 256. Any instrument of a testamentary character was, however, a good execution. Id. 260.

[3] Amer. Home Miss. v. Wadhams, 10 Barb. 597; *cf.* Coleman v. Beach, 97 N. Y. 545.

[4] Lynes v. Townsend, 33 N. Y. 558, 561; White v. Howard, 46 id. 144, 159.

[5] Betts v. Betts, 4 Abb. N. C. 317, 389.

[6] Chapl. Ex. Trusts & Pow. § 653; *cf.* Lynes v. Townsend, 33 N. Y. at p. 561; Lockwood v. Mildeberger, 5 App. Div. 459.

[7] Farwell Pow. (2d ed.) 222.

[8] Chapl. Ex. Trusts & Pow. § 653.

[9] *Supra*, p. 317.

§ 148. **Execution of power to dispose 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 person executing the power.

Formerly 1 Revised Statutes, 736, section 116:

§ 116. 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.[1]

Comment on Section 148, Supra. A power to be executed by deed could not at common law be executed by will.[2] It must be executed by an instrument under seal at least.[3] At the present day the deed or "grant" required by this section cannot be of a testamentary character,[4] but must respond to the requirements of the article on Conveyances and Mortgages.[5] But if a limitation of a power is general without being confined to a deed or will it may be executed by either.[6] In the Matter of Gardner, the Court of Appeals distinctly reiterate the last rule and say: "A general power to dispose of property includes the right to dispose of it by will, unless the grant of the power contains words which expressly or by fair implication exclude such a method of disposition."[7] But where the power is limited to be executed by deed alone, it cannot be well executed by a testamentary disposition, even though the estate is not to take effect until after the death of the party executing the power.[8]

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 Sugd. Pow. 255.

[3] Id. 280.

[4] Coleman v. Beach, 97 N. Y. 545, 556.

[5] *Infra*, art. VII, The Real Prop. Law.

[6] Matter of Gardner, 140 N. Y. 122.

[7] Matter of Gardner, 140 N. Y. 122.

[8] Coleman v. Beach, 97 N. Y. at p. 556.

§ 149. **When direction by grantor does not render power void.**— Where the grantor of a power has directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the provisions of this article.

Formerly 1 Revised Statutes, 736, section 118:

§ 118. Where 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 before prescribed in this Article.[1]

Comment on Section 149, Supra. As a general principle at common law a power could not be validly executed, except by such instruments as were specified by the donor in the limitation of the power.[2] But equity would often supplement a defective execution.[3] The Revised Statutes aided, in the original of this section, not a defective execution, but an insufficient grant, of a power; for a direction to do something in a manner it is not permitted to be done by law, may be regarded as an insufficient direction, if not an illegal direction, because it is one contrary to law. This section presumes that the grantor intended the power to be executed by a sufficient, not an insufficient, instrument. It provides for a case not provided for by the common law. The section applies to all grants of powers whether contained in deeds or wills.

Applications of this Section. If the grantor of a power direct the grantee of the power to execute it by a will, to be witnessed by one person only, clearly by the law of New York, the will would not be sufficient to pass the estate. In such a case this section applies, and if the grantee of the power execute it by a will witnessed in conformity with the Statute of Wills by more than one witness the power is under this section well executed, although executed in a mode contrary to that directed by the grantor of the power and bad at common law.[4]

[1] Repealed, chap. 547, Laws of 1896.

[2] Farw. Pow. 262; 1 Sugd. Pow. 250; 1 Chance, Pow. 310.

[3] *Supra*, p. 377.

[4] 1 Sugd. Pow. 251, 252, 253; *cf.* § 151, The Real Prop. Law.

§ 150. **When directions by grantor need not be followed.**—Where the grantor of a power has directed any formality to be observed in its execution, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formality is not necessary to the valid execution of the power.

Formerly 1 Revised Statutes, 736, section 119:

§ 119. When the grantor shall have directed any formalities to be observed in the execution of the power, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formalities shall not be necessary to a valid execution of the power.[1]

Comment on Section 150, Supra. This section refers to "accumulative" or redundant "ceremonies," *i. e.*, those which the grantor of the power prescribes as additional to the requirements of the law for an act of like nature. At common law, "accumulative" ceremonies directed by donor must be observed in the execution of a power. Thus, where the donor directed the power to be executed by a will "duly delivered," a delivery of the will to some persons present was held sufficient.[2] The present section does not prohibit a limitation containing superfluous, or accumulative, ceremonies, but it renders the superfluous ceremonies themselves unnecessary. Thus, a direction by a grantor of a power that a deed, to be executed under the power, shall be attested by two witnesses, is now equivalent to a direction that it shall be attested by one witness, as the law requires only one witness to a deed of conveyance.[3]

Construction of Section 150, Supra. This section is equivalent to a command to grantors to omit a direction for all unnecessary ceremonies in a grant of a power. But the consent of a third person to the execution of a power is not a ceremony.[4]

Power of Sale. A power of sale directed to be performed in a designated place and in a designated mode is not, however, executed by following a statute regulating certain sales, and treating the directions of the grantor of the power as superfluous, under this section.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] Doe v. Holloway, 1 Starkie, 431.

[3] Schenck v. Ellingwood, 3 Edw. Ch. 175; Kissam v. Dierkes, 49 N. Y. 602, 604.

[4] The Real Prop. Law, § 153; Kissam v. Dierkes, 49 N. Y. 602; Stokes v. Hyde, 14 App. Div. 530.

[5] 4 Kent Comm. 333, note c (Phila. ed. of 1889).

§ 151. **Nominal conditions may be disregarded.** — Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.

Formerly 1 Revised Statutes, 736, section 120:

§ 120. Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.[1]

Construction of Section 151, Supra. The word "conditions" in this section is probably the equivalent of "forms," as "conditions precedent," or conditions prescribed by a grant or devise, as precedent to the vesting of a power, are still to be performed.[2] At common law forms non-essential to the validity of an act were, nevertheless, if required by the donor of the power to be literally performed in order to make an execution of the power good at law.[3] The revisers saw fit to absolve the grantee of the power from such of the prescribed forms as were purely nominal or non-essential to the valid execution of the act empowered,[4] except consent of third parties provided for in a subsequent section.[5]

Section 150, Supra. Section 150 of this act is of a similar import to the present section, and should be consulted in connection with it, although the evils intended to be remedied by the several sections were probably quite distinct.

[1] Repealed, chap. 547, Laws of 1896.

[2] § 134, The Real Prop. Law; Kissam v. Dierkes, 49 N. Y. 602; Griswold v. Perry, 7 Lans. 98; Allen v. De Witt, 3 N. Y. 276, 278.

[3] 1 Sugd. Pow. 251, 252, 253; Hawkins v. Kemp, 3 East, 410.

[4] Macy v. Sawyer, 66 How. Pr. 381.

[5] § 153, The Real Prop. Law; formerly 1 R. S. 736, § 122; Phillips v. Davies, 92 N. Y. 199; Kissam v. Dierkes, 49 id. 602; Stokes v. Hyde, 14 App. Div. 530.

§ 152. **Intent of grantor to be observed.**— Except as provided in this article, the intentions of the grantor of a power as to the manner, time and conditions of its execution must be observed; subject to the power of the supreme court, to supply a defective execution as provided in this article.

Formerly 1 Revised Statutes, 736, section 121:

§ 121. With the exceptions contained in the preceding sections, the intentions of the grantor of a power, as to the mode, time and conditions of its execution, shall be observed, subject to the power of the court of chancery, to supply a defective execution, in the cases hereinafter provided.[1]

Construction of Section 152, Supra. It is well understood that the common law governs real property excepting in so far as that law is expressly abrogated by statute. Courts have otherwise no power to depart from the common law as prescribed by the Constitution.[2] Therefore, if this article does not expressly absolve a grantee of a power from executing the power as directed by the grantor, he must still follow the directions as at common law.[3] The cases bearing on powers in trust and their due discharge by the trustees are commonly cited as bearing on the rule stated in this section;[4] whereas strictly they have no application, as the section probably was intended to refer to the execution of powers operating solely under this statute[5] and not to powers in the nature of trusts, breaches of which are amply remedied by the law regulating fiduciaries and trusts.

Appointments to Charitable Uses. How far this section, in connection with section 93 of this act,[6] may sanction indefinite appointments to charitable uses, may be a question for consideration in all such cases. The statute has sanctioned uncertain uses for charity, and under the analogies of the former law should sanction uncertain appointments.[7]

The Cy Pres Doctrine.[8] The *cy pres* doctrine, or the canon of approximate construction, has been held to have no application

[1] Repealed, chap. 547, Laws of 1896.

[2] Co. Litt. 115b; Challis, 152; Cunliffe v. Brancker, 3 Ch. Div. 393, 410; Fitzgerald v. Quann, 109 N. Y. 441; Dean v. M. E. R. Co., 119 id. 540; *cf.* Marshall v. Mosely, 21 id. 280, 292.

[3] Allen v. De Witt, 3 N. Y. 276, 278; Barber v. Cary, 11 id. 397; Woerz v. Rademacher, 120 id. 62, 68; Benedict v. Arnoux, 7 App. Div. 1; revd., 154 N. Y. 715; Russell v. Russell, 36 id. 581; 1 Sugd. Pow. 250 *seq.*

[4] Chap. Ex. Trusts & Pow. § 627.

[5] *Vide supra*, pp. 314, 327, 368, 389.

[6] The Real Prop. Law.

[7] 1 Sugd. Pow. 254.

[8] See the notes to Alexander v. Alexander, Tudor, Lead. Cas. Real

to powers of appointment since the Revised Statutes.[1] But this section under consideration would certainly have justified the application of any doctrine which seeks only to effectuate the intention of the grantor of the power, at least when the power is created by will.[2] The *cy pres* doctrine is often made applicable in this country to the construction of wills by statute, and it is not irrelevant to the execution of powers.[3] Thus section 157 of this act is an extensive application of the doctrine of *cy pres* as was section 2, 1 Revised Statutes, 748. The doctrine of *cy pres* was applied, in connection with powers, to estates tail. As these are abolished in this State, the doctrine itself ceases, but the equitable doctrines relative to excessive execution of powers were very closely allied to *cy pres* for they separated good appointments from bad or excessive appointments and upheld the good *pro tanto*.[4]

Devise or Grant of Power, when Severable. It is well understood that where a limitation of a power may be separated from a void scheme of trusts, the power will stand though the trusts fall.[5]

Prop. for applications of this doctrine to Powers.

[1] Hillen v. Iselin, 144 N. Y. at p. 374.

[2] *Cy pres* does not apply to deeds, Brudenell v. Elwes, 1 East, 440.

[3] Jackson v. Brown, 13 Wend. 437; Coster v. Lorillard, 14 Wend. at pp. 308, 309; 4 Kent, Comm. 508, note; 1 R. S. 748, § 2.

[4] See under § 157, The Real Prop. Law.

[5] Lindo v. Murray, 91 Hun, 335.

§ 153. **Consent of grantor or third person to execution of power.**— Where the consent of the grantor or 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 in a written certificate thereon. In the first case, the instrument of execution, in the second, the certificate, must be subscribed by the person whose consent is necessary; and to entitle the instrument to be recorded, such signature must be acknowledged or proved and certified in like manner as a deed to be recorded.

Formerly 1 Revised Statutes, 736, section 122:

§ 122. 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 the first case, the instrument of execution, in the second, the certificate, shall be signed by the party whose consent is required; and to entitle the instrument to be recorded, such signature must be duly proved or acknowledged, in the same manner as if subscribed to a conveyance of lands.[1]

Construction of Section 153, Supra. The consent of a single third person may still be made requisite, as at common law,[2] to the due execution of a power. And if such person die before the consent is manifest, the power, unless otherwise provided in the grant of the power, is gone.[3] Whenever such consent is required, it must be manifested with the formalities required by this section, and an informal consent is insufficient.[4] The present section of this act places the consent of grantor in the same category as consents of third persons.

When Third Person Dead. But a limitation may be so framed as to make it apparent that grantor intended to make the consent of a third person conditional only upon such third person's being alive at the time of the execution of the power.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] Hawkins v. Kemp, 3 East, 410; 1 Sugd. Pow. 253.

[3] Kissam v. Dierkes, 49 N. Y. 602; Mott v. Ackerman, 92 id. 539; Phillips v. Davies, Id. 199; Gulick v. Jones, 14 App. Div. 85; Stokes v. Hyde, Id. 530.

[4] Barber v. Cary, 11 N. Y. 397; *cf.* Stokes v. Hyde, 14 App. Div. 530; Hoyt v. Hoyt, 17 Hun, 192; S. C., 85 N. Y. 142.

[5] House v. Raymond, 3 Hun, 44; Kimball v. Chappell, 27 Abb. N. C. 437; Odell v. Youngs, 64 How. Pr. 56; Hoyt v. Hoyt, 85 N. Y. 142; Phillips v. Davies, 92 id. 199.

§ 154. **When all must consent.**— Where the consent of two or more persons to the execution of a power is requisite, all must consent thereto; but if, before its execution, one or more of them die, the consent of the survivor or survivors is sufficient, unless otherwise prescribed by the terms of the power.

Section 154, Supra. The Commissioners of Statutory Revision announce that this section is new, and that the last clause is not now the law.[1]

Construction of Section 154, Supra. The Commissioners of Statutory Revision were undoubtedly correct in their statement,[2] that a power, the execution of which was made entirely dependent on the consent of two or more persons, was extinguished by the death of such persons before consent.[3] As this section of The Real Property Law is framed it does not, however, preclude the extinguishment of a power by the death of one of several persons whose consent is so made requisite; provided that the consent of the deceased was indispensable to the execution of the power by the very terms of the grant, and he died before such consent given.

Consent. The limitation may be so framed as to require the consent of certain officers[4] or of a class.[5] In such cases the wisdom of the rule stated in this section is apparent and even declaratory of pre-existing decisions.

Consent Conditional on Living. Again, the grant of a power may be so framed as to make it apparent that the consent of third persons was only provisional or conditional upon their being alive at a certain time.[6]

[1] Report of Commissioners of Statutory Revision, section 154 (Appendix I, *infra*), citing Barber v. Cary, 11 N. Y. 397.

[2] Note to this section, Appendix I, *infra*.

[3] See the cases cited, *supra*, under § 153, The Real Prop. Law; and *cf.* Farw. Pow. (1st ed.) 117.

[4] Correll v. Lauterbach, 14 Misc. Rep. 469; *cf.* People ex rel. Loew v. Batchelor, 28 Barb. 310; Perry v. Tynen, 22 id. 137; People ex rel. Hawes v. Walker, 23 id. 304, as to statutory powers.

[5] Hoyt v. Hoyt, 85 N. Y. 142; Hamilton v. N. Y. Stock E. B. Co., 20 Hun, 88.

[6] See the cases to this effect cited under § 153, The Real Prop. Law.

§ 155. **Omission to recite power.**— An instrument executed by the grantee of a power, conveying an estate or creating a charge, which he would have no right to convey or create, except by virtue of the power, shall be deemed a valid execution of the power, although the power be not recited or referred to therein.

Formerly 1 Revised Statutes, 737, § 124:

§ 124. 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 such power be not recited or referred to therein.[1]

Section 155, Supra. This section furnishes a rule of construction applicable only under the circumstances there denoted.[2] The rule is founded on a reasonable presumption recognized by the common law.[3] If a grantee of a power deal with specific property in which he has no interest, except under a grant of such power, the dealing, if authorized, should be regarded as an execution of the power, although no reference be made to the power. But this section has no application where the grantee has both an interest and a power.[4] This section in terms includes appointments by either deeds or wills. In a very carefully considered opinion, this section of The Real Property Law is regarded as declaratory of the rules of construction prevailing in that "country from whose jurisprudence our statutes in relation to powers were mainly derived."[5]

Mutual Life Ins. Co. v. Shipman. The case last cited in our text[6] is instructive not only in connection with this section, but with the entire article on Powers. The opinion there rendered shows the accuracy of the statement made in the earlier pages of this work to the effect that the existing law of powers is but a modification of the earlier common law, and that the abolition of all powers, other than those tolerated in this article, did not essentially abridge the dominion of owners over their property or their right to delegate their powers over their estates.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] Mut. Life Ins. Co. v. Shipman, 119 N. Y. 324; White v. Hicks, 33 N. Y. 383.

[3] 2 Chance, Pow. 84; White v. Hicks, 33 N. Y. at p. 393; Sir E. Clere's Case, 6 Rep. 17b.

[4] Mut. Life Ins. Co. v. Shipman, 119 N. Y. 324; and see under the following section of this act.

[5] Mut. Life Ins. Co. v. Shipman, 119 N. Y. at p. 329.

[6] Id. *supra.*

[7] *Supra*, p. 317.

§ 156. **When devise operates as an execution of the power.** — Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication.

Formerly 1 Revised Statutes, 737, section 126:

§ 126. Lands embraced in a power to devise, shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power, shall appear, expressly or by necessary implication.[1]

Old Law. At common law a general devise was not an appointment, where the grantee of the power had an interest, or other lands to answer to the devise. The general rule of the common law was that to execute a power there must be a reference to it;[2] but in the case of a will circumstances might be relied on to show that there was an intention to execute the power even where no reference was made to the power.[4]

The Revised Statutes. The Revised Statutes made a general devise an execution of a power, unless circumstances rebutted the presumption that such was testator's intention.[5] But where the testator had both a power and an interest, a general devise is still presumed to refer to the interest.[6]

Appointment by Deed. This section can have no reference to an appointment by deed, for in terms it is confined to devises. A deed, without reference to a power, may be construed either as a conveyance of an interest or as an execution of a power, according to the intention of the parties which is sought to be arrived at.[7] But, as a rule, a general deed will be construed to refer to an interest where donee has both an interest and a power.[8]

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 Chance, Pow. 84; Mut. L. I. Co. v. Shipman, 119 N. Y. at p. 328.

[3] 1 Sugd. Pow. 371.

[4] 1 Sugd. Pow. 356, 371; Lockwood v. Mildeberger, 5 App. Div. 459, 462.

[5] Hutton v. Benkard, 92 N. Y. 295; Mott v. Ackerman, Id. 539; N. Y. Life Ins. & T. Co. v. Livingston, 133 id. 125; Kibler v. Miller, 57 Hun, 14; affd., 141 N. Y. 571; Van Woert v. Benedict, 1 Bradf. 114; Thomas v. Snyder, 43 Hun, 14; Matter of Pilfard, 42 id. 34; Bolton v. De Peyster, 25 Barb. 539, 564; Matter of Watson, 34 N. Y. St. Repr. 906; S. C., 39 id. 42.

[6] Mut. L. I. Ins. Co. v. Shipman, 119 N. Y. 324; 1 Sugd. Pow. 412 *seq.*

[7] 1 Sugd. Pow. 435; *supra*, p. 392.

[8] 2 Chance, Pow. 71.

§ 157. **Disposition not void because too extensive.**— A disposition or charge by virtue of a power is not void on the ground that it is more extensive than was authorized by the power; but an estate or interest so created, so far as embraced by the terms of the power, is valid.

Formerly 1 Revised Statutes, 737, section 123:

§ 123. No disposition, by virtue of a power, shall be void in law or in equity, on the ground that it is more extensive than was authorised by the power; but every estate or interest so created, so far as embraced by the terms of the power, shall be valid.[1]

Cy Pres Doctrine and Excessive Execution. The doctrine of *cy pres*, or approximate execution, and the equitable doctrines relative to the excessive execution of powers, where the grantee of the power has exceeded his authority, are closely allied. The doctrine of *cy pres*, by the adjudged cases applying it, extended to excessive execution of powers of appointment. Under that doctrine certain appointed estates unauthorized were regarded as estates tail.[2] The other doctrines relative to excessive execution of powers separated the good from the bad parts of the execution if possible, and upheld the execution *pro tanto*.[3] The doctrines of excessive execution applied where the estate granted by the donee of the power could not be turned into an estate tail under the doctrine of *cy pres*.[4] Estates tail no longer exist in this State, and the doctrine of *cy pres* has not now any strict application to powers.[5] But the equitable doctrines relative to excessive execution are only confirmed by this section of this act, and such are closely allied to the *cy pres doctrine*, in its larger sense.[6] Whenever the provision in excess of the power may be eliminated without disturbing the scheme, the excessive execution stands under this section.[7] And such was the rule at common law before the Revised Statutes.[8]

[1] Repealed, chap. 547, Laws of 1896.

[2] All the cases cited by Sugden and Chance are of this nature, 2 Sugd. Pow. 57; 2 Chance, Pow. 58 *seq.*; Tudor, Lead. Cas. Real Prop. (3d ed.) 409.

[3] Farw. Pow. (1st ed.) 250; 2 Sugd. Pow. 62 *seq.*; 2 Chance, Pow. 45 *seq.*; and see remarks, *supra*, under § 152, The Real Prop. Law.

[4] *Supra*, pp. 388, 389.

[5] Hillen v. Iselin, 144 N. Y. 365, 374.

[6] Root v. Stuyvesant, 18 Wend. at pp. 274, 288; Hillen v. Iselin, 144 N. Y. 365, 380.

[7] Hillen v. Iselin, 144 N. Y. at p. 380.

[8] 2 Chance, Pow. 511, § 2891.

This Section Applies to Excessive not Deficient Executions. This section applies to excessive and not to deficient executions of powers.[1] Where a power is not well and sufficiently executed, because the grantee of the power has partially executed, or has not exhausted, his authority, the execution was formerly good *pro tanto*,[2] and it might be aided in equity in a proper case. This principle is now stated in the statute, in respect of powers in trust, which embrace many former powers,[3] and as the general equitable jurisdiction of the Supreme Court remains co-extensive with the Court of Chancery, a defective execution of other powers will, no doubt, be remedied in a proper case.

[1] Austin v. Oakes, 48 Hun, 492, 496; S. C., 117 N. Y. 577.

[2] 2 Chance, Pow. 511; Tudor, Lead. Cas. Real Prop. 422.

[3] § 143, The Real Prop. Law.

§ 158. **Computation of term of suspension.**— The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power must be computed, not from the date of such instrument, but from the time of the creation of the power.

Formerly 1 Revised Statutes, 737, section 128:

§ 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.[1]

This Section Relates to the Rule against Perpetuities. This section and the one following it[2] have a distinct relation to the rule against perpetuities, or that rule now more commonly called "the rule against unlawful suspension of the power of alienation.[3]

Powers of Appointment. Powers of appointment, whereby executory limitations arise, were regarded as within the former rule against a perpetuity, and consequently no limitation could be effected by a power of appointment, if it could not have been effected by the original instrument creating the power.[4] For the purpose of this rule, the date of the operation of the original instrument, and not that executing the power, determined the time when the rule began to run.[5] This rule did not, at common law, apply to general powers.[6] The doctrine of relation, whereby an instrument in execution of a power related back to the inception of the original instrument creating the power, was *fictio juris*, and not upheld to advance a wrong.[7] This doctrine always applied, however,[8] and applies still, under this section, for the purposes of the rule against perpetuities.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] The Real Prop. Law, § 159.

[3] The Real Prop. Law, § 32.

[4] Challis, 156; 1 Chance, Pow. 115, 439; 2 id. 1.

[5] Challis, 156.

[6] Challis, 156.

[7] Jackson v. Davenport, 20 Johns. 537, 546; Matter of Stewart, 131 N. Y. 274, 281.

[8] Henry v. Davis, 7 Johns. Ch. 40.

[9] Fargo v. Squiers, 154 N. Y. 250; Hillen v. Iselin, 144 id. 365, 378; Dana v. Murray, 122 id. 604; Crooke v. County of Kings, 97 id. 421, 445; Beardsley v. Hotchkiss, 96 id. 201, 214; Conkling v. N. Y. El. R. R. Co., 76 Hun, 420; *cf.* Frear v. Pugsley, 9 Misc. Rep. 316, 322, which case said to be erroneous; Chapl. Ex. Trusts & Pow. § 679.

§ 159. **Capacity to take under a power.**— An estate or interest cannot be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.

Formerly 1 Revised Statutes, 737, section 129:

§ 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.[1]

Construction of Section 159. Section 158[2] is the complement of this section, and in logical order this section, 159, should have preceded section 158, for it is this section which subjects all estates created by powers to the rules regulating the creation of legal estates by principals;[3] whereas section 158 states only a subordinate principle concerning the computation of time under the rule against perpetuities.

Rule against Perpetuities. The application of the rule against perpetuities to estates created under powers is provided for by three separate sections of this act.[4] Section 111 prohibits a grantor from empowering an act which he himself could not do. Section 124 prohibits the reservation of any act which may not be lawfully delegated, while this section acts obliquely on the grantee and prevents any estate from passing under a power, unless such estate might have been valid in the instrument creating the power.[5]

The Revised Statutes. Under the Revised Statutes, as before those statutes,[6] it was a general principle that a power could not be the medium of a perpetuity any more than a direct limitation.[7] But what powers tend to a perpetuity, and what do not, are now, as at common law, the questions for professional consideration; for not all limitations of powers, and not all powers, tend to infringe the rule against perpetuities.

Powers of Appointment. It must be conceded that all powers of appointment, whereby executory limitations are to arise as

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, The Real Prop. Law.

[3] Art. II, The Real Prop. Law; Dempsey v. Tylee, 3 Duer, 73, 101.

[4] §§ 111, 124, 159.

[5] Dempsey v. Tylee, 3 Duer, 73, 101.

[6] 1 Sugd. Pow. 178.

[7] Salmon v. Stuyvesant, 16 Wend. 321; Root v. Stuyvesant, 18 id. 257, 264, 265; Belmont v. O'Brien, 12 N. Y. 394, 403; Everitt v. Everitt, 29 id. 39, 78; Read v. Williams, 125 id. 560, 569; Booth v. Baptist Church, 126 id. 215, 239; Sweeney v. Warren, 127 id. 426, 433; Tilden v. Green, 130 id. 29,

future estates, are within the rule against perpetuities[1] now as formerly.[2] So those powers in trust, which necessarily suspend the power of alienation, are within the rule.[3] But not all powers in trust are within the rule; for a power of sale, for example, cannot be said, *per se*, to suspend the power of alienation,[4] unless the proceeds of such sale are to be held on further trusts,[5] or the execution of the power of sale is unduly postponed by the limitation of the power.[6]

54, and see *infra*, § 159, The Real Prop. Law.

[1] Salmon v. Stuyvesant, 16 Wend. 321; Root v. Stuyvesant, 18 id. 257, 265; Booth v. Baptist Church, 126 N. Y. 215, 240; Hillen v. Iselin, 144 id. 365, 378.

[2] 1 Sugd. Pow. 178.

[3] A trust or power in trust suspends the power of alienation, only when the trust purpose prevents an alienation by the trustee. This prevention is by virtue of 1 R. S. 731, § 65; § 85, The Real Prop. Law. Russell v. Russell, 36 N. Y. 581, 584; Beardsley v. Hotchkiss, 96 id. 201, 214; Hillen v. Iselin, 144 id. at p. 379, *et supra*, p. 254, under § 76, The Real Prop. Law.

[4] Garvey v. McDevitt, 72 N. Y. 556, 563; Robert v. Corning, 89 id. 225, 239; Henderson v. Henderson, 113 id. 1, 10; Cussack v. Tweedy, 126 id. 81, 87; Deegan v. Wade, 144 id. 573; Blanchard v. Blanchard, 4 Hun, 289.

[5] Savage v. Burnham, 17 N. Y. at p. 572; Allen v. Allen, 149 id. 280; Underwood v. Curtis, 127 id. 523.

[6] Hobson v. Hale, 95 N. Y. 588, 609; Dana v. Murray, 122 id. 604, 614; Matter of Will of Butterfield, 133 id. 473; Trowbridge v. Metcalf, 5 App. Div. 318.

§ 160. **Purchase under defective execution.**—A purchaser for a valuable consideration, claiming under a defective execution of a power, is entitled to the same relief as a similar purchaser, claiming under a defective conveyance from an actual owner.

Formerly 1 Revised Statutes, 737, section 132:

§ 132. Purchasers for a valuable consideration, claiming under a defective execution of any power, shall be entitled to the same relief in equity, as similar purchasers, claiming under a defective conveyance from an actual owner.[1]

Comment. Under section 143 of this act,[2] a reference was made to the former rules touching defective execution of powers. This section, now under consideration, refers specifically to judicial aid to purchasers in cases of defective execution of powers. Before the Revised Statutes relief against defective executions was frequently granted in equity in favor of purchasers.[3] And for this purpose a wife, under marriage articles,[4] a mortgagee[5] and a lessee[6] were regarded as purchasers. Equity would relieve in case of the want of a seal or of witnesses,[7] or in case of a defect in the description of the property appointed. Since the Revised Statutes, in a proper case, equity must aid a defective execution in favor of a purchaser.[8] But the remedy cannot be invoked in all cases by purchasers under defective executions of powers. For example, in an action for specific performance it was held that purchasers were not entitled to relief in such a case.[9]

Term "Purchaser" Includes Mortgagee and Lessee. Before the Revised Statutes, equity, as stated above, included in the term "purchasers" under this rule, both mortgagees and lessees.[10] Certainly those persons are still within the equity of the present section and will be entitled to relief whenever their title is imperfect by reason of a defective execution of a power.

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, p. 377.

[3] See the cases cited, 2 Chance, Pow. § 2830, p. 494.

[4] 2 Chance, Pow. 494.

[5] 2 Sugd. Pow. 93.

[6] Campbell v. Leach, Amb. 740.

[7] Schenck v. Ellingwood, 3 Edw. Ch. 175.

[8] Barber v. Cary, 11 N. Y. 397, 400; *cf.* Correll v. Lauterbach, 14 Misc. Rep. 469, 473.

[9] Correll v. Lauterbach, 14 Misc. Rep. at p. 473.

[10] *Cf.* 2 Sugd. Pow. 93, citing several cases.

§ 161. **Instrument affected by fraud.**— An instrument in execution of a power is affected by fraud, in the same manner as a conveyance or will, executed by an owner or by a trustee.

Formerly 1 Revised Statutes, 737, section 125:

§ 125. 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.[1]

Construction of Section 161, Supra. This section is equivalent to a clause saving existing jurisdictions; for, at the time of the enactment of the original section, a deed or will in execution of a power was affected by fraud in the same manner as a deed or will not in execution of a power. The fraud referred to in this section may be the fraud of a third person, not the grantee of the power,[3] or it may be the fraud of the grantee of a power in trust.

Formerly there were some cases involving fraudulent executions of powers which equity alone could reach; the power, in such cases, was executed according to the terms of it, but there was some unlawful bargain behind it, or some ill motive which rendered the execution fraudulent.[5] In all such cases equity afforded appropriate relief. At the present day the like jurisdiction is vested in the courts of general powers. The jurisdiction over cases involving fraudulent execution of powers remains as extensive as ever; the tribunal administering it and the form of redress have alone changed.

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 Sugd. Pow. 181; 2 Chance, Pow. 549, 552; Harty v. Doyle, 49 Hun, 410, 413.

[3] Scroggs v. Scroggs, Ambl. 272; Harty v. Doyle, 49 Hun, 410.

[4] Matter of Vandevort, 8 App. Div. 341; Post v. Benchley, 48 Hun, 83, 90.

[5] 2 Sugd. Pow. 181.

§ 162. **Sections applicable to trust powers.**—Sections ninety-one to ninety-three of this chapter, both inclusive, in relation to express trust estates, and the trustee thereof, apply equally to trust powers, however created, and to the grantees of such powers.

Formerly 1 Revised Statutes, 734, section 102:

§ 102. The provisions contained in the second Article of this Title, from section sixty-six to section seventy-one, both inclusive, in relation to express trusts and trustees, shall apply equally to powers in trust, and the grantees of such powers.[1]

Construction of Section 162, Supra. The prior sections which are thus made applicable to powers in trust relate, (1) to the devolution of a trust on the death of a last surviving trustee;[2] (2) to the resignation or removal of a trustee;[3] (3) to charitable, religious, educational and benevolent uses.[4]

Death of Trustee of a Power. It is thus apparent, that on the death of the last surviving or sole trustee of a power in trust the trust, if unexecuted, vests in the Supreme Court and shall be executed by its direction,[5] unless the trust is purely personal.[6]

Resignation of Trustee of a Power. So the trustee of a power in trust may resign, or be removed, and a new trustee appointed in his place.[7]

When Power of Sale Passes to Administrators with the Will Annexed. If a power of sale is discretionary it cannot pass to an administrator with the will annexed.[8] Otherwise if it is peremptory and imperative involving no discretion.[9]

Charitable, Religious, Educational and Benevolent Uses. Section 93 of this act relating to charitable, religious, educational and benevolent uses, and declaring conveyances and devises to such uses not invalid for uncertainty of the beneficiaries, is now expressly applicable to trusts operative as powers in trust.[10] Prior

[1] Repealed, chap. 547, Laws of 1896.

[2] § 91, The Real Prop. Law.

[3] § 92, The Real Prop. Law.

[4] § 93, The Real Prop. Law.

[5] Crocheron v. Jaques, 3 Edw. Ch. 207; Clark v. Crego, 51 N. Y. 646; Delaney v. McCormack, 88 id. 174, 182; Cooke v. Platt, 98 id. 35, 39.

[6] See p. 319, under § 111, The Real Prop. Law, "*delegatus non potest delegare*," and Chapl. Ex. Trusts & Pow. §§ 604, 726.

[7] § 92, The Real Prop. Law; Farrar v. McCue, 89 N. Y. 139, 144; Cooke v. Platt, 98 id. 35, 39; Oliver v. Frisbie, 3 Dem. 22; Fleet v. Simmons, Id. 542.

[8] Greenland v. Waddell, 116 N. Y. 234, 240; *supra*, p. 319.

[9] Mott v. Ackerman, 92 N. Y. 539, 553, 554; Clifford v. Morrell, 22 App. Div. 470; Carpenter v. Bonner, 26 id. 462; *supra*, at pp. 319, 381.

[10] *Supra*, § 162, The Real Prop. Law.

to the enactment of The Real Property Law, chapter 701, Laws of 1893, had introduced this change in the law of New York, and as most charitable trusts were operative only as powers in trust prior to 1893,[1] the act of 1893 necessarily applied to powers in trust; and quite independently of this section. This section, therefore, in so far as it concerns charities, is only declaratory of a change introduced by the law of 1893.

If no Trustee of a Charitable Power in Trust Named. So where a charitable use was operative as a power in trust and no trustee was named, the execution of the trust vested in the Supreme Court as declared in chapter 701, Laws of 1893, and as now stated in this section of this act.[2] In this respect both the act of 1893 and this section were declaratory of the pre-existing law.[3]

[1] Downing v. Marshall, 23 N. Y. 366, 380; Adams v. Perry, 43 id. 487; Cottman v. Grace, 112 id. 299, 306, 307; Erwin v. Hurd, 13 Abb. N. C. 91.

[2] § 162, The Real Prop. Law.

[3] There are no existing sections of this act between § 162 and § 170.

ARTICLE V.

Dower.

SECTION 170. Dower.
171. Dower in lands exchanged.
172. Dower in land mortgaged before marriage.
173. Dower in lands mortgaged for purchase money.
174. Surplus proceeds of sale under purchase money mortgages.
175. Widow of mortgagee not endowed.
176. When dower barred by misconduct.
177. When dower barred by jointure.
178. When dower barred by pecuniary provisions.
179. When widow to elect between jointure and dower.
180. Election between devise and dower.
181. When deemed to have elected.
182. When provision in lieu of dower is forfeited.
183. Effect of acts of husband.
184. Widow's quarantine.
185. Widow may bequeath crop.
186. Divorced woman may release dower.
187. Married woman may release dower by attorney.

SECTION 170. **Dower.**—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.

Formerly 1 Revised Statutes, 740, section 1:

§ 1. 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.[1]

Dower. Article II of The Real Property Law enumerates estates for life among the continuing estates in land, and regulates the creation of such estates when created by act of the parties. This article regulates both the inchoate interest and the estate for life called "dower." Dower is created by act of the law, and not by act of the parties.[2] The ancient law of England made provision for the wife out of the husband's estate. In the thirteenth century widows of tenants of socage lands claimed a moiety or one-half for dower.[3] But by Littleton's time common-law dower was restricted to one-third, unless there was a special custom to the contrary.[4]

[1] Repealed, chap. 547, Laws of 1896.
[2] McKeen v. Fish, 33 Hun, 28.
[3] 2 Pol. & Mait. Hist. Eng. Law, 419, citing Bracton, f. 93; Note Book, pl. 758.
[4] Litt. § 37.

"Dower" under the Laws of the Province of New York. Long before the English occupation of New York the *quantum* of dower in lands held by the socage tenure was fixed at one-third.[1] When the socage tenure was made the tenure of New York,[2] dower followed as an incident of the introduction of that tenure and the formal establishment of the common law by the Crown. The Duke's Laws of 1664–5,[3] and an act of the first assembly of the province,[4] enacted in 1683, both recognized dower as a part of the law of the province. So did an act of 1691.[5] Both these acts were, however, disallowed by the Crown, but without affecting dower, as they were, in this respect, simply declaratory of the law otherwise existing and established in the province.

"Dower" under the State Government. The great English statutes affecting the law of dower,[6] being enacted before the establishment of the common law in New York, were always recognized in the province, and they were adopted by the first Constitution of the State.[7] These statutes of England were formerly re-enacted as statutes of the State, in the first revision of the State laws, made by Jones and Varick in 1787,[8] and were again re-enacted in 1801,[9] and in 1813.[10] Thence in substance they passed into the Revised Statutes,[11] and are now contained in this article of The Real Property Law.[12] Thus, the real basis of the existing law of dower is the common law of England as modified by statutes, ancient and modern.

Section 170, Supra, and Cognate Statutes. In the section of The Real Property Law now under consideration, the survival of the common law is detected in the word "endowed," which derives its whole technical force from that law. This section as a general statutory statement of the prevailing *quantum* of dower is older than *Magna Charta*,[13] which was only repeated in the above-men-

[1] Bisset, Estates for Life, chap. 4. *Cf.* 2 Pol. & Mait. Hist. Eng. Law, 418, *seq.*

[2] Patent of King Charles II to Duke of York of 1664, and Statute 12 Car. II, chap. 24, precluded any other tenure by the crown. Challis, 22; Co. Litt. 93b, note 3; Chetwode, Bart., v. Crew, Willes, 614.

[3] Title "Dowryes."

[4] 2 R. L. Appendix II.

[5] 1 Bradf. N. Y. Laws of 1694, p. 15.

[6] 9 Hen. III, chap. 7; 20 Hen. III, chap. 20; 3 Edw. I, chaps. 40, 48; 13 Edw. I, chaps. 7, 14, 34; 27 Hen. VIII, chap. 10.

[7] Const. of 1777, § 35.

[8] 2 J. & V. 4; 1 Greenl. 292.

[9] 1 K. & R. 51.

[10] 1 R. L. 56.

[11] 1 R. S. 740, *seq.*

[12] Art. V, "Dower."

[13] Ed. of 1215, chap. VII; Coke's 2d Inst. 16. *Cf.* 2 Pol. & Mait. Hist. Eng. Law, 422.

tioned colonial statutes of New York, in 1683 and 1691.[1] The first formal re-enactment of those English statutes which prior to Independence extended to New York, fixed a widow's dower as "the third part of all the Lands of her Husband which were his at any Time during the Coverture."[2] This language was made precise by the section of the Revised Statutes, set out at the head of this section.[3] The act of 1787 extended dower to all the lands in the State, whether such as were held by the socage tenure or made allodial;[4] and thenceforth there was no distinction between dower in the lands in tenure and in the lands made allodial until the time when all lands became allodial.[5] The abolition of tenure did not affect estates in lands.

Statutory Definition of Dower. The Revised Statutes conformed the estate in dower to that of Littleton[6] and was in that respect more precise than the statute it superseded.[7] Dower extends only to such lands as the husband is seized of as an estate of inheritance during marriage.[8] In order to entitle a widow to dower three successive circumstances must concur: (1) Marriage; (2) seisin of, and (3) death of, the husband.

Marriage. The marriage need not be a ceremonial marriage, as by a long-established local interpretation of the common law a contract of marriage *per verba de præsenti* is now as valid in New York as a marriage celebrated *in facie ecclesiæ*.[9]

A ceremonial marriage may be solemnized by the persons specified in "The Domestic Relations Law."[10]

Seisin. Seisin of the husband must be either in deed or in law.[11] It must be of a present freehold in possession as well as of

[1] *Supra*.

[2] 2 J. & V. 4; 1 R. L. 56.

[3] 1 R. S. 740, § 1.

[4] 2 J. & V. 4; Id. 67, 68.

[5] *Supra*, pp. 41, 49, 83.

[6] § 36.

[7] 2 J. & V. 4; 1 R. L. 56.

[8] Poor v. Horton, 15 Barb. 485. The term "seisin" or "seized" has undergone great change in modern law. Matter of Dodge, 105 N. Y. 585, 591, and see under §§ 280, 281, The Real Prop. Law, *infra*, and p. 83, *supra*.

[9] Fenton v. Reed, 4 Johns. 52; Van Gilder v. Post, 2 Edw. Ch. 577; Hynes v. The People, 25 N. Y. 390, 395; Hynes v. McDermott, 91 id. 451, 459; 2 Kent, Comm. 87. It is denied that this was the law of New York prior to independence of the Crown. Landerdale Peerages, 17 Abb. N. C. 439 and notes; S. C., L. R., 10 App. Cas. 692. *Cf.* Rose v. Clark, 8 Paige, 574, 579.

[10] Chap. 48, General Laws, § 11.

[11] Durando v. Durando, 23 N. Y. 331; Phelps v. Phelps, 143 id. 197; McIntyre v. Costello, 47 Hun, 289; Bisset, Estates for Life, 70. The term seisin has undergone great change in modern law. See under §§ 280, 281,

an estate of inheritance.[1] Therefore, when the husband has previously to his death, simply a reversion in fee, or a vested remainder expectant upon an estate for life, the widow is not endowed.[2] But where a remainderman purchases the intervening life estate his wife is endowed.[3] Dower cannot be had on a dower estate, or as it is said, "*dos de dote peti non debet.*"[4] But this maxim applies only where dower is actually assigned.[5] In the application of the maxim *dos de dote peti non debet*, Lord COKE made a distinction between a case where the husband of second dowress acquired by purchase, and one where he came in by descent,[6] a distinction denied when the purchase is not by deed but by devise.[7] Even before the Revised Statutes, the wife was not endowed of the husband's trust estate.[8] As equitable estates of *cestuis que trustent* were abolished by the Revised Statutes,[9] there could be no ground for claiming dower thereafter in the husband's trust interests.[10] But it has been held that under the Revised Statutes a widow is entitled to dower out of the descendible equitable interests in land where the husband died seised of such interests.[11] Otherwise of interests aliened before his death.[12] If the husband's estate is defeasible, or rescinded for fraud, the wife's inchoate right of dower is defeasible or defeated.[13] Where the husband holds as joint tenant, the possibility of the estate

The Real Prop. Law, *et supra*, p. 83.

[1] Safford v. Safford, 7 Johns. Ch. 259; Chamberlain v. Chamberlain, 43 N. Y. 424, 441; Phelps v. Phelps, 143 id. 197, 200.

[2] Durando v. Durando, 23 N. Y, 331; House v. Jackson, 50 id. 161; Dunham v. Osborn, 1 Paige, 634; Green v. Putnam, 1 Barb. 500; Beekman v. Hudson, 20 Wend. 53; Clark v. Clark, 84 Hun, 362; *vide supra*, p. 143, and compare Adair v. Lott, 3 Hill, 182.

[3] House v. Jackson, 50 N. Y. 161.

[4] 4 Rep. 122; Co. Litt. 31a; Park on Dower, 54; Dunham v. Osborn, 1 Paige, 634; Safford v. Safford, 7 id. 259; Durando v. Durando, 23 N. Y. 331, 334.

[5] Bisset, Estates for Life, 94; Park on Dower, 54, 157; Elwood v. Klock, 13 Barb. 50.

[6] Co. Litt. 31a; Park on Dower, 154; Matter of Cregier, 1 Barb. Ch. 98.

[7] Durando v. Durando, 23 N. Y. 331; Dunham v. Osborn, 1 Paige, 634.

[8] Germond v. Jones, 2 Hill, 569, 573; Hawley v. James, 5 Paige, 318, 452; Manhattan Co. v. Evertson, 6 id. 457, 460, 465.

[9] 1 R. S. 729, § 60; § 80, The Real Prop. Law.

[10] Revisers' notes to 1 R. S. 740, tit. 3.

[11] Hawley v. James, 5 Paige, 453, 454, 456; Matter of McKay, 5 Misc. Rep. 123.

[12] Hicks v. Stebbins, 3 Lans. 39.

[13] Scott v. Howard, 3 Barb. 319; Beardslee v. Beardslee, 5 id. 324; Warner v. Van Alstyne, 3 Paige, 513; Moriarta v. McRea, 45 Hun, 564; affd., 120 N. Y. 659; Hinchliffe v. Shea, 103 id. 153; Greene v. Reynolds,

being defeated by survivorship prevents dower.[1] So a mere transitory seisin in the husband is not sufficient to entitle wife to dower,[2] as where the husband takes a conveyance and instantly gives back a mortgage to the vendor.[3] To entitle a wife to dower, the same evidence of husband's seisin is necessary which would entitle his heir to maintain ejectment.[4]

Death of Husband. Death of the husband must occur before the estate of the wife can be vested. Until such death and assignment to her, her dower is only an inchoate right,[5] which, under some circumstances of fraud, etc., the law, however, recognizes and protects at her individual instance;[6] and this right entitles her to redeem mortgaged premises, where she was not served with process,[7] even if the mortgage was made before her marriage. After dower is assigned, the widow has a freehold estate in possession as of the husband's seisin.[9]

What Property Widow Endowed of. What property the widow may be endowed of is not otherwise defined than by the common law and by this statute, which provides as above, that she "shall be endowed of the third part of all the lands whereof her husband was seised," etc.[10] Elsewhere in this act this term "lands" is declared to be coextensive with lands, tenements and hereditaments.[11] By the common law the widow is endowed of mines

72 Hun, 565; Hammond v. Pennock, 61 N. Y. 145; House v. Jackson, 50 id. 161, 164; Brackett v. Baum, Id. 8; Williams v. Kinney, 43 Hun, 1; Weller v. Weller, 28 Barb. 588; Wilkinson v. Paddock, 57 Hun, 191.

[1] 4 Kent, Comm. 37; Smith v. Smith, 6 Lans. 313; Jourdan v. Haran, 56 N. Y. Super. Ct. 185.

[2] 4 Kent, Comm. 38; Stohlin v. Golding, 15 N. Y. St. Repr. 814; Brackett v. Baum, 50 N. Y. 8; De Lisle v. Herbs, 25 Hun, 485.

[3] Cunningham v. Knight, 1 Barb. 399; § 173, The Real Prop. Law.

[4] Jackson v. Waltermire, 5 Cow. 299; Bedlow v. Stillwell, 91 Hun, 384; and see Poor v. Horton, 15 Barb. 485.

[5] Lawrence v. Miller, 2 N. Y. 245; Moore v. The Mayor, etc., 8 id. 110; S. C., 4 Sandf. 456; Aikman v. Harsell, 98 N. Y. 186; Payne v. Becker, 87 id. 153; Simar v. Canaday, 53 id. 298; Witthaus v. Schack, 105 id. 332; McKeen v. Fish, 33 Hun, 28; Mut. Life Ins. Co. v. Shipman, 50 id. 578; S. C., 119 N. Y. 324.

[6] Simar v. Canaday, 53 N. Y. 298; Youngs v. Carter, 1 Abb. N. C. 136, note; Clifford v. Kempfe, 147 N. Y. 383, 386.

[7] Taggart v. Rogers, 49 Hun, 265.

[8] Bell v. Mayor, etc., of New York, 10 Paige, 49. *Cf.* 21 Hun, 36, 44; 8 Barb. 618.

[9] Gibbs v. Esty, 22 Hun, 266; Lawrence v. Brown, 5 N. Y. 394, 400; Challis, 187.

[10] See § 170, *supra*, The Real Prop. Law.

[11] § 1, The Real Prop. Law; 4 Kent, Comm. 40; Moriarta v. McRea, 45 Hun, 564.

wrought during coverture, but not of mines unopened;[1] of a pier;[2] of an interest in a lease made by Seneca Indians;[3] in land subject to perpetual lease,[4] but not in lands which husband held as tenant *pur autre vie;* they go to the husband's executor, or administrator.[5] A widow is endowed of a perpetual rent,[6] but not of a perpetual lease.[7] The general test of what tenements are subject to dower is to inquire whether the widow's issue, if any, would have been entitled to inherit them from the husband as his heir. If they are so entitled, she is endowed.[8] She is entitled to dower in the husband's equity of redemption of lands mortgaged before coverture,[9] and in the surplus moneys arising in a foreclosure sale, even though she joined in the mortgage which stipulated that the surplus should be paid to the husband or those claiming under him.[10] But she is not endowed of an estate which the husband held jointly as trustee, or singly as sole surviving trustee.[11] The dower which the widow is entitled to in lands alienated by her husband during coverture is one-third of the value at the time of alienation.[12]

Maxim, "Dower is Favored." Dower is always highly favored in the law.[13]

[1] Coates v. Cheever, 1 Cow. 460, 478. A mine a hereditament. Matter of Hoysradt, 20 Misc. Rep. 265, 270.

[2] Bedlow v. Stillwell, 91 Hun, 384.

[3] Matter of McKay, 5 Misc. Rep. 123.

[4] Moriarta v. McRea, 45 Hun, 564. *Cf.* Williams v. Cox, 3 Edw. Ch. 178.

[5] § 24, The Real Prop. Law; 2 R. S. 82, § 6. *Cf.* Gillis v. Brown, 5 Cow. 388.

[6] Williams v. Cox, 3 Edw. Ch. 178. *Cf.* Moriarta v. McRea, 45 Hun, 564.

[7] Finn v. Sleight, 8 Barb. 401. 2 Black. Comm. 131.

[8] § 172, The Real Prop. Law. Unless he released the equity of redemption to the mortgagee. Jackson v. De Witt, 6 Cow. 316; Van Dyke v. Thayre, 19 Wend. 162.

[9] N. Y. Life Ins. Co. v. Mayer, 12 N. Y. St. Repr. 119, affg. 19 Abb. N. C. 92, 103; Denton v. Nanny, 8 Barb. 418; Hawley v. Bradford, 9 Paige, 200; Vartie v. Underwood, 18 Barb. 561. *Cf.* Bank of Ogdensburgh v. Arnold, 5 Paige, 38, as to dower in equity before foreclosure; and Frost v. Peacock, 4 Edw. Ch. 678, where husband dies after confirmation of sale. *Sed cf.* Matthews v. Duryee, 4 Keyes, 525.

[10] § 91, The Real Prop. Law; Cooper v. Whitney, 3 Hill, 95, 101; Terrett v. Crombie, 6 Lans. 82; Gomez v. The Tradesmen's Bank, 4 Sandf. 102.

[11] Walker v. Schuyler, 10 Wend. 480; Van Gelder v. Post, 2 Edw. Ch. 577, 579.

[12] Konvalinka v. Schlegel, 104 N. Y. 125, 129; Lasher v. Lasher, 13 Barb. 106; Leonard v. Steele, 4 id. 20; Gray v. Gray, 5 App. Div. 132; Hindley v. Hindley, 29 Hun, 318; Fern v. Osterhout, 11 App. Div. 319. *Cf.* Nelson v. Brown, 144 N. Y. 384, 391.

Remedy if Dower not Assigned. By the common law the widow's remedy for not assigning her dower was a writ of dower *unde nihil habet*;[1] but if part was assigned and part only deforced, then she had recourse to the writ of right of dower.[2] The ancient English statutes concerning remedies for deforcement of dower were re-enacted in 1787, among the English statutes extending to New York, and adopted by the first State Constitution.[3] The form of the writ is set out in the statute of 1787, which was several times re-enacted in later revisions.[4] In April, 1806, the widow was given a more speedy remedy in the Supreme, County and Surrogates' Courts,[5] in cases where dower was not assigned to her during her quarantine.[6] The Revised Statutes abolished the writ of dower[7] and substituted an action of ejectment,[8] continuing, however, the jurisdiction in the Surrogates' and the County Courts by petition.[9] Under the Code of Procedure the proceeding for the admeasurement of dower might be by petition or by an action.[10] Since 1880 the Code of Civil Procedure has confirmed and regulated the widow's action for dower.[11] Proceedings to admeasure dower, a remedy once generally confined to the heir in cases where he assigned the widow too much,[12] have since the statute of 1806[13] partially, and 1880 wholly, taken the place of the older remedies indicated above.

Period in which Dower may be Demanded. The Revised Statutes shortened the period in which the widow might demand dower, confining it to twenty years,[14] and, revising the statute of 1806 concerning admeasurement of dower, prescribed the proceedings with great particularity.[15]

Remedy in Equity. Besides the proceedings at law indicated, the widow had always a right to resort to equity to recover her

[1] Fitz Herbert, *Natura Brevium*, 147.

[2] Id. 7; 3 Black. Comm. 183.

[3] 2 J. & V. 4; Const. of 1777, § 35.

[4] 1 K. & R. 51; 1 R. L. 56.

[5] 1 R. L. 60, 62.

[6] *Cf. infra*, § 184, The Real Prop. Law.

[7] 2 R. S. 343, § 24.

[8] 2 R. S. 303, § 2.

[9] 2 R. S. 488.

[10] 1 Crary Special Proceedings, 1; 2 id. 317; §§ 2, 30, 307, Code of Proc.; Brown v. Brown, 31 How. Pr. 481, 499; Townsend v. Townsend, 2 Sandf. 711.

[11] §§ 1596–1625; chap. 245, Laws of 1880; repealing 2 R. S. 488, *seq.* (Tit. 7, chap. 8, part 3).

[12] Fitz Herbert, *Natura Brevium*, 148; 2 J. & V. 5.

[13] See the statute, cited *supra*, 1 R. L. 60.

[14] 1 R. S. 742, § 18, and Revisers' note to same; Code Civ. Proc. § 1596.

[15] 2 R. S. 488, *seq.*; now repealed, chap. 245, Laws of 1880, and em-

dower, where impediments were thrown in the way of the legal proceedings.[1]

Law of Dower. The substantive parts of the law of dower are now contained in this act,[2] and are largely declaratory of the common law.[3] The adjective, or remedial, parts of the law are now embodied for the time being in the Code of Civil Procedure,[4] as stated above under this section.

bodied in Code Civ. Proc. §§ 1596–1625.

[1] Swaine v. Perrine, 5 Johns. Ch. 482; Townsend v. Townsend, 2 Sandf. 711; Phelps v. Phelps, 143 N. Y. 197.

[2] The Real Prop. Law, art. V.

[3] House v. Jackson, 50 N. Y. 161, 164; Price v. Price, 124 id. 589, 596.

[4] §§ 1596–1625; Fiero on Special Actions, chap. 3.

§ 171. **Dower in lands exchanged.**— If a husband seized of an estate of inheritance in lands, exchanges them for other lands, his widow shall not have dower of both, but she must make her election, to be endowed of the lands given, or of those taken, in exchange; and if her election be not evinced by the commencement of an action to recover her dower of the lands given in exchange, within one year after the death of her husband, she is deemed to have elected to take her dower of the lands received in exchange.

Formerly 1 Revised Statutes, 740, section 3:

§ 3. If a husband, seized of an estate of inheritance in lands, exchanges them for other lands, his widow shall not have dower of both, but shall make her election, to be endowed of the lands given, or of those taken, in exchange; 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.[1]

Section 171, Supra. This section is declaratory of the common law,[2] excepting the latter clause, which is new.[3] It has been held that the word "exchange" in this section is to receive the same interpretation which was applied to it when used at common law.[4] By the common law, exchange was a recognized original conveyance,[5] the one in consideration of the other. The estates exchanged must be equal in quantity, not of value, but of interest, as fee simple for fee simple.[6] Prior to the Statute of Frauds, neither livery of seisin nor a deed was necessary to an exchange, but it was executed by the entry of the parties.[7] Since the Statute of Frauds the exchange must be by deed in writing,[8] and this is so in New York, at least since the Revised Statutes.[9] As all tenants in common have a right to demand partition and to equalize their shares by interchanging deeds, the wife's right to dower may fall under this section in such a case. A wife's inchoate right of dower is not paramount to the right of her husband's co-tenant to compel partition.[10]

[1] Repealed, chap. 547, Laws of 1896.

[2] Co. Litt. 31b.

[3] Revisers' note to the original section, 1 R. S. 740, § 3.

[4] Wilcox v. Randall, 7 Barb. 633; 1 Sharswood & Budd, Lead. Cas. Real Prop. 346.

[5] 2 Black. Comm. 310.

[6] 2 Black. Comm. 323; Wilcox v. Randall, 7 Barb. 633.

[7] 2 Black. Comm. 323.

[8] Cruise, Dig. tit. 32, chap. 6, § 7.

[9] 2 R. S. 134, § 6; § 207, The Real Prop. Law; Huntington v. Huntington, 9 Civ. Proc. 182.

[10] Huntington v. Huntington, 9 Civ. Proc. 182; Jordan v. Van Epps, 85 N. Y. 427.

§ 172. **Dower in lands mortgaged before marriage.**— Where a person seized of an estate of inheritance in lands, executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him.

Formerly 1 Revised Statutes, 740, section 4:

§ 4. 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 out of the lands mortgaged, as against every person except the mortgagee and those claiming under him.[1]

The Revised Statutes. This section of the Revised Statutes stated the pre-existing law of New York. Where a man, seized of mortgaged land in fee, marries and dies, his widow is entitled to dower out of the equity of redemption.[2] In this State the equity of redemption has long been regarded as the legal estate, devisable by will, and alienable by deed, in all respects as if it were an absolute inheritance at law.[3] The mortgagor was soon regarded as seized of the estate, at least before foreclosure or entry, so as to entitle his widow to dower.[4] For this reason the expression "mortgagor's equity of redemption" has been criticized as inapplicable to this country.[5] But it seems to express aptly the continued right of an owner, who holds an estate subject to a mortgage, to redeem it. The departure of the New York law from the English law of mortgage, which treats a mortgage as a conveyance, confirms the widow's local right to dower in mortgaged lands of her husband.[6]

Section 172, Supra. But this section is not applicable to the case of a husband's purchase-money mortgage, where the seisin is transitory. That case falls under another rule.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] Note of Revisers to 1 R. S. 740, § 4, citing Coles v. Coles, 15 Johns. 319, and see Smith v. Gardner, 42 Barb. 356; Denton v. Nanny, 8 id. 618; Ulrich v. Ulrich, 17 N. Y. St. Repr. 414.

[3] Waters v. Stewart, 1 Cai. Cas. 47.

[4] Hitchcock v. Harrington, 6 Johns. 290; Brackett v. Baum, 50 N. Y. 8, 11.

[5] Brief of counsel in Smith v. Gardner, 42 Barb. at p. 357.

[6] See citations Hist. Real Prop. in N. Y., pp. 88, 121.

[7] § 173, The Real Prop. Law; Cunningham v. Knight, 1 Barb. 399; Mills v. Van Voorhies, 20 N. Y. 412, 417; Brackett v. Baum, 50 id. 8. *Sed cf.* Blydenburgh v. Northrop, 13 How Pr. 289.

§ 173. **Dower in lands mortgaged for purchase money.**—Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase-money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person.

Formerly 1 Revised Statutes, 740, section 5:

§ 5. Where a husband shall purchase lands during coverture, and shall at the same time mortgage his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands, 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.[1]

Observation on this Enactment. The original section of the Revised Statutes was conformed to Stow v. Tifft (15 Johns. 458), in which the court were divided, the chief justice being of the opinion that the husband's instantaneous seisin was sufficient to cause the wife's dower inchoate to attach and defeat the purchase-money mortgage to the extent of one-third of the land.[2] The original section of the Revised Statutes determined that controversy in favor of the mortgagee.[3]

As to Other than Purchase-money Mortgagees. But as to all others besides the purchase-money mortgagees the wife has dower,[4] and if the mortgagees enter the wife may redeem.[5] The purchase-money mortgage need not, under this section, necessarily be given to the vendor, but is valid in the hands of a third person furnishing the consideration.[6] If the foreclosure is by suit, and the wife is not made party, she may redeem after decree, her right in the equity of redemption not being affected.[7] Where the foreclosure and sale are statutory under a power of sale contained in a pur-

[1] Repealed, chap. 547, Laws of 1896.

[2] Revisers' note to 1 R. S. 740, § 5.

[3] Mills v. Van Voorhies, 20 N. Y. 412.

[4] Bell v. Mayor of New York, 10 Paige, 49; De Lisle v. Herbs, 25 Hun, 485; but not vendors for lien, *vide infra*.

[5] Bell v. Mayor of New York, 10 Paige, 49; House v. House, Id. 158; Mills v. Van Voorhies, 20 N. Y. 412.

[6] Kittle v. Van Dyck, 1 Sandf. Ch. 76; Boies v. Benham, 127 N. Y. 620, 624; Sheldon v Hoffnagle, 51 Hun, 478; Taggart v. Rogers, 49 id. 265; 34 N. Y. St. Repr. 942; Campbell v. Ellwanger, 81 Hun, 259.

[7] Mills v. Van Voorhies, 20 N. Y. 412.

chase-money mortgage, the right of dower of the wife, who was not a party to the mortgage, is barred.[1]

Dower Subject to Vendor's Lien. The widow of a purchaser takes her dower in the land subject to the equitable lien of the vendor for unpaid purchase money.[2]

Dower in Surplus Moneys. The wife has dower in the surplus moneys arising on sale under such a purchase-money mortgage, even as against husband's creditors.[3]

[1] Brackett v. Baum, 50 N. Y. 8. *Cf.* Revisers' note to 1 R. S. 741, § 6.

[2] Warner v. Van Alstyne, 3 Paige, 513; cited, Chase v. Peck, 21 N. Y. 581, 584. *Cf.* Dodge v. Manning, 19 App. Div. 29.

[3] § 174, The Real Prop. Law; Vartie v. Underwood, 18 Barb. 561; Denton v. Nanny, 8 id. 618; Blydenburgh v. Northrop, 13 How. Pr. 289; Matthews v. Duryee, 45 Barb. 69.

§ 174. **Surplus proceeds of sale, under purchase-money mortgages.**— Where, in a case specified in the last section, the mortgagee, or a person claiming under him, causes the land mortgaged to be sold, after the death of the husband, either under a power of sale contained in the mortgage, or by virtue of a judgment in an action to foreclose the mortgage, and any surplus remains, after payment of the money due on the mortgage and the costs and charges of the sale, the widow is nevertheless entitled to the interest or income of one-third part of the surplus for her life, as her dower.

Formerly 1 Revised Statutes, 741, section 6:

§ 6. Where, in such case, the mortgagee, or those claiming under him, shall, after the death of the husband of such widow, cause the land mortgaged to be sold, either under a power of sale contained in the mortgage, or by virtue of the decree of a court of equity, and any surplus shall remain, after payment of the monies due on such mortgage and the costs and charges of the sale, such widow shall nevertheless be entitled to the interest or income of the one-third part of such surplus, for her life, as her dower.[1]

Reason of this Enactment. The original revisers say that the rule stated in this section prevailed in Chancery, but not when the sale was under a power, although the equity was the same.[2] Since the Revised Statutes, this divergence is reconciled, and no matter in which way the surplus arises, the widow is endowed.[3] The section applies only to a sale after the death of the husband, and not a sale in the lifetime of the husband.[4] In Brackett v. Baum it is said: This section "contains no express declaration that the sale under the power shall bar the dower of the wife, even in the case mentioned; but the plain import of the language is to assume that such would be the effect of the sale." The section immediately preceding, "provides that when the mortgage is given by the husband for purchase money, the widow shall not be entitled to dower in the land as against the mortgagee and those claiming under him, though she shall not have united in the mortgage. * * *" But no provision is made for the case of a sale in the lifetime of the husband. It was, however, held that a statutory foreclosure and sale under a power of sale, contained in a purchase-money mortgage, bars the right of dower of the wife of the mortgagor, when not a party to the mortgage.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] Revisers' note to 1 R. S. 741, § 6.

[3] Denton v. Nanny, 8 Barb. 618; Vartie v. Underwood, 18 id. 561; Matthews v. Duryee, 45 id. 69; Blydenburgh v. Northrop, 13 How. Pr. 289.

[4] Brackett v. Baum, 50 N. Y. 8, 11.

[5] Brackett v. Baum, Id. *supra*.

§ 175. **Widow of mortgagee not endowed.**— A widow shall not be endowed of the lands conveyed to her husband by way of mortgage, unless he acquires an absolute estate therein, during the marriage.

Formerly 1 Revised Statutes, 741, section 7:

§ 7. A widow shall not be endowed of lands conveyed to her husband by way of mortgage, unless he acquire an absolute estate therein, during the marriage.[1]

Reason for Section 175. When this original section was drawn, it had been finally decided in New York that in both law and equity a mortgage was a mere security, and that even after default the mortgagee had not the legal estate, but a mere chattel interest.[2] As a mortgagor's widow had dower in the equity of redemption and the mortgagee's interest was only a chattel, the wisdom of this provision of the statute has never been questioned.

Mortgagee in Possession. Even where the mortgagee takes possession and then dies, such possession is but an incident and part of the security.[3] Such a possession cannot be said to be a "seisin" of the husband which entitles the widow to dower, within the existing law of dower. When the Legislature took away the remedy of ejectment from a mortgagee, they probably intended to sweep away the only remaining vestige of the common law which regarded a mortgage as a conveyance of a freehold.[4] The intention being that a mortgage in this State should be a security and not a conveyance, it is difficult to perceive why the possession of the mortgagee should better the widow's claim to dower in the freehold.

[1] Repealed, chap. 547, Laws of 1896.

[2] Revisers' note to 1 R. S. 741, § 7, citing Jackson ex dem., etc., v. Willard, 4 Johns. 41; Collins v. Torrey, 7 id. 278; Runyan v. Mesereau, Jr., 11 id. 534; Coles v. Coles, 15 id. 319.

[3] Kortright v. Cady, 21 N. Y. 343, 364, 365.

[4] Kortright v. Cady, Id. *supra.*

§ 176. **When dower barred by misconduct.**— In case of a divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

Formerly 1 Revised Statutes, 741, section 8:

§ 8. In case of divorce, dissolving the marriage contract, for the misconduct of the wife, she shall not be endowed.[1]

History of this Provision. By the Statute of Westminister II,[2] if a wife abandoned her husband and lived with her adulterer she was barred of her dower if convict, except her husband reconciled her.[3] So, if she were ravished and after such rape consented to the ravisher, she lost her dower, and after the death of the husband, his heir might enter.[4] Both these ancient acts extended to the province of New York, and after independence were re-enacted among those laws of the province or England continued here by force of the Constitution.[5] But otherwise than as specified in those acts adultery was not a bar of dower unless followed by a divorce *a vinculo matrimonii*.[6] Such divorces were granted in England originally only by act of Parliament.[7]

Divorces in New York. It has been held judicially, although denied historically, that divorces *a vinculo matrimonii* could not be granted by any authority in the province of New York.[8] Nor could they be granted in the State prior to the year 1787, when an act allowing divorces in cases of adultery was passed.[9] Yet, as it has been said, in conformity with Dutch law, divorces *a vinculo matrimonii* were at first granted in the province of New York.[10] But be that as it may, after the act of 1787, all divorces *a vinculo matrimonii* were referred by the courts to the authority of that act,[11] and it was even denied that the ecclesiastical jurisdiction to grant limited divorces, or divorces *a mensa et thoro*, or to

[1] Repealed, chap. 547, Laws of 1896.

[2] 13 Edw. I, chap. 34; 2 Inst. 433.

[3] Reynolds v. Reynolds, 24 Wend. 193. The act, 13 Edw. I, chap. 34, seems to have been re-enacted in the Duke of York's Laws for New York in 1665, title "Doweyes."

[4] 6 Rich. II, stat. 1, chap. 6.

[5] Const. of 1777, § 35; 2 J. & V. 4; 1 K. & R. 51; 1 R. L. 56.

[6] Reynolds v. Reynolds, 24 Wend. at p. 194; Co. Litt. 32a, and Mr. Hargrave's note, 194.

[7] 1 Black. Comm. 441.

[8] Forrest v. Forrest, 25 N. Y. 501, 506; Griffin v. Griffin, 47 id. 134, 138.

[9] 2 J. & V. 133; 1 K. & R. 93; 1 R. L. 197; Erkenbach v. Erkenbach, 96 N. Y. 456.

[10] Record of Court of Assizes, 316, 318, 319, 519; Burtis v. Burtis, Hopk. 557, 563.

[11] Erkenbach v. Erkenbach, 96 N. Y. 456; Griffin v. Griffin, 47 id. 134, 138; Forrest v. Forrest, 25 id. 501, 506.

dissolve a marriage by reason of a canonical disability, existed here at all.[1] But in 1824 an act was passed permitting limited divorces in certain cases.[2] There was, however, a jurisdiction in the State courts independent of statute, to declare a marriage void *ab initio* for fraud or lunacy.[3] But the sentence in the last class of cases was not a divorce, but that there was no marriage between the parties, and, therefore, the maxim "*Ubi nullum matrimonium ibi nulla dos*" applied in all such cases, and there was no dower because no marriage.[4]

Dower not Barred by Wife's Misconduct but by Decree against Her. Since the Revised Statutes in 1830, adultery, the wife's abandonment of the husband and her living with the adulterer, or her consent to the ravisher after a rape, do not forfeit dower, unless the woman has been divorced therefor by a decree *a vinculo matrimonii*, the former laws to the contrary being repealed.[5] The action for a divorce is now wholly regulated by statute in New York,[6] and, in order to bar dower, the divorce must be a divorce *a vinculo matrimonii*, and on the statutory ground.[7] When the woman forfeits dower, she forfeits all other pecuniary provisions made for her.[8]

Husband's Misconduct. A divorce *a vinculo matrimonii* granted the wife for misconduct of the husband, does not forfeit the wife's dower,[9] nor does a divorce *a mensa et thoro* forfeit any right of property arising through the conjugal relation.[10]

Wife's Absence, Effect of. While a wife's continuous absence for five years, without her husband's knowledge of her being alive, may

[1] Burtis v. Burtis, Hopk. 557; Perry v. Perry, 2 Paige, 501; Jones v. Jones, 90 Hun, 414. *Cf.* Campbell v. Crampton, 8 Abb. N. C. 363.

[2] Chap. 205, Laws of 1824; Perry v. Perry, 2 Barb. Ch. 311; Perry v. Perry, 2 Paige, 501. *Cf.* Code Civ. Proc. §§ 1762, 1767.

[3] Griffin v. Griffin, 47 N. Y. at p. 138; Weightman v. Weightman, 4 Johns. Ch. 343; Ferlat v. Gojon, Hopk. 478.

[4] Price v. Price, 124 N. Y. 589; § 1754, Code Civ. Proc.; §§ 3, 4, The Domestic Relations Law.

[5] 1 R. S. 741, § 8; 2 id. 146, § 48; Reynolds v. Reynolds, 24 Wend. 193; Pitts v. Pitts, 52 N. Y. 593; Schiffer v. Pruden, 64 id. 47, 49; Van Cleaf v. Burns, 118 id. 549; Cooper v. Whitney, 3 Hill. 95.

[6] Code Civ. Proc. chap. XV, art. II, §§ 1756–1761.

[7] Pitts v. Pitts, 52 N. Y. 593; Code Civ. Proc. §§ 1756, 1760; Van Cleaf v. Burns, 133 N. Y. 540; 2 R. S. 146, § 48; Day v. West, 2 Edw. Ch. 592.

[8] § 182, The Real Prop. Law.

[9] § 1759, Code Civ. Proc.; Wait v. Wait, 4 N. Y. 95; Price v. Price, 124 id. 589, 599. *Cf.* Barrett v. Failing, 111 U. S. 523, 525; and as to personalty, see Matter of Ensign, 103 N. Y. 284.

[10] Day v. West, 2 Edw. Ch. 592.

prevent his second marriage from being bigamy,[1] yet such second marriage does not deprive the wife of dower, or entitle the woman last married to dower, though she entered into the supposed marriage relation in entire good faith.[2]

Divorce in Other States, Effect of. In several other aspects it is still a question how far a divorce *a vinculo matrimonii*, granted by the courts of other States, bars dower in this State, when the matrimonial domicile is in this State.[3]

Effect of Divorce on Wife's Separate Property in Former Husband's Hands. A divorce *a vinculo matrimonii*, obtained by the wife, has no effect upon her estate or property left in his hands by her. They continue her sole estate.[4] So, where husband and wife held as tenants by entireties, and are divorced *a vinculo matrimonii*, the tenancy is severed ; each takes a proportionate share of the property as a tenant in common.[5]

Effect of Divorce by Courts of Other States for Causes not Allowed Here. A divorce *a vinculo matrimonii*, rendered by the courts of another State for a cause not regarded as adequate by the laws of this State, will not deprive the wife of her dower in this State.[6] A divorce rendered in another State against a resident of this State, where there was no personal service, and no personal appearance within the State rendering it, is void in this State.[7]

[1] 2 R. S. 687, § 9; Penal Code, § 299; and see history of these laws, 124 N. Y. at p. 596.

[2] Price v. Price, 124 N. Y. 589; Spies v. Spies, 16 Abb. Pr. (N. S.) 112; Rundle v. Van Inwegan, 9 Civ. Proc. 328.

[3] 30 Amer. Law Rev. 612. And see second paragraph below.

[4] 2 R. S. 146, § 46; 2 R. L. 199, § 6.

[5] Stetz v. Shreck, 128 N. Y. 263.

[6] Van Cleaf v. Burns, 118 N. Y. 549; 133 id. 540. *Cf.* Barrett v. Failing, 111 U. S. 523; Denick v. Denick, 92 Hun, 161; Campbell v. Campbell, 90 id. 233.

[7] Williams v. Williams, 130 N. Y. 193; Bell v. Bell, 4 App. Div. 527; People v. Karlsioe, 1 id. 571.

§ 177. **When dower barred by jointure.**— Where an estate in real property is conveyed to a person and his intended wife, or to the intended wife alone, or to a person in trust for them or for the intended wife alone, for the purpose of creating a jointure for her, and with her assent, the jointure bars her right or claim of dower in all the lands of the husband. The assent of the wife to such a jointure is evidenced, if she be of full age, by her becoming a party to the conveyance by which it is settled; if she be a minor, by her joining with her father or guardian in that conveyance.

Formerly 1 Revised Statutes, 741, sections 9, 10:

§ 9. Whenever an estate in lands shall be conveyed to a person and his intended wife, or to such intended wife alone, or to any person in trust for such person and his intended wife, or in trust for such wife alone, for the purpose of creating a jointure for such intended wife, and with her assent, such jointure shall be a bar to any right or claim of dower of such wife, in any lands of the husband.[1]

§ 10. The assent of the wife to such jointure shall be evidenced, if she be of full age, by her becoming a party to the conveyance by which it shall be settled; if she be an infant, by her joining with her father or guardian in such conveyance.[2]

Common Law. At common law, as no right could be barred till it accrued, and no right to an estate of freehold could be barred by a collateral satisfaction, it was impossible to bar dower by any assurance either before or during marriage.[3] To avoid this consequence, estates were commonly conveyed to uses, a widow not being dowable of a use.[4]

Jointure. It was a common practice before the Statute of Uses (27 Henry VIII) to provide for the wife by a settlement or by an estate held to the joint use of herself and husband. When the Statute of Uses fastened the legal estate to the use, the effect of such union would have been to endow the wife of all the husband's estate, leaving her also her separate provision, had the 6th section of that statute not taken this fact into consideration, and provided that where a "jointure" was made she should not claim or have title to dower.[5] From this statute arose the modern "jointure."[6] But as the statute was in derogation of the common law it was construed strictly, and, as Lord COKE stated, to bar a wife's dower

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] Cruise, Dig. tit. 7, chap. 1, § 1.
[4] Atherly, Marriage Settlements, 501, and see Sugden's note to Gilbert on Uses (Lond. ed. of 1811), 321.
[5] 27 Hen. VIII, chap. 10.
[6] 1 Roper, Husband & Wife, 462.

by a jointure five facts must concur: (1) The jointure must take effect immediately on the husband's death. (2) It must be an estate for her life or a greater estate. (3) It must be made to her and not in trust for her. (4) It must be in satisfaction of the whole dower and not of a part. (5) It must be averred to be in satisfaction of dower. It might be made either before or after marriage.[1] In the construction of the Statute of Wills, courts of law regulated their decisions upon the validity of jointures, in reference to the widow's title to dower. As to time of commencement, certainty, interest, etc., they have required the jointure to be as beneficial to the widow as her dower. If this object was effected, the jointure might be limited by any conveyance, though the statute expressly mentioned five forms: (1) To the husband and wife and to the heirs of the husband; (2) to the husband and wife and to the heirs of their two bodies; (3) to the husband and wife and to the heirs of the body of one of them; (4) to the husband and wife for lives; (5) to the husband and wife for the life of the wife.[2] The intending wife's assent was not necessary to a legal jointure, if it corresponded with the requirements denoted.[3] But if the settlement was made after marriage, the jointure might be refused by the wife on the death of the husband, unless it was made by act of Parliament.[4]

"Jointure" in New York. The Statute of Uses being in force in the province of New York was adopted by the first State Constitution,[5] and in 1787 it was revised among the English statutes extending here and re-enacted as a statute of the State.[6] The 6th and 9th sections of the English Statute of Uses were, however, in New York then placed in a separate "act concerning dower."[7] As thus re-enacted, these provisions of the Statute of Uses received the same construction accorded them in England, and a jointure barred dower here, as there.[8] Before the Revised Statutes the assent of the intending wife was not necessary to a legal jointure to bar dower. The legal jointure then derived its effect from the Statute of Uses.[9]

[1] Co. Litt. 36b.

[2] 1 Roper, Husband & Wife, 463.

[3] *Vide infra.*

[4] 27 Hen. VIII, chap. 10, § 9.

[5] Const. of 1777, § 35.

[6] 2 J. & V. 68; 1 K. & R. 66; 1 R. L. 72; 4 Kent, Comm. 56.

[7] 2 J. & V. 4, §§ 8, 9; 1 K. & R. 51; 1 R. L. 56; McCartee v. Teller, 8 Wend. at p. 275.

[8] McCartee v. Teller, 2 Paige, 511; affd., 8 Wend. 267; Swaine v. Perrine, 5 Johns. Ch. 482.

[9] 27 Hen. VIII, chap. 10, § 6; 1 Roper, Husband & Wife, 475; 1 R. L. 56; McCartee v. Teller, 2 Paige,

The Revised Statutes. The Revised Statutes and the repeal of the old Statutes of Uses and Dower made the actual assent of the intending wife or her guardian or parent necessary to both a legal and equitable jointure, or ante-nuptial settlement, to bar dower,[1] and The Real Property Law makes no change in this respect.[2]

Contracts before Marriage. Contracts made between intending spouses before marriage now remain in full force after their marriage.

Infant Female's Assent. The provision of the statute that an infant female's assent should be made by her joining with her father or guardian was not entirely new, as it was thought that a legal or equitable jointure should be on notice to these same persons to bind an infant at a time when the intending wife's assent was not deemed necessary to a valid jointure.[4] Without the assent of parent or guardian an infant may not bar her dower.[5]

511, 559; affd., 8 Wend. 267; 4 Kent, Comm. 55; Cruise, Dig. tit. 7, chap. 1, § 37.

[1] 1 R. S. 741, §§ 9, 10.

[2] *Supra*, § 177; and 179, The Real Prop. Law.

[3] Chap. 375, Laws of 1849; now § 23, The Domestic Relations Law; chap. 48, General Laws; Wright v. Wright, 54 N. Y. 437, 442; Matter of Young v. Hicks, 92 id. 235.

[4] Cruise, Dig. tit. 7, chap. 1, § 38; Drury v. Drury, 2 Eden, 65, 66; 1 Roper, Husband & Wife, 486, note.

[5] Cunningham v. Knight, 1 Barb. 399. See as to ante-nuptial settlement by infant of her own estate: Bool v. Mix, 17 Wend. 119; Temple v. Hawley, 1 Sandf. Ch. 153; Strong v. Wilkins, 1 Barb. Ch. 9; Wetmore v. Kessam, 3 Bosw. 334; McIlvaine v. Kadel, 30 How. Pr. 193.

§ 178. **When dower barred by pecuniary provisions.**— Any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her as prescribed in the last section, bars her right or claim of dower in all the lands of her husband.

Formerly 1 Revised Statutes, 741, section 11:

§ 11. Any pecuniary provision that shall be made for the benefit of an intended wife and in lieu of dower, shall, if assented to by such intended wife, as above provided, be a bar to any right or claim of dower of such wife in all the lands of her husband.[1]

Ante-nuptial Provision Bars Dower. The 6th section of the English Statute of Uses,[2] which was re-enacted in the 8th section of the original New York "Statute on Dower,"[3] provided for legal jointures as stated in the remarks on the last preceding section.[4] With the growth of equity jurisprudence the intending wife might be barred of her dower in equity by an ante-nuptial settlement, and the provision thus made was called an "equitable jointure" and operated as an "equitable bar" to dower,[5] although an equitable jointure never barred 'dower" at law; the bar was enforced only in equity, and if the wife were evicted of her equitable jointure equity would not interfere to deprive her of her dower.[6] The original revisers of the New York statutes, taking equitable bars into consideration, made any pecuniary provision, duly assented to by the intending wife, a bar to dower both at law and in equity.[7]

Amount of the Provision. Prior to the Revised Statutes there was much uncertainty as to the amount of the property necessary to satisfy the Statute of Uses and operate as a legal jointure and especially in the case of an infant wife whose assent could hardly be presumed,[8] even if a wife's consent was ever necessary under

[1] Repealed, chap. 547, Laws of 1896.

[2] 27 Hen. VIII, chap. 10.

[3] 2 J. & V. 4; 1 K. & R. 51; 1 R. L. 56.

[4] § 177, The Real Prop. Law, *supra*, pp.

[5] Lord Hardwicke, in Hervey v. Hervey, 1 Atk. 562, 563; 4 Kent, Comm. 55.

[6] 1 Roper, Husband & Wife, 486; Atherly, Marriage Settlements, 553. *Cf.* Swaine v. Perrine, 5 Johns. Ch. 482, 489.

[7] Revisers' note to 1 R. S. 741, § 11, and 1 R. S. 741, § 12, now §§ 178, 179, The Real Prop. Law.

[8] See notes to 1 Roper, Husband & Wife, 462, 479. But if the jointure was illusory or fraudulent equity would relieve against it. Wilmot's Opins. 194; Cruise, Dig. tit. 7, chap. 1, § 38; 3 Atk. 312.

the Statute of Uses, as was denied.[1] The revisers in New York carefully provided for the intending wife's assent, but left the amount of the provision to bar dower to the agreement of the parties.[2]

Nature of the Agreement to Bar Dower. The precise nature of the agreement necessary to bar dower should always be considered.[3] The consideration need not now be made for the wife's benefit, through the medium of a trustee, as, since the "Married Women's Acts," the wife retains the custody and the dominion over her separate estate, and, therefore, the executed consideration of the ante-nuptial agreement remains hers after marriage and does not become the husband's again when the marriage takes place.[4] While such an agreement between intending spouses will now be sustained, if fairly made,[5] yet from the confidential relations of the parties it will be regarded with the most rigid scrutiny.[6] The agreement must be in writing.[7] It should be founded on some pecuniary provision for the benefit of the intended wife,[8] and be made by her with full knowledge of the surrounding circumstances.[9] It is safer that the intending wife should have independent legal advice.[10] The agreement should expressly state that the pecuniary provision for her is in lieu of, and in satisfaction of, all her claim and title to dower.[11] It should be specific in its description of the estate affected, if it is intended to secure the consideration by a charge or lien.[12]

[1] Drury v. Drury, in the House of Lords, reported at end of McCartee v. Teller, 8 Wend. 267, 297.

[2] 1 R. S. 741, §§ 10, 11, now §§ 177, 178, The Real Prop. Law. See Revisers' note, 1 R. S. 741, § 11, and Lewis v. Smith, 9 N. Y. at p. 511, on a kindred point.

[3] *Cf.* Wadhams v. Amer. Home Miss. Soc., 12 N. Y. at p. 422; Dillaye v. Greenough, 45 id. 438.

[4] See the Married Women's Acts, note 11, p. 339, *supra*, and Wood v. Wood, 83 N. Y. 575; Jones v. Fleming, 104 id. 418, 431, and §§ 20, 21, 26, The Domestic Relations Law.

[5] Matter of Young v. Hicks, 92 N. Y. 235. See the agreement set out in this case and in Carpenter v. Carpenter, 40 Hun, 263.

[6] Pierce v. Pierce, 71 N. Y. 154; Graham v. Graham, 143 id. 573.

[7] § 207, The Real Prop. Law. See as to oral equitable agreements in equity actions, Lowry v. Smith, 9 Hun, 514.

[8] Graham v. Graham, 143 N. Y. 573, 580; S. C., 67 Hun, 329; Crain v. Cavana, 36 Barb. 410; S. C., 62 id. 109.

[9] Graham v. Graham, 143 N. Y. 573.

[10] Graham v. Graham, 143 N. Y. at p. 577; Crousque v. Quinn, 14 Abb. N. C. 9, 11.

[11] Sheldon v. Bliss, 8 N. Y. 31; Gray v. Gray, 5 App. Div. 132.

[12] Mundy v. Munson, 40 Hun, 304.

§ 179. **When widow to elect between jointure and dower.**—If, before the marriage, but without her assent, or, if after the marriage, real property is given or assured for the jointure of a wife, or a pecuniary provision is made for her, in lieu of dower, she must make her election whether she will take the jointure or pecuniary provision, or be endowed of the lands of her husband; but she is not entitled to both.

Formerly 1 Revised Statutes, 741, section 12:

§ 12. If before her coverture, but without her assent, or if after her coverture, lands shall be given or assured for the jointure of a wife, or a pecuniary provision be made for her, in lieu of dower, she shall make her election whether she will take such jointure or pecuniary provision, or whether she will be endowed of the lands of her husband, but she shall not be entitled to both.[1]

Comment on Section 179, Supra. Under the preceding sections[2] of this act it has been stated that the consent of the intending wife was not necessary, before the Revised Statutes, to the validity of a legal jointure,[3] and that as to a post-nuptial settlement the wife might, at her husband's death, elect, under the Statute of Uses, to take her dower instead of the provisions thus made for her.[4] The Revised Statutes made the assent of the intending wife necessary to a jointure to bar dower,[5] and reserved the wife's right of election to reject the settlement and take her dower when the settlement was a post-nuptial one.[6]

Post-nuptial Settlements to Bar Dower. Prior to the Married Women's Acts, the wife was incompetent to release her dower to her husband.[7] But the "Married Women's Acts" came after the Revised Statutes, and tended to place a married woman in a legal situation where she might contract even with her husband, and it

[1] Repealed, chap. 547, Laws of 1896.

[2] §§ 177, 178, The Real Prop. Law.

[3] *Supra*, p. 421.

[4] 27 Hen. VIII, chap. 10, § 9; 1 R. L. 56, § 9; McCartee v. Teller, 8 Wend. at p. 275.

[5] *Supra*, 1 R. S. 741, §§ 10, 11, 12, and Id. 742, § 16; now §§ 177, 178, 179 and 183, The Real Prop. Law.

[6] *Supra*, 1 R. S. 741, § 12; now § 179, The Real Prop. Law; Jones v. Fleming, 104 N. Y. 418, 430, 432; Crain v. Cavana, 36 Barb. 410; Guidet v. Brown, 3 Abb. N. C. 295.

[7] Crain v. Cavana, 36 Barb. 410; S. C., 62 id. 109; except in partition cases. *Vide*, chap. 177, Laws of 1840, p. 128; chap. 472, Laws of 1880; § 1571, Code Civ. Proc.; §§ 21, 26, The Domestic Relations Law. *Cf.* Wightman v. Schliefer, 45 N. Y. St. Repr. 698.

is said thus agree to bar her dower by a proper post-nuptial settlement.[1] The present re-enactment of the Revised Statutes, it will be observed, is posterior in point of time to the Married Women's Acts, and this section now under consideration[2] re-enacts again the provisions of section 12 of the Revised Statutes.[3] This law[4] is, however, to be read in connection with The Domestic Relations Law,[5] as they are part of the same statutory revision. Whether or not a *feme covert* may now irrevocably bar dower by a post-nuptial settlement, it is certain that whenever she retains the consideration of such settlement it must remain an equitable bar to dower, if so agreed, and disentitles her to an election, at least until such consideration is restored.[6] But a wife's mere release of dower to the husband direct, is not a proper bar to her dower.[7]

Intending Wife's Assent to Bar Dower. Although an intended wife's assent was not necessary to a legal jointure, there were, before the Revised Statutes, equitable jointures which, however, required the assent of the intending wife before they became valid bars in equity to dower.[8] Indeed the uncertainty of legal jointures made without the assent of the intending wife long anterior to the Revised Statutes caused most ante-nuptial provisions for married women to take the form of trust settlements, which, if they also involved the woman's separate property, were necessarily executed by her, and at the same time she often formally accepted the provision in lieu and satisfaction of dower. If she was an infant the provision to bar dower required the assent of parent or guardian.[9] The original revisers, by providing that the assent of the intending wife should be necessary to any settlement to bar

[1] Chap. 537, Laws of 1887; §§ 21, 26, The Domestic Relations Law; Jones v. Fleming, 104 N. Y. at pp. 433, 434; Matter of Benson, 96 id. 499, 507; Doremus v. Doremus, 66 Hun, 111. *Cf.* Hendricks v. Isaacs, 117 N. Y. 411; Townsend v. Townsend, 2 Sandf. 711; Witthaus v. Schack, 105 N. Y. 332.

[2] § 179, The Real Prop Law.

[3] 1 R. S. 741, § 12.

[4] The Real Prop. Law.

[5] Chap. 48, General Laws.

[6] Jones v. Fleming, 104 N. Y. 430, 433; Doremus v. Doremus, 66 Hun, 111; Wood v. Seely, 32 N. Y. 105; Lee v. Timken, 10 App. Div. 213. *Cf.* Townsend v. Townsend, 2 Sandf. 711; Hendricks v. Isaacs, 117 N. Y. 411; Dworsky v. Arndtstein, 29 App. Div. 274. See, also, under § 183, *infra*, how wife may bar her inchoate dower.

[7] Wightman v. Schliefer, 45 N. Y. St. Repr. 698; S. C., 18 N. Y. Supp. 551; Hendricks v. Isaacs, 117 N. Y. 411; Townsend v. Townsend, 2 Sandf. 711. *Cf.* chap. 594, Laws of 1892; §§ 21 and 26, The Domestic Relations Law.

[8] Cruise, Dig. tit. 7, chap. 1, § 38; Drury v. Drury, 2 Eden, 65, 66.

[9] Lord Hardwicke, in Drury v. Drury, 2 Eden, 65, 66.

dower, followed the equitable rather than the legal rule regarding jointures to bar dower.

Infant Wife. A post-nuptial settlement on an infant wife is subject to her election and *a fortiori* does not bar her dower under this section,[1] or on general principles of law relating to infants.[2]

[1] § 179, *supra*.

[2] McIntyre v. Costello, 47 Hun, 289; 14 N. Y. St. Repr. 369; Sandford v. McLean, 1 Sandf. Ch. 117; Cunningham v. Knight, 1 Barb. 399.

§ 180. **Election between devise and dower.**— If real property is devised to a woman, or a pecuniary or other provision is made for her by will in lieu of her dower, she must make her election whether she will take the property so devised, or the provision so made, or be endowed of the lands of her husband; but she is not entitled to both.

Formerly 1 Revised Statutes, 741, section 13:

§ 13. If lands be devised to a woman, or a pecuniary or other provision be made for her by will, in lieu of her dower, she shall make her election whether she will take the lands so devised, or the provision so made, or whether she will be endowed of the lands of her husband.[1]

Note on 1 Revised Statutes, 741, Section 13.— Section 13, 1 Revised Statutes, 741, was amended by chapter 171, Laws of 1895; such amendment to take effect on the 1st day of January, 1896. But the original section was restored by the repeal of chapter 171, Laws of 1895, on June 14, 1895 (Chap. 1022, Laws of 1895).

Dower in Exchanged Lands. We have seen that at common law a widow was put to her election in respect of lands exchanged by her husband, and that she could not have dower in both parcels.[2]

Doctrine of Election between Devise and Dower. The doctrine of election between devise and dower did not, however, grow out of the rule concerning dower in exchanged lands. The provision of the Statute of Uses relating to post-nuptial settlements was broad enough to cover devises of lands in satisfaction of dower,[3] although the Statute of Wills was enacted subsequently.[4] The Statute of Uses provided that a surviving wife might, at her husband's death, elect to take either a provision made for her or her dower, and such a provision might, after the Statute of Wills, be made by will. Courts of equity then put her to her election.[5] The doctrine of election between devise and dower was founded on the principle that a person shall not be permitted to claim under any instrument, whether it be a will or a deed, without giving full effect to it in every respect, so far as such person is concerned.[6] But all the old cases, English and American, hold that the intention to exclude dower by a devise must be demonstrated either by express words or clear and manifest intention; so that if there was anything ambiguous or doubtful, the legal

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, under § 171, The Real Prop. Law; Co. Litt. 31b.

[3] 27 Hen. VIII, chap. 10, § 9.

[4] 32 Hen. VIII, chap. 1; 34, 35 id. chap. 5.

[5] Co. Litt. 36b; Larrabee v. Van Alstyne, 1 Johns. 307.

[6] 1 Roper, Husband & Wife, 565, 566.

right to dower prevailed and the devise was additional to dower and not in lieu of it.[1]

The Revised Statutes. The Revised Statutes simply adopted the equitable principles of election indicated, and made the widow's acceptance of an estate, given her in lieu of dower, a bar both at law and in equity;[2] although such acceptance was thought, before the Revised Statutes, to be a legal as well as an equitable bar.[3] But the intention to exclude dower by devise must be expressed and clear, or else the legal right to dower prevails as before the Revised Statutes.[4]

Construction of Devise which Puts Widow to Her Election. The intention to exclude dower need not be express; it may be manifested by a provision wholly inconsistent with the right to dower; and in such cases the widow will be put to her election. She cannot have both.[5] But it has been frequently held that a devise of all testator's lands, with peremptory powers of sale or trust for sale is not inconsistent with a right to dower; the trustees take the lands with all their legal incidents, including dower.[6] Nor is the fact that the provision made for the wife exceeds in value her dower right conclusive of intent to exclude dower.[7]

Widow's Provision Entitled to Preference. Where a bequest is made for a widow in lieu of dower and she accepts it, she is entitled to preference over other legatees, debts being first paid.[8]

[1] Larrabee v. Van Alstyne, 1 Johns. 307; Adsit v. Adsit, 2 Johns. Ch. 448; Smith v. Kniskern, 4 id. 9; Rathbone v. Dyckman, 3 Paige, 9, 30; Jackson v. Churchill, 7 Cow. 287; Steele v. Fisher, 1 Edw. Ch. 435.

[2] 1 R. S. 741, § 13; Lewis v. Smith, 9 N. Y. 502, 511; Sandford v. Jackson, 10 Paige, 266.

[3] Kennedy v. Mills, 13 Wend. 553; Van Orden v. Van Orden, 10 Johns. 30.

[4] *Supra*, p. 428; Fuller v. Yates, 8 Paige, 325; Sandford v. Jackson, 10 id. 266; Church v. Bull, 5 Hill, 206; affd., 2 Den. 430; Lewis v. Smith, 9 N. Y. 502, 512; Matter of Zahrt, 94 id. 605; Konvalinka v. Schlegel, 104 id. 125; Mills v. Mills, 28 Barb. 454; Kimbel v. Kimbel, 14 App. Div. 570, 572; Matter of Smith, 1 Misc. Rep. 269; S. C., 22 N. Y. Supp. 1067; Purdy v. Purdy, 18 App. Div. 310; Miller v. Miller, 22 Misc. Rep. 582; Closs v. Eldert, 30 App. Div. 338.

[5] Savage v. Burnham, 17 N. Y. 561; Vernon v. Vernon, 53 id. 351; In the Matter, etc., of Zahrt, 94 id. 605, 609; Konvalinka v. Schlegel, 104 id. 125, 129; Nelson v. Brown, 144 id. 384, 391; Asch v. Asch, 18 Abb. N. C. 82; S. C., 113 N. Y. 232; Jurgens v. Rogge, 16 Misc. Rep. 100; Starr v. Starr, 54 Hun, 300.

[6] Konvalinka v. Schlegel, 104 N. Y. 125, 131; Gray v. Gray, 5 App. Div. 132. And see under § 170, The Real Prop Law, *supra*, p. 408, "dower favored."

[7] Mills v. Mills, 28 Barb. 454.

[8] Isenhart v. Brown, 1 Edw. Ch. 411.

Joint Note to Husband and Wife. Where husband and wife hold at his death a note payable to the order of both, she takes the note as a gift,[1] and by reason thereof is not put to her election respecting her right to dower, even though the will give her certain property, real and personal, in lieu of dower.[2]

Widow's Election in Ease of Husband's Estate. The widow's election is in ease and benefit of the testator's estate, and not for the benefit of the devisees and legatees only; it operates as a limitation to the claims of the widow, and the fact that the other devisees and legatees do not insist upon the bar is immaterial.[3]

[1] Sandford v. Sandford, 45 N. Y. 723.

[2] Sandford v. Sandford, 58 N. Y. 69.

[3] Matter of Accounting of Benson, 96 N. Y. 499; Lee v. Tower, 124 id. 370, 376.

§ 181. **When deemed to have elected.**— Where a woman is entitled to an election, as prescribed in either of the last two sections, she is deemed to have elected to take the jointure, devise or pecuniary provision, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for her dower. But, during such period of one year after the death of her said husband, her time to make such election may be enlarged by the order of any court competent to pass on the accounts of executors, administrators or testamentary trustees, or to admeasure dower, on an affidavit showing the pendency of a proceeding to contest the probate of the will containing such jointure, devise or pecuniary provision, or of an action to construe or set aside such will, or that the amount of claims against the estate of the testator can not be ascertained within the period so limited, or other reasonable cause, and on notice given to such persons, and in such manner, as such court may direct. Such order shall be indexed and recorded in the same manner as a notice of pendency of action in the office of the clerk of each county wherein the real property or a portion thereof affected thereby is situated.

Formerly 1 Revised Statutes, 742, section 14:

§ 14. When a woman shall be entitled to an election, under either of the two last sections, she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof.

This section of the Revised Statutes was amended by chapter 61, Laws of 1890, as follows:

AN ACT to amend section fourteen of title three of chapter one of part two of the Revised Statutes, relating to estates in dower.

Approved by the Governor March 22, 1890. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section fourteen of title three of chapter one of part two of the Revised Statutes is hereby amended so as to read as follows:

§ 14. When a woman shall be entitled to an election, under either of the two last sections, she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof. Where the time within which such election may be made has begun to run and has not expired, it may be enlarged by the order of any court competent to pass upon the accounts of executors, administrators or testamentary trustees, or to admeasure dower, upon an affidavit showing the pendency of a proceed-

ing to contest the probate of the will containing such jointure, devise or pecuniary provision, or of action to construe or set aside such will, or that the amount of claims against the estate of the testator can not be ascertained within the period so limited, or other reasonable cause therefor. Notice of application for such order shall be given to such persons as the court may direct. And such order when granted shall be recorded and indexed in the same manner as a notice of a pendency of action in the office of the clerk of each county wherein such lands or any part thereof are situated.

§ 2. This act shall take effect immediately.[1]

The latter act was again amended by chapter 171, Laws of 1895, such amendment to take effect on the 1st day of January, 1896; but chapter 171, Laws of 1895, was repealed before it went into effect (Chap. 1022, Laws of 1895), and chapter 61, Laws of 1890,[2] restored *ipsissimis verbis*.

Intent of Section 181, Supra. The original revisers thought it best to prescribe the mode of evincing an election between a devise and dower, and also the time in which such election should be made.[3]

Effect of Section 181, Supra. This section has the force of a Statute of Limitations, and bars dower after the time specified has elapsed, unless the widow has entered or commenced an action for her dower,[4] or had her time to make her election enlarged, as now prescribed in the act of 1890.[5] Prior to that act it was held that fraud might relieve a person from an agreement to accept a provision in lieu of dower, but could not enlarge the time to make the election or bring an action for dower.[6]

Effect of Widow's Neglect upon Her Election. How far it is incumbent upon the widow to make diligent effort to acquaint herself with the nature and extent of the estate before evincing her election is not always clear, but it is to be inferred that a supine reliance upon the statement of others may not defeat an election for fraud after the year has elapsed without effort to extend the time, although, as a general principle, it has been said that the widow's election is not binding without full knowledge of the nature and extent of the estate.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, p. 431.

[3] Note to 1 R. S. 742, § 14.

[4] Chamberlain v. Chamberlain, 43 N. Y. 424, 441; In the Matter, etc., of Zahrt, 94 id. 605, 610; Jones v. Fleming, 104 id. 418, 432; Akin v. Kellogg, 119 id. 441; Lee v. Timken, 10 App. Div. 213. Where widow dies pending election, see Doty v. Hendrix, 16 N. Y. Supp. 284.

[5] *Supra*, chap. 61, Laws of 1890; now § 181, The Real Prop. Law.

[6] Aken v. Kellogg, 16 Abb. N. C. 265; S. C. above, *sub nom.* Akin v. Kellogg, 39 Hun, 252; 119 N. Y. 441. *Cf.* Hindley v. Hindley, 29 Hun, 318; Lee v. Timken, 10 App. Div. 213.

[7] *Cf.* Hindley v. Hindley, 29 Hun, 318; Akin v. Kellogg, 119 N. Y. 441; S. C., 39 Hun, 252; 48 id. 459; 16 Abb. N. C. 265; Lee v. Tower, 124

Widow's Application to Extend Time for Her Election. When the widow applies for an order to extend her time to make her election, she should state reasonable cause for granting such order.[1]

Effect of Failure of Consideration. If a widow accept a testamentary provision in lieu of dower and it fail through any cause, equity will relieve her, provided the rights of creditors and purchasers have not intervened.[2] But the mere fact that that which is taken in lieu of dower turns out of less value than dower is not sufficient in itself to set aside her acceptance;[3] she is a purchaser in effect by contract.[4]

N. Y. 370, 375, 376; Lee v. Timken, 10 App. Div. 213.

[1] Bradhurst v. Field, 32 N. Y. St. Repr. 430; S. C., 10 N. Y. Supp. 452.

[2] Hone v. Van Schaick, 7 Paige, 221, 223; Akin v. Kellogg, 119 N. Y. 441, 450. *Cf.* Chamberlain v. Chamberlain, 43 id. 424; Matter of Benson, 96 id. 499, 507.

[3] Lee v. Tower, 124 N. Y. 370, 375; Akin v. Kellogg, 48 Hun, 459; S. C. 16 N. Y. St. Repr. 428.

[4] Hathaway v. Hathaway, 37 Hun, 265.

§ 182. **When provision in lieu of dower is forfeited.**— Every jointure, devise and pecuniary provision in lieu of dower is forfeited by the woman for whose benefit it is made in a case in which she would forfeit her dower; and on such forfeiture, an estate so conveyed for jointure, or devised, or a pecuniary provision so made, immediately vests in the person or legal representatives of the person in whom they would have vested on the determination of her interest therein, by her death.

Formerly 1 Revised Statutes, 742, section 15:

§ 15. 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 conveyed 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.[1]

Comment on Section 182. Prior to this provision of the Revised Statutes a jointure was not barred or forfeited as was dower by the wife's elopement and living in adultery,[2] nor was it forfeited after the Divorce Act of 1787[3] by a divorce *a vinculo matrimonii*. The original revisers deemed it desirable to make the law uniform and to forfeit wife's jointures and settlements in lieu of dower, whenever dower was forfeited.[4]

[1] Repealed, chap. 547, Laws of 1896.

[2] See the English acts discussed under § 176, The Real Prop. Law, *supra*, p. 417.

[3] *Supra*, p. 417.

[4] Note of Revisers to 1 R. S. 742, § 15, and § 176, The Real Prop. Law. *Cf.* Forrest v. Forrest, 3 Bosw. 661, 695.

§ 183. **Effect of acts of husband.**— An 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 contingent right of dower of a married woman, or a judgment or decree confessed by or recovered against him, or any laches, default, covin or crime of a husband, does not prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof.

Formerly 1 Revised Statutes, 742, section 16:

§ 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 women, 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.[1]

History of this Enactment. The original revisers in their note to the above section[2] state that that section is in substance the old "act concerning dower" of 1787,[3] which was, in turn, partly taken from the Statute of Westminster II.[4] The Statute of Westminster II provided that "in case where the husband, being impleaded for land, giveth up the land demanded unto his adversary by covin; after the death of the husband, the justices shall award the wife her dower," etc., etc. The 10th section of the New York "act concerning dower," re-enacted also that other English statute providing that the attainder or outlawery of the husband should be no bar to dower.[5]

Dower in Husband's Defeasible Estate. It was stated under section 170 of this article of The Real Property Law that the right of dower attaches on the concurrence of marriage and seisin of the husband.[6] If the husband's estate is defeasible, the wife's dower right follows the nature of the husband's estate, and is defeasible in like manner.[7] But no act or covin of the husband, or no judgment rendered against him alone, defeats dower.[8]

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 R. S. 742, § 16.

[3] 2 J. & V. 4; 1 K. & R. 51; 1 R. L. 56, 59.

[4] 13 Edw. I, chap. 4; 2 Inst. 347.

[5] 1 Edw. VI, chap. 12, § 17; 5, 6 id. chap. 11, § 13.

[6] *Supra*, pp. 405, 406.

[7] *Supra*, p. 406.

[8] Scott v. Howard, 3 Barb. 319; Denton v. Nanny, 8 id. 618; Lawrence v. Miller, 2 N. Y. 245, 251; House v. Jackson, 50 id. 161, 165; Elmendorf v. Lockwood, 57 id. 322, 324.

How Wife may Release or Bar Dower to Third Persons. Having seen that the husband's deed does not bar dower of his wife, let us next examine the mode in which she may release her right of dower. At common law a wife's dower right could not be barred by a collateral satisfaction.[1] She might bar herself of dower only by joining her husband in a fine or recovery.[2] This more tedious process was not resorted to in the province of New York. In New York, by custom, a *feme covert* might bar her dower by deed if it were made by her in conjunction with her husband.[3] And it seems that in New York, prior to the year 1771, her deed need not be even separately acknowledged to bar dower,[4] although in most of the other British plantations only a deed of the wife and husband, separately acknowledged by the wife, after the custom of London in Middlesex,[5] had the force of a fine and recovery to bar dower or pass her estate.[6] In 1788 the substance of the former act of 1771[7] was re-enacted by the State Legislature, and the wife's private examination made necessary to bar dower.[8] This act was from time to time re-enacted in the various revisions[9] of the statute law prior to this act.

Acts do not Apply to Non-residents. These acts did not apply to those women who were residents of other States.[10]

[1] Cruise, Dig. tit. 7, chap. 1, § 1.

[2] 2 Black. Comm. 137; Cruise, Dig. tit. 6, chap. 4, § 14; Bool v. Mix, 17 Wend. 119, 128. *Cf.* remarks, *infra*, § 251, The Real Prop. Law.

[3] Van Winkle v. Constantine, 10 N. Y. 422; Constantine v. Van Winkle, 6 Hill, 177; Jackson ex dem., etc., v. Gilchrist, 15 Johns. 89, 114; Jackson ex dem., etc., v. Hollaway, 7 id. 81, 86; Van Schaack's N. Y. Laws, 611.

[4] Id. *supra;* Van Schaack's N. Y. Laws, 611, 765. *Cf.* 1 J. & V. Appendix, VIII; 2 J. & V. 84. The "Charter of Libertys" of 1683 required her separate examination, but this act was disallowed. Constantine v. Van Winkle, 10 N. Y. 422; 6 Hill, 177; Jackson ex dem., etc., v. Gilchrist, 15 Johns. 89, 113; Humbert v. Trinity Church, 24 Wend. 587, 625; Albany Fire Ins. Co. v. Bay, 4 N. Y. 1, 23; Bool v. Mix, 17 Wend. 119, 129; Hardenburgh v. Lakin, 47 N. Y. 109; chap. 123, Laws of 1775.

[5] Cruise, Dig. tit. 6, chap. 4, § 15; 1 Cruise, Fines, 53, 54, 97, and some other places. See Park, Dower, 195. This custom was confirmed by statutes 34, 35, Hen. VIII, chap. 22. *Cf.* 2 Black. Comm. 361.

[6] Stokes' British Colonies. 443; Chancellor Jones of New York, in "Collection of N. Y. Historical Society" for 1821, p. 347. See acts appendix to New York R. S. of 1830 (1st ed.), 22, 23.

[7] Van Schaack's N. Y. Laws, 611, 765; chap. 123, N. Y. Laws of 1775.

[8] 2 J. & V. 265.

[9] 1 K. & R. 478; 1 R. L. 369; 1 R. S. 758, § 10; Id. 742, § 16.

[10] Chap. 155, Laws of 1801; 1 R. L. of 1813, p. 369, § 2; 1 R. S. 758, § 11; Andrews v. Shaffer, 12 How. Pr. 441.

Effect of Deed by Husband and Wife. Thus in New York a deed of husband and adult wife, separately acknowledged by the wife, operates by way of estoppel to release dower to the grantee of the husband,[1] but not to release it to a stranger to the title.[2] Although a husband and wife may now convey directly to each other without the intervention of a third person,[3] yet her release of dower to her husband direct does not enable him to convey to a third person free of her right of dower. Such a conveyance is not a bar of dower within the statute,[4] except in partition suits.[5]

Wife's Separate Acknowledgment. Since 1879 separate acknowledgments of deeds by married women are unnecessary: they may by statute be made in the same manner as if such women were sole.[6] Even prior to 1879 it had been held that a private examination was not necessary to her acknowledgment of a deed of her separate estate since the Married Women's Acts.[7] But before the act of 1879 a deed to bar dower stood in this respect differently from a deed of her separate estate where she was a *quasi feme sole.*

Effect of Subsequent Avoidance of Deed by Husband and Wife. While a deed of husband and wife to the husband's grantee operates against the wife as an estoppel to bar dower or as a release of dower, yet if such deed is afterwards avoided by the husband, the wife is *ipso facto* remitted to her right of dower.[8]

[1] Malloney v. Horan, 49 N. Y. 111, 118; Elmendorf v. Lockwood, 57 id. 322, 324 (the statutes are miscited in this last-mentioned case, but the conclusion is accurate enough); Hinchliffe v. Shea, 103 id. 153; Witthaus v. Schack, 105 id. 332; Jackson ex dem. v. Vanderheyden, 17 Johns. 167; Tompkins v. Fonda, 4 Paige, 448; Taylor v. Post, 30 Hun, 446, but not as to infant *feme;* McIntyre v. Costello, 47 id. 289; S. C., 14 N. Y. St. Repr. 369; Sandford v. McLean, 1 Sandf. Ch. 117; Cunningham v. Knight, 1 Barb. 399.

[2] Merchants' Bank v. Thompson, 55 N. Y. 7; Malloney v. Horan, 49 id. 111; Marvin v. Smith, 46 id. 571; Sandford v. Ellithorp, 95 id. 48, 51; Dworsky v. Arndtstein, 29 App. Div. 274, 280. *Cf.* § 187, The Real Prop. Law.

[3] Chap. 537, Laws of 1887, now § 26, The Domestic Relations Law, being chap. 48, General Laws.

[4] Wightman v. Schliefer, 45 N. Y. St. Repr. 698; S. C., 18 N.Y. Supp. 551; Townsend v. Townsend, 2 Sandf. 711, and see § 179, *supra*, The Real Prop. Law.

[5] Chap. 177, Laws of 1840; chap. 472, Laws of 1880; § 1571, Code Civ. Proc.; §§ 21, 26, The Domestic Relations Law. *Cf.* Wightman v. Schliefer, 45 N. Y. St. Repr. 698; S. C., 18 N. Y. Supp. 551; Hendricks v. Isaacs, 117 N. Y. 411.

[6] Chap. 249, Laws of 1879; amd., chap. 300, Laws of 1880, now § 251, The Real Prop. Law.

[7] Yale v. Dederer, 18 N. Y. 265, 271; Wiles v. Peck, 26 id. 42; Andrews v. Shaffer, 12 How. Pr. 441; Blood v. Humphrey, 17 Barb. 660; Allen v. Reynolds, 36 N. Y. Super. Ct. 297; Richardson v. Pulver, 63 Barb. 67.

[8] Sandford v. Ellithorp, 95 N. Y. 48, 51.

Release of Lunatic Wife's Inchoate Right of Dower. Formerly the committee of a lunatic, by joining with lunatic's husband in executing a deed, could not extinguish her right of dower.[1] In 1893 the Code of Civil Procedure was so amended as to provide for lunatic's release of inchoate rights of dower, requiring *inter alia* one-third of the amount realized to be invested for the ultimate benefit of the lunatic wife, etc.[2]

When Widow May Assign Her Right of Dower. The widow's estate in dower after the death of her husband, but before assignment to her, stands on quite a different footing from a right of dower or dower inchoate; it is assignable as a right in action and is liable in equity for her debts.[3]

[1] Matter of Dunn, 64 Hun, 18.

[2] Chap. 639, Laws of 1893, amending §§ 2348, 2351, 2355, 2356, 2358, Code Civ. Proc.

[3] Payne v. Becker, 87 N. Y. 153; The Mut. Life Ins. Co. v. Shipman, 119 id. 324, 330.

§ 184. **Widow's quarantine.**— A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband.

Formerly 1 Revised Statutes, 742, section 17:

§ 17. A widow may tarry in the chief house of her husband, forty days after his death, whether her dower be sooner assigned to her or not, without being liable to any rent for the same, and in the meantime she shall have her reasonable sustenance out of the estate of her husband.[1]

History of this Enactment. This provision of the statute shows how dependent any consideration of the present, or actual, law is on the early history of New York. This section of The Real Property Law is at least as old as *Magna Charta*.[2] Its re-enactment in New York was attributed by the New York revisers of 1813 to a colonial act of 1683.[3] In point of fact this particular law is in England[4] not only older than *Magna Charta*, but it is older than the act of 1683 in New York.[5] This portion of *Magna Charta* was expressly re-enacted by the first English Legislature of New York in 1683.[6] But that act was disallowed.[7] Yet, as dower was an incident of the socage tenure by which all the lands of New York were held,[8] the repeal of the acts of 1683 was inconsequential. The widow in New York had her "quarantine" at common law, as declared by *Magna Charta;* that statute, in common with all the the great statutes of England declaratory of the common law, being simply received here as part of the common law.[9] In 1787 this part of *Magna Charta* was revised with the other leading English statutes extending to New York, and re-enacted by the Legislature of the State;[10] the other English acts not so re-enacted being then

[1] Repealed, chap. 547, Laws of 1896.

[2] Chap. VII, ed. of 1215; Coke's 2d Inst. 16.

[3] Note, 1 R. L. 56.

[4] Poll. & Mait. Hist. Eng. Law, 420. It corresponded to the widow's month in Germanic law.

[5] It came in with the socage tenure in 1664, and was indirectly recognized by the "Duke's Lawes" of 1665, tit. "Dowryes," 1 Col. Laws (Ed. of 1894), p. 32.

[6] Charter of Libertys, 2 R. L. Appendix II.

[7] Doc. relating to Hist. of N. Y., IV, 263.

[8] The socage tenure introduced all the common law relating to that tenure. There could not be one socage tenure in England and another in New York.

[9] Bogardus v. Trinity Church, 4 Paige, at p. 198.

[10] 2 J. & V. 4, § 1, act concerning dower.

all repealed.[1] From time to time the act of 1787 was re-enacted,[2] and finally crept into the Revised Statutes,[3] and thence into this latest expression of the fundamental law of real property.[4] Yet not one of these enactments was essential to a widow's quarantine. The common law would, probably, have given the widow the same right until it was formally abrogated by statute.[5] But its formal and repeated re-enactment in statutes serves to show the importance our law of family relations attaches to "dower." The construction of the New York statute and *Magna Charta* are the same.[6]

This Section Confined to Land. This section has no relation to personal property.[7] It assures the widow of an asylum and reasonable sustenance[8] until her dower can be assigned, and meanwhile the heir cannot expel her from the freehold.[9] After forty days he may expel her and put her to her remedy.[10]

Remedy for Interference with Widow's "Quarantine." By the common law, if the wife was not permitted to enjoy her quarantine, she had the writ *de quarentina habenda*,[11] now turned into a general action under the Code of Civil Procedure.[12]

[1] Chap. 46, Laws of 1788; 2 J. & V. 282; Levy v. Levy, 6 Pet. 102, 110.

[2] 1 K. & R. 51; 1 R. L. 56.

[3] 1 R. S. 742, § 17. As set out above.

[4] § 184, *supra*.

[5] Park, Dower, 4.

[6] Jackson v. O'Donaghy, 7 Johns. 247; Yates v. Paddock, 10 Wend. 528, 531.

[7] Voelckner v. Hudson, 1 Sandf. 215.

[8] Johnson v. Corbett, 11 Paige, 265, 276.

[9] Siglar v. Van Riper, 10 Wend. 414, 419.

[10] Jackson v. O'Donaghy, 7 Johns. 247.

[11] Fitz Herbert, *Natura Brevium*, 161.

[12] Code Civ. Proc. § 3333.

§ 185. **Widow may bequeath a crop.**—A woman may bequeath a crop in the ground of land held by her in dower.

Formerly 1 Revised Statutes, 743, section 25:

§ 25. A widow may bequeath the crop in the ground of the land holden by her in dower.[1]

History of this Section. The question whether growing crops were real or personal property was one of difficulty in many cases.[2] Tenants had by custom a right to "away-going crops,"[3] and they generally passed to executors.[4] By the Statute of Merton widows might bequeath the corn growing on their dower lands,[5] and at the general re-enactment of the English statutes extending to New York the Statute of Merton was re-enacted in 1787, and has thus passed into the Revised Statutes, and finally into this section of the present act.[6]

Dower in Crops Growing when Husband Died. Widows had also dower in crops sown at time of husband's death.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] Austin v. Sawyer, 9 Cow. 39; *supra*, p. 53.

[3] Wigglesworth v. Dallison, 1 Smith Lead. Cas. and notes.

[4] Smith, Real & Pers. Prop. 775.

[5] 20 Hen. III, chap. 2.

[6] 2 J. & V. 97, § 14; 1 K. & R. 181; 1 R. L. 368; 1 R. S. 743, § 25; § 185, The Real Prop. Law.

[7] Clark v. Battorf, 1 Thomp. & Cook, 58.

§ 186. **Divorced woman may release dower.**— A woman who is divorced from her husband, whether such divorce be absolute or limited, or granted in his or her favor, by any court of competent jurisdiction, may release to him, by an instrument in writing, sufficient to pass title to real estate, her inchoate right of dower in any specific real property theretofore owned by him, or generally in all such real property, and such as he shall thereafter acquire.

Formerly chapter 616, Laws of 1892:

AN ACT to enable and authorize a woman heretofore or hereafter divorced from her husband to convey and release her inchoate right of dower in lands to which her husband has title or may hereafter acquire title.

Approved by the Governor May 16, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. In all cases when a husband or wife has been heretofore or may hereafter become divorced the one from the other, whether said divorce be absolute or limited, or granted to either the husband or the wife under the laws of this state or any other state or country, the said wife against whom or in favor of whom said divorce has been or may be granted, is hereby authorized and empowered, upon receiving a consideration satisfactory to herself, to sell, convey and release by deed of conveyance or release duly signed, executed and acknowledged unto her said husband from whom she has been divorced as aforesaid, all her inchoate right of dower of, in and to all the real estate of which her husband was seized at the time of the granting of said divorce, and all her inchoate right of dower of, in and to any and all real estate that he has since that time acquired, and in which she would or might have a right of dower or inchoate right of dower, and upon the execution and delivery and recording of said conveyance or release, together with the filing or recording in the proper county, a certified copy of the judgment or decree granting said divorce, all the lands and real estate of which the said husband was seized at the time of the granting of said divorce, or at any time subsequent, or lands which he may at any time acquire after the execution and recording of said conveyance or release as aforesaid, shall forever be released and discharged from any and all right of dower, or inchoate right of dower, claim or demand as wife or widow of said divorced husband.

§ 2. Chapter five hundred and two of the laws of eighteen hundred and ninety, entitled "An act to enable and authorize a woman heretofore divorced from her husband to convey and release her inchoate right of dower in lands to which her husband has title or may hereafter acquire title," is hereby repealed.

§ 3. This act shall take effect immediately.[1]

Comment on Section 186, Supra. A woman absolutely divorced from her husband for fault of the husband, retains her dower

[1] Repealed, chap. 547, Laws of 1896.

rights;[1] so upon a divorce *a mensa et thoro*.[2] If he obtains the divorce she forfeits dower,[3] and all provisions by way of jointure.[4] But as a wife could not release to her husband except in partition suits,[5] a release of dower directly from a wife to a *quondam*, or divorced, husband, was viewed with suspicion until the question was set at rest by an act of the Legislature.[6]

[1] § 1759, Code Civ. Proc., *et supra*, p. 418.
[2] *Supra*, p. 418.
[3] § 176, The Real Prop. Law.
[4] § 182, The Real Prop. Law.
[5] *Supra*, p. 427, note 5.
[6] Chap. 502, Laws of 1890, amended by chap. 616, Laws of 1892, *supra*.

§ 187. **Married woman may release dower by attorney.**—A married woman of full age may release her inchoate right of dower in real property by attorney in fact in any case where she can personally release the same.

Formerly chapter 599, Laws of 1893, as follows:

AN ACT relating to powers of attorney of married woman.

Approved by the Governor May 5, 1893. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Any married woman of the age of twenty-one years, or more, may execute, acknowledge and deliver her power of attorney for the release of her inchoate right of dower in real estate situated in this state, in all cases where such married woman may now execute such release.

§ 2. This act shall take effect immediately.[1]

Comment on Section 187, Supra. At the common law a married woman could not appoint or constitute an attorney.[2] When empowered to appoint an attorney on general principles she could not do by another what she herself might not do. We have seen that she might not release her dower to a stranger to the title.[3] In 1878, an adult married woman was authorized by statute to appoint an attorney in fact,[4] and under this act it was held that she might appoint her husband her attorney to release her dower to a grantee of the husband.[5] In 1893 an adult *feme covert* was specially authorized to release her inchoate right of dower by attorney in all cases where she herself could release it.[6] But this act only gave expression to the former law as stated in Wronkow v. Oakley. She cannot yet release her dower to a stranger to the title, and, therefore, she cannot appoint her husband to so release it for her.

Omitted Sections of this Article. There are at present no sections of The Real Property Law numbered 188, 189.

[1] Repealed, chap. 547, Laws of 1896.

[2] Hardenburgh v. Lakin, 47 N. Y. 109, 113.

[3] *Supra*, p. 437.

[4] Chap. 300, Laws of 1878.

[5] Wronkow v. Oakley, 133 N. Y. 505, affg. In re Wolff, 19 N. Y. Supp. 51.

[6] See the act at the head of this page.

ARTICLE VI.

Landlord and Tenant.

SECTION 190. Action for use and occupation.
191. Rent due on life leases recoverable.
192. When rent is apportionable.
193. Rights where property or lease is transferred.
194. Attornment by tenant.
195. Notice of action adverse to possession of tenant.
196. Effect of renewal on sub-lease.
197. When tenant may surrender premises.
198. Termination of tenancies at will or by sufferance, by notice.
199. Liability of tenant holding over after giving notice of intention to quit.
200. Liability of tenant holding over after giving notice to quit.
201. Liability of landlord where premises are occupied for unlawful purpose.
202. Duration of certain agreements in New York.

SECTION 190. **Action for use and occupation.**— The landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which he is entitled.

Formerly 1 Revised Statutes, 748, section 26:

§ 26. Any landlord may recover in an action on the case, a reasonable satisfaction for the use and occupation of any lands or tenements, by any person under any agreement not made by deed: and if any parol demise or other agreement, not being by deed, by which a certain rent is reserved, shall appear in evidence on the trial of any such action, the plaintiff shall not on that account be debarred from a recovery, but may make use thereof as evidence of the amount of the damages to be recovered.[1]

Comments. The present article of The Real Property Law, like the Revised Statutes,[2] by no means exhausts the law regarding landlord and tenant in their reciprocal relations. It simply codifies some great statutes, several of them of early origin.[3] The section now under consideration treats of the remedy for use and

[1] Repealed, chap. 547, Laws of 1896.

[2] Tit. IV, chap. I, part II, R. S. "Of Estates for Years and at Will, and the Rights and Duties of Landlords and Tenants."

[3] *Vide supra*, pp. 91, 92, under § 20, The Real Prop. Law, "Estates for Years," and pp. 109, 110, under § 21, The Real Prop. Law, "Rents Reserved on Estates in Fee."

occupation in cases where the common law gave none, or a most imperfect one at best.

The Conventional Relation of Landlord and Tenant. The term landlord indicated primarily the lord of the fee,[1] but by a series of historic gradations, the term has come to denote an owner of an estate in real property, or of an interest therein when considered in relation to some one else who occupies or holds under such owner. In reference to the latter person, called the tenant, such owner is the "landlord." The relation of landlord and tenant is wholly conventional and relative,[2] and we now never speak of an owner of land who has no tenant as a "landlord." The modern terms "lessor" and "lessee" also denote the same relation, but ordinarily connote a more certain and formal demise, usually in writing, although no writing be necessary to the validity of the demise. The present modern remedies for use and occupation,[3] or possession, are wholly predicated of this conventional legal relation of landlord and tenant.[4] Between a landlord and a tenant there is always a tenure subsisting,[5] for neither the Revised Statutes[6] nor the Constitution of the State abolish tenure, but feudal tenure only;[7] the lands themselves alone being made allodial.[8] The conventional relation of landlord and tenant usually, though not necessarily, subsists only in connection with terms of years, which grew up subsequent to the feudal settlement, and such tenancies are, therefore, not feudal in origin. The rights of the tenant for years pushed themselves into legal recognition as "estates" only by force of statutes, and not by the feudal or common law.[9] But in New York, with its historic "perpetual or manor leases," reserved on estates in fee,[10] rent alone is regarded as a sign of the conventional relation of landlord and tenant.[11] Rent may be nominal or rent service. Rent is not of feudal origin, but is associated, at first, with the non-military or socage tenure,[12] so that in the nominal abolition of feudal tenures in

[1] See introduction to Comyn, Landlord & Tenant (2d ed. London), 1 *seq.*

[2] Hosford v. Ballard, 39 N. Y. 147, 151.

[3] Sylvester v. Ralston, 31 Barb. 286; Collyer v. Collyer, 113 N. Y. 442.

[4] Burnet v. Scribner, 16 Barb. 621; Deuel v. Rust, 24 id. 438; People ex rel. Hubbard v. Annis, 45 id. 304; Wilson v. Martin, 1 Den. 602.

[5] Saunders v. Hanes, 44 N. Y. 353, 361.

[6] 1 R. S. 718, § 3.

[7] Const. of 1895, art. 1, § 11.

[8] Const. of 1895, art. 1, § 12.

[9] *Supra*, pp. 86, 87; Challis, 6, 46, 47.

[10] *Supra*, pp. 103, 104.

[11] Saunders v. Hanes, 44 N. Y. 353.

[12] Dalrymple, Feudal Property, chap. II.

New York, rent and the incidents of socage tenure were always saved.[1]

Account of Section 190, Supra. This section of the original, or Revised Statutes,[2] was taken from the New York Revised Laws of 1813,[3] which in turn came from the statute of 1787,[4] re-enacting the colonial statute on the same subject.[5] The history of the remedy for use and occupation is not very ancient. The colonial statutes re-enacted the statute of 11 George II (Chap. 19, § 14) almost *verbatim.* The object of the statute 11 George II (Chap. 19. § 14) was to furnish landlords with a better remedy than any the common law recognized. An action on the case did not lie for rent, as it was a matter savoring of the realty, and debt was the proper remedy,[6] except after the expiration of the tenancy, when assumpsit might lie.[7] The statute, 11 George II, meant to provide an easy remedy, in the simple case of actual occupation, leaving more complicated cases to their ordinary remedy.[8] When the Revised Statutes was enacted the Code of Procedure had not been thought of, and the common-law practice still prevailed. The object of the present re-enactment of this section is not to modify practice, since all rights are redressed by the same form of action under the Code of Civil Procedure, but is to give a plain remedy where the common law gave none.

When Action for Use and Occupation Lies. Under the Revised Statutes and the Revised Laws it was held that an action for use and occupation, by virtue of this statute, lay only where the conventional relation of landlord and tenant existed.[9] It lay where the holding was on an implied, as well as on an express, permission of the landlord,[10] and against tenants who held over, whether originally the tenancy was by deed or oral.[11] The conventional relation of landlord and tenant may be implied ; it exists where he

[1] Const. of 1894–5, art. 1, § 11; *vide supra*, p. 45.

[2] § 190, *supra;* 1 R. S. 748, § 26.

[3] 1 R. L. 444, § 31.

[4] 2 J. & V. 241, § 31.

[5] Chap. 14, Laws of 1774; 11 Geo. II, chap. 19, § 14; Vernam v. Smith, 15 N. Y. 327, 330; Preston v. Hawley, 139 id. 296, 300.

[6] Archbold, Landl. & Ten. 148.

[7] Comyn, Landl. & Ten. 435. *Cf.* Preston v. Hawley, 139 N. Y. 296, 300.

[8] Comyn, Landl. & Ten. 436.

[9] Lalor, Real Prop. 301; Hall v. Southmayd, 15 Barb. 332; Sylvester v. Ralston, 31 id. 286; Smith v. Stewart, 6 Johns. 46; Bancroft v. Wardwell, 13 id. 489; Preston v. Hawley, 101 N. Y. 586; S. C., 139 id. 296; Collyer v. Collyer, 113 id. 442; Lamb v. Lamb, 146 id. 317, 323.

[10] Osgood v. Dewey, 13 Johns. 240; Lalor, Real Prop. 301.

[11] Abeel v. Radcliff, 13 Johns. 297; 15 id. 505. See all the earlier New

who is in possession has recognized the other as his lessor, in some such way as to entail the legal obligations of tenancy.[1] It does not exist when the occupant is a trespasser,[2] or has not recognized the owner as landlord in any way.[3] Where defendant is in under a contract of sale which is abandoned the action lies ;[4] so for past due rent when corporate tenant was in under a demise *ultra vires* the corporation.[5]

When Action Lies or Not. When the tenant is in under a deed the action for use and occupation does not lie.[6] Nor does it lie in favor of the original owner without a surrender against a sub-tenant.[7] The presumption is, however, that the sub-tenant is in as assignee of the original lease.[8] Where one enters under a lease void as against the Statute of Frauds the landlord may recover for use and occupation,[9] and the rent reserved and terms of such lease are evidence in an action for use and occupation.[10] In New York a tenant entering under a parol demise, void by the Statute of Frauds, and paying rent, may become a tenant from year to year, and a continuance of occupancy into the second year renders him chargeable with the rent until its close.[11] But the mere fact that a person goes into possession under a demise, void under the Statute of Frauds, does not create a yearly tenancy but a tenancy at will, and he is liable only for actual occupation.[12]

York cases cited, Lalor, Real Prop. 301–304; Evertson v. Sawyer, 2 Wend. 507; Rosenberg v. Lustgarten, 41 N. Y. St. Repr. 623; S. C., 16 N. Y. Supp. 523. *Cf.* Coudert v. Cohn, 118 N. Y. 309; Haynes v. Aldrich, 133 id. 287; Herter v. Mullen, 9 App. Div. 593.

[1] Moffatt v. Smith, 4 N.Y. 126; Benjamin v. Benjamin, 5 id. 383, 388; Coit v. Planer, 51 id. 647; Pierce v. Pierce, 25 Barb. 243; Dorschel v. Burkley, 18 Misc. Rep. 240; David Stevenson Brewing Co. v. Culbertson, Id. 486.

[2] Featherstonhaugh v. Bradshaw, 1 Wend. 134; Baxter v. West, 5 Daly, 460; Preston v. Hawley, 139 N. Y. 296, 298.

[3] Davis v. Pres., etc., D. & H. Canal Co., 109 N. Y. 47.

[4] Pierce v. Pierce, 25 Barb. 243.

[5] Bath Gas Light Co. v. Claffy, 151 N. Y. 24.

[6] Kierstedt v. Orange & Alexandria R. R. Co., 69 N. Y. 343; Bedford v. Terhune, 30 id. 453.

[7] Bedford v. Terhune, 30 N. Y. 453. *Cf.* McFarlan v. Watson, 3 id. 286.

[8] Frank v. N. Y., L. E. & W. R. R. Co., 122 N. Y. 197, 219.

[9] Thomas v. Nelson, 69 N. Y. 118, 121; Talamo v. Spitzmiller, 120 id. 37; Laughran v. Smith, 75 id. 205. *Cf.* Reeder v. Sayre, 70 id. 180.

[10] Talamo v. Spitzmiller, 120 N. Y. 37, 42; § 190, *supra;* Gilfoyle v. Cahill, 18 Misc. Rep. 68, 70, 72; Williams v. Sherman, 7 Wend. 109; *vide*, § 124, *infra.*

[11] Coudert v. Cohn, 118 N. Y. 309; Unglish v. Marvin, 128 id. 380, 385; People ex rel. Botsford v. Darling, 47 id. 666. *Cf.* Kernochan v. Wilkens, 3 App. Div. 596.

[12] Talamo v. Spitzmiller, 120 N. Y. 37; Unglish v. Marvin, 128 id. 380;

Damages. Where there is no express agreement as to rent, the tenant must pay as much as the premises are reasonably worth.[1]

Action does not Lie if Premises to be Used for Unlawful Purpose. Knowledge by the landlord that the premises are to be used for an unlawful purpose will defeat this as every other form of action.[2]

Actual Occupation by Tenant not Necessary. Manual occupation by the tenant is not essential to maintain an action for use and occupation; if the power to occupy and enjoy is given by the landlord that suffices.[3]

Recovery, how Limited. But the recovery cannot extend beyond the time of actual occupation or opportunity to occupy.[4]

Right of Way. The action does not lie for the use of a mere right of way.[5]

When Contract to Pay Rent not Implied. Where the use and occupation of real estate is under such circumstances as to show that there was no expectation of rent by either party, a contract to pay rent will not be implied.[6] The issue is, however, a question of fact for the jury.[7]

Prindle v. Anderson, 19 Wend. 391; People ex rel. Botsford v. Darling, 47 N. Y. 666; Hungerford v. Wagoner, 5 App. Div. 590.

[1] Scranton v. Booth, 29 Barb. 171; Coit v. Planer, 7 Robt. 413, 415.

[2] Plath v. Kline, 18 App. Div. 240.

[3] Little v. Martin, 3 Wend. 220; Hall v. Western Transportation Co., 34 N. Y. 284. *Cf.* Herrmann v. Curiel, 3 App. Div. 511; Wood v. Wilcox, 1 Den. 37; Beach v. Gray, 2 id. 84; Hoffman v. Delihanty, 13 Abb. Pr. 388.

[4] Hall v. Western Transportation Co., 34 N. Y. 284; Hoffman v. Delihanty, 13 Abb. Pr. 38; Westlake v. DeGraw, 25 Wend. 669. *Cf.* Croswell v. Crane, 7 Barb. 191; Cleves v. Willoughby, 7 Hill, 83.

[5] Forsyth v. Hartnett, 10 Hun, 573.

[6] Preston v. Hawley, 139 N. Y. 301; Thompson v. Cox, 20 Misc. Rep. 421.

[7] Collyer v. Collyer, 113 N. Y. 442; Lamb v. Lamb, 146 id. 323.

§ 191. **Rent due on life leases recoverable.**— Rent due on a lease for life or lives, is recoverable by action, as well after as before the death of the person on whose life the rent depends, and in the same manner as rent due on a lease for years.

Formerly 1 Revised Statutes, 747, sections 19, 20 and 21:

§ 19. Any person having any rent due upon any 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]

§ 20. Every person entitled to any rents dependent upon the life of any other, may, notwithstanding the death of such other person, have the same remedy by action or by distress, for the recovery of all arrears of such rent, that shall be behind and unpaid at the death of such other person, as he might have had if such person was in full life. (As modified by chap. 274, Laws of 1846.)[2]

§ 21. The executors or administrators of every person to whom any rent shall have been due and unpaid at the time of his death, may have the same remedy by action or by distress, for the recovery of all such arrears, that their testator or intestate might have had, if living.[3]

Account of this Enactment. At common law, debt lay for the rent of lands demised for life, for years, or at will. But with this distinction, that upon a lease for years or will, it lay as soon as in arrears, but upon a freehold lease, it was not maintainable until after the lease determined in some way; *e. g.*, by the death of *cestui que vie*.[4] The English statute, 8 Anne, chapter 14, section 4, put freehold leases on the same footing as leases for years. This statute did not, however, extend to the province of New York, but was nevertheless re-enacted in 1788[5] as a statute of the State. From the Revised Laws of 1813, it was incorporated in the Revised Statutes.[6]

1 Revised Statutes, 747, Sections 20, 21. 1 Revised Statutes, 747, sections 20 and 21,[7] stood upon a different principle. At common law, where a man was seized of a rent service, rent charge, rent seck, or fee farm rent, either in fee or in tail, and died, neither his heir nor personal representative could recover from the tenant the arrears of rent which had become due in the lifetime of the owner of the rent.[8] The same defect applied to the case of a

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Repealed, chap. 547, Laws of 1896.

[4] *Cf.* Comyn, Landlord & Tenant, 420.

[5] 2 J. & V. 236, § 16.

[6] 1 R. S. 747, § 19.

[7] *Supra.*

[8] Co. Litt. 162a.

tenant *pur autre vie* of a rent who died, living *cestui que vie*.[1] To remedy the former defect, it was enacted by the statute 32 Henry VIII, chapter 37, entitled "An act for recovery of arrearages of rent by executors of tenant in fee simple," that the executors should have an action for debt, and might also distrain for the rent unpaid at the time of the death of the person to whom the rent was due.[2] This statute was re-enacted in 1788 in New York,[3] and thence passed into the Revised Laws.[4] The Revised Statutes adopted the principle of the Revised Laws, but simplified the language.[5] Thus rights were given which did not exist by the common law, and proper remedies by action and distraint conferred.

Distraint for Rent. Distraint for rent was taken away in 1846,[6] and under the Constitution of 1846 the Code of Practice and statutes soon simplified the remedies for the collection of rent. But as the common law gave no rights in the cases mentioned above, the provisions of the Revised Statutes[7] have now again been re-enacted in this single section of The Real Property Law.[8] Through the aid of the Code of Practice[9] and other statutes[10] this section adequately provides a remedy in all the cases provided by any of the statutes above mentioned.

[1] Comyn, Landlord & Tenant, 371. *Cf.* 1 R. L. 438, § 17.

[2] Wright v. Williams, 5 Cow. 501; Van Rensselaer v. Jones, 5 Den. 449. *Cf.* Jacques v. Short, 20 Barb. 269, 274.

[3] 2 J. & V. 236, §§ 17, 18, 19; 1 K. & R. 134.

[4] 1 R. L. 438, 439.

[5] 1 R. S. 747, §§ 20, 21, and notes of Revisers to same.

[6] Chap. 271, Laws of 1846.

[7] 1 R. S. 747, §§ 19, 20, 21.

[8] § 191, *supra*.

[9] Regulating, actions, judgments, executions, etc.

[10] *Vide* Summary Proceeding Acts, "Consolidation Act," and 2 R. S. 113, § 3.

§ 192. **When rent is apportionable.**— Where a tenant for life, who shall have demised the real property, dies before the first rent day, or between two rent days, his executor or administrator may recover the proportion of rent which accrued to him before his death.

Formerly 1 Revised Statutes, 747, section 22:

§ 22. When a tenant for life, who shall have demised any lands, shall die on or after the day when any rent became due and payable, his executors or administrators may recover from the under tenant, the whole rent due; if he die before the day when any rent is to become due, they may recover the proportion of rent which accrued before his death.[1]

Apportionment of Rent. At common law rent could not be apportioned in respect of time.[2] Thus, where life tenant demised and died the day before a quarter day and the lease determined, his executors could not claim an apportionment of the rent; nor could the remainderman or reversioner claim that part of the rent which accrued during the life of the tenant for life; so that the lessee paid nothing.[3] This state of things was remedied in England by the statute 11 George II, chapter 19, section 15.[4] The English act was re-enacted in New York in 1788,[5] and passed into the Revised Laws of 1813,[6] and thence into the Revised Statutes.[7] But this statute was strictly construed, and did not extend to a case where the lease was not made by tenant for life, but was made before tenant for life's estate vested.[8]

Act of 1875. In 1875 an act was passed making all rents reserved on demises thereafter made apportionable and vesting a right of action in the legal representatives of persons entitled.[9] In 1893 the act of 1875 was repealed[10] and its provisions were transferred to the Code of Civil Procedure.[11]

The Commissioners of Statutory Revision state in substance that they have revised the above provision of the Revised Statutes in this section with a view to enlarge the remedy.[12]

[1] Repealed, chap. 547, Laws of 1896.

[2] Covenants to apportion were consequently inserted in most leases.

[3] Cruise, Dig., tit. 28, chap. 3, § 44; Marshall v. Moseley, 21 N. Y. 280, 282; Zule v. Zule, 24 Wend. 76.

[4] See the English act set out in Cruise, Dig., tit. 28, chap. 3, § 45.

[5] 2 J. & V. 241, § 27; 1 K. & R. 144.

[6] 1 R. L. 443.

[7] 1 R. S. 747, § 22; Marshall v. Moseley, 21 N. Y. at p. 284.

[8] Stilwell v. Doughty, 3 Bradf. (Sur.) 359; Marshall v. Moseley, 21 N. Y. at p. 285; Fay v. Halloran, 35 Barb. 295.

[9] Chap. 542, Laws of 1875, repealed by The Real Prop. Law, art. X, *infra*.

[10] Chap. 686, Laws of 1893.

[11] § 2720, Code of Civ. Proc.; Niles v. Chase, 29 Hun, 200.

[12] *Vide* note to § 192, The Real Prop. Law, Appendix 1, *infra*.

§ 193. **Rights where property or lease is transferred.**— The grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease, or the heir or personal representative of either of them, has the same remedies, by entry, action or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had, or would have had, if the reversion had remained in him. A lessee of real property, his assignee or personal representative, has the same remedy against the lessor, his grantee or assignee, or the representative of either, for the breach of an agreement contained in the lease, that the lessee might have had against his immediate lessor, except a covenant against incumbrances or relating to the title or possession of the premises leased. This section applies as well to a grant or lease in fee, reserving rent, as to a lease for life or for years; but not to a deed of conveyance in fee, made before the ninth day of April, eighteen hundred and five, or after the fourteenth day of April, eighteen hundred and sixty.

Formerly 1 Revised Statutes, 747, sections 23, 24, and 1 Revised Statutes, 748, section 25:

§ 23. The grantees of any demised lands, 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, distress 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. (Amended by chap. 274, Laws of 1846, by striking out the word "distress.")[1]

§ 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.[2]

§ 25. The provisions of the last two sections shall extend as well to grants or leases in fee, reserving rents, as to leases for life and for years.

The last section was amended by chapter 396, Laws of 1860, as follows:

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

CHAP. 396.

AN ACT to repeal chapter ninety-eight of the laws of eighteen hundred and five, and the subsequent re-enactment thereof.

Passed April 14, 1860.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter ninety-eight of the laws of eighteen hundred and five, passed April ninth, eighteen hundred and five, entitled "An act to amend an act entitled 'An act to enable grantees of reversions to take advantage of the conditions to be performed by lessees,'" and section three of chapter thirty-one of the Revised Laws, passed March nineteenth, eighteen hundred and thirteen, being a re-enactment of said chapter ninety-eight of the laws of eighteen hundred and five, and section twenty-five of chapter one, title four, part two, of the Revised Statutes, being a further re-enactment of the same, shall not apply to deeds of conveyance in fee made before the ninth day of April, eighteen hundred and five, nor to such deeds hereafter to be made.

§ 2. This act shall take effect immediately.[1]

Comment on Form of Section 193, Supra. By including the three foregoing sections of the Revised Statutes in a single section of this act the Commissioners of Statutory Revision have included a variety of laws under one head. It conduces to simplicity, therefore, to consider this section in its original shape.

Account of Legislation Embodied in Section 193, Supra. The provisions of 1 Revised Statutes, 747, section 23,[2] giving grantees of reversions the advantages of any conditions, etc., enjoyed by their grantors, was taken from the New York Revised Laws of 1813,[3] which in turn came from the re-enactment by the State Legislature in 1788 of the English statute of 32 Henry VIII, chapter 34.[4] This English act had extended to New York before its independence of the Crown.[5] Before the statute 32 Henry VIII, chapter 34, an assignee of a reversion had a right to sue tenant for rent, for rent was incident to the reversion.[6] But with reference to express covenants and conditions contained in the lease, the grantee being a stranger could not avail of them.[7] The statute 32 Henry VIII, chapter 34, enabled assignees of reversions to have

[1] Repealed, chap. 547, Laws of 1896.

[2] *Vide supra*, p. 453.

[3] 1 R. L. 363; 1 K. & R. 105.

[4] 2 J. & V. 184; Van Rensselaer v. Ball, 19 N. Y. 100, 104.

[5] And it was adopted by § 35, Const. of 1777, as a statute of the State.

[6] Dolph v. White, 12 N. Y. 296, 301; Marshall v. Moseley, 20 id. 280, 283; Payn v. Beal, 4 Den. 405, 410.

[7] See the text under § 49, The Real Prop. Law, *supra*, pp. 211, 212; Platt, Cov. 527; Comyn, Landl. & Ten. 362; Dolph v. White, 12 N. Y. 296; Cruger

the advantages of their assignors against lessees.[1] The act was substantially re-enacted in Jones & Varick's Revision of the New York laws, and, as detailed above, passed into the New York Revised Statutes.[2]

Assignee of Possibility of Reverter. The assignee of a mere possibility of reverter[3] is not an assignee of a reversion under the acts mentioned, and is not aided by this section of the statute.[4]

Assignees of Rent Charges and Perpetual Rents. How far this statute aided in New York assignees of a rent charge, or of a perpetual rent, has been considered above.[5] The statute 32 Henry VIII, chapter 34, had no reference to assignees of a rent, being confined to assignees of the land.[6] Assignees of a rent, but not of the reversion, were, however, enabled to sue for it in their own name in this State, at an early day.[7]

1 Revised Statutes, 747, Section 24, Supra. The provisions of 1 Revised Statutes, 747, section 24,[8] giving lessees and their assigns and representatives the same rights against assignees of reversions that they had against their predecessors in demise, is also derived from the same English statute mentioned just above,[9] and its re-enactment followed the course in New York detailed in the preceding paragraph.[10] Indeed, the statute of 32 Henry VIII, chapter 34, provided relief for assignees of reversions against tenants, and also for tenants against assignees of reversions.[11] Under this statute the common law was so modified as to give tenants the same rights against assignees of reversion on real covenants and conditions in demises that they had against the original lessors,[12]

v. McLawry, 41 id. 219, 226; Willard v. Tillman, 2 Hill, 274; Van Rensselaer v. Jewett, 5 Den. 121; Harbeck v. Sylvester, 13 Wend. 608.

[1] This English act is set out in Comyn, at p. 263, and in Platt, Cov. 527, *seq.*

[2] Van Rensselaer v. Ball, 19 N. Y. 100, 104.

[3] *Vide* "Possibility of Reverter," General Index, *infra.*

[4] Van Rensselaer v. Ball, 19 N. Y. 100, 103; Upington v. Corrigan, 151 id. 143, and cases cited at pp. 211, 212, *supra*, under § 49, The Real Prop. Law, and Berenbroick v. St. Luke's Hospital, 23 App. Div. 339.

[5] *Supra*, pp. 91, 105, under §§ 20, 21, The Real Prop. Law.

[6] Comyn, Landl. & Ten. 267.

[7] Demarest v. Willard, 8 Cow. 206; Willard v. Tillman, 3 Hill, 274.

[8] *Supra*, p. 453.

[9] 32 Hen. VIII, chap. 34.

[10] 2 J. & V. 184; 1 K. & R. 105; 1 R. L. 363; 1 R. S. 748, § 24, and now § 193, *supra*, of The Real Prop. Law.

[11] Taylor, Landl. & Ten. § 439 Comyn, Landl. & Ten. 269.

[12] Platt, Cov. 522; Buck v. Binnenger, 3 Barb. 391; Myers v. Burns, 33 id. 401; S. C., 35 N. Y. 269; Wilkinson v. Petit, 47 Barb. 230; Verplanck v. Wright, 23 Wend. 506; Allen v. Culver, 3 Den. 284, 294, and see Phœnix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400.

provided such covenants and conditions run with the land and are not purely personal.[1]

1 Revised Statutes, 748, Section 25, Supra. The provisions of 1 Revised Statutes, 748, section 25, were an epitome of chapter 98 of the Laws of 1805, as it was re-enacted in the Revised Laws of 1813.[2] In the remarks under section 21 of The Real Property Law, the remedies reserved on fee farm grants, or those grants in fee subject to perpetual rents, have been freely discussed,[3] and it is not necessary to repeat, in detail, the causes which led to the act of 1805. We may now confine our attention to the salient points involved in this branch of section 193 of The Real Property Law.[4] In the first place we must remember that the act 32 Henry VIII, chapter 34[5] (embodied in 1 R. S. 747, §§ 23, 24), had no relation to assignments of perpetual rents reserved on estates in fee, for there the tenant of the rent had no reversion.[6] As after the Statute *Quia Emptores* no subject could reserve a rent as a mere incident of tenure, the reservation of a perpetual rent seck, or one unaccompanied with a charge on land, or a clause reserving right of distress or re-entry, was, at common law, a very precarious security even in the hands of the original grantee.[7] Indeed, it was claimed in New York that the assignees and devisees of the tenant of the perpetual rents had practically no remedy whatever.[8] This claim extended even to rents charge, such as were usual in the Manors of Rensselaer and Livingston.[9] The act of 1805, extending the remedies and rights of the act 32 Henry VIII, chapter 34, to assignees of rents reserved on grants in fee, was long considered the basis of protection to all devisees, assignees and heirs of perpetual rents in New York.[10] Chapter 396 of the Laws of 1860, however, repealed the act of 1805 as far as possible, making that act inapplicable to grants in fee made prior

[1] Norman v. Wells, 17 Wend. 136; Mirick v. Bashford, 38 Barb. 191. *Cf.* Avery v. N. Y. Cent. & H. R. R. R. Co., 7 N. Y. Supp. 341; Wilmurt v. McGrane, 16 App. Div. 412.

[2] 1 R. L. 364, § 3, and thence introduced in 1 R. S. 748, § 23.

[3] *Supra*, pp. 103, 104, 105, 106.

[4] *Supra*, pp. 453, 454.

[5] *Supra*, p. 454.

[6] Comyn, Landl. & Ten. 267; Van Rensselaer v. Read, 26 N. Y. at p. 569.

[7] The right of distraint depended on fealty and tenure at common law. *Supra*, p. 49.

[8] *Supra*, pp. 108, 109.

[9] These grants usually reserved the right to re-enter for breach of conditions subsequent, and the right to distrain, but not invariably. (*Vide* Hosford v. Ballard, 39 N. Y. at p. 150.) *Cf.* chap. 14, Laws of 1774.

[10] *Supra*, pp. 105, 106. See, also, the curious history of the tenants' side of the anti-rent difficulties in New York,

to 1805 or subsequently to 1860. The object of this repeal was supposed to be, nay was, to take away or embarrass the remedies of devisees, assignees or heirs of perpetual rents reserved on deeds in fee.[1] But subsequently to 1860 it was held that the remedies of assignees, devisees and heirs of perpetual rents reserved in deeds in fee, were independent of the act of 1805, and that an action on the covenant lay at common law;[2] that the covenant ran with the land, and might be taken advantage of by grantees, devisees and assignees of the original covenantee.[3] This decision puts the remedies on covenants for the payment of rent, and on conditions for re-entry,[4] contained in deeds in fee, at rest in New York, independently of the act of 1805 and of this section of The Real Property Law.[5] Even proof of non-payment of rent for a period of sixty-three years will not raise a conclusive presumption of release of rent reserved, when the covenant sued on remains in possession of the covenantee, or his heirs and assigns.[6]

Remedies of Heirs of Lessor. Before this section, the remedies of heirs by entry, action or otherwise, on breaches of covenants in leases, were provided by statute.[7] They might maintain action for waste,[8] and their right of action was not impaired by descent cast.[9]

set out in a book entitled "Rents, Covenants and Conditions," by Bingham and Colvin, Albany, 1857. *Sed. cf.* chap. 14, Laws of 1774.

[1] See reporter's note to Cruger v McLawry, 41 N. Y. at p. 227.

[2] Van Rensselaer v. Read, 26 N. Y. 558.

[3] Van Rensselaer v. Read, 26 N. Y. 558.

[4] Van Rensselaer v. Read, 26 N. Y. at p. 576; Van Rensselaer v. Dennison; 35 id. 393; Cruger v. McLawry, 41 id. at p. 222. *Cf.* Graves v. Deterling, 120 id. at p. 457.

[5] Bradt v. Church, 110 N. Y. 537; Taylor, Landl. & Ten. note to § 261 (8th ed.).

[6] Central Bank v. Heydorn, 48 N. Y. 260.

[7] 1 R. S. 747, § 23; Laws of 1846, chap. 274.

[8] 2 R. S. 334, § 4; Code Civ. Proc. § 1652.

[9] 2 R. S. 295, § 15; Code of Proc. § 87; Code of Civ. Proc. § 374.

§ 194. **Attornment by tenant.**— The attornment of a tenant to a stranger is absolutely void, and does not in any way affect the possession of the landlord unless made either:

1. With the consent of the landlord; or,

2. Pursuant to or in consequence of a judgment, order, or decree of a court of competent jurisdiction; or,

3. To a mortgagee, after the mortgage has become forfeited.

Formerly 1 Revised Statutes, 744, section 3:

§ 3. 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,

1. With the consent of the landlord: or,

2. Pursuant to, or in consequence of, a judgment at law, or the order or a decree of a court of equity: or,

3. To a mortgagee after the mortgage has become forfeited.[1]

Attornment. At common law, an attornment was the assent of the tenant to a grant of the seigniory. This grant, as the relation of lord and tenant was reciprocal, could not be made without the tenant's consent.[2] Such consent was an "attornment." This restraint on the lord's power of alienation soon wore away.[3] Even after the gradual amelioration of the feudal law, an attornment of the tenant was still, however, necessary for some purposes when a landlord assigned a reversion.[4] The legal doctrine of attornment had three purposes: (1) That the tenant might not be subjected to a new landlord without his consent; (2) that he might know to whom to render services and pay rent, and distinguish between an unlawful and lawful taking or distraint of his cattle by persons claiming to be his landlords; (3) that by such attornment, the grantee of the reversion might be put in acknowledged and public possession.[5] The necessity of attornment was partly avoided by the method of conveying to uses under the statute 27 Henry VIII, chapter 10, and by the Statutes of Wills (32, 34, 35 Henry VIII), by which the estate was vested in the devisee;[6] and such necessity

[1] Repealed, chap. 547, Laws of 1896.

[2] Co. Litt. 309a; Litt. § 551; *vide*, § 213, The Real Prop. Law.

[3] 2 Black. Comm. 72.

[4] 3 Preston, Abstracts of Title, 82. Prior to 4, 5 Anne, the grant of a reversion or an incorporeal hereditament was not perfect till attornment; and see Comyn, Landlord & Tenant, 423.

[5] Gilbert, Tenures, 81.

[6] Comyn, Landlord & Tenant, 423; Archbold, Landlord & Tenant, 76.

of attornment was almost taken away by two later statutes.[1] These two acts, not extending to the province of New York, were substantially re-enacted here in 1773 and 1774.[2] In 1788, these two English acts were again re-enacted by the State Legislature,[3] and thence passed into subsequent revisions,[4] including the Revised Statutes[5] and this present law.[6] By virtue of these enactments, attornment is not now necessary to an assignment of a reversion.

11 George II, Chapter 19. The present sections of The Real Property Law[7] are not essentially different from the English statutes cited above.[8] The latter law (11 Geo. II) was copied into Jones & Varick's Revision, and enacted in the following words:

> And whereas the possession of estates in lands, tenements and hereditaments, is rendered very precarious, by the frequent and fraudulent practice of tenants, in attorning to strangers who claim title to the estates of their respective landlord or landlords, lessor or lessors, who by that means are turned out of possession of their respective estates, and put to the difficulty and expence of recovering the possession thereof, by actions or suits at law: For remedy whereof, Be it further enacted, by the authority aforesaid, That all and every such attornment or attornments of any tenant or tenants of any messuages, lands, tenements or hereditaments, shall be absolutely null and void, to all intents and purposes whatsoever, and the possession of their respective landlord or landlords, lessor or lessors, shall not be deemed or construed to be in any wise changed, altered or affected, by any such attornment or attornments: Provided always, That nothing herein contained, shall extend to vacate or affect any attornment made pursuant to and in consequence of some judgment at law, or decree, or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee, after the mortgage is become forfeited.[9]

The substance of the act 4 Anne, chapter 16, was also re-enacted saving rents paid by tenant without notice of assignment of reversion.[10]

[1] 4 Anne, chap. 16, §§ 9, 10; 11 Geo. II, chap. 19, § 11.

[2] Van Schaack's N. Y. Laws, 768, § 7; N. Y. Laws of 1774, chap. 14. It was thought that the doctrine of attornment had a limited application in America even before these statutes. 1 Hilliard, Real Prop. 190. This is shown by the date of the re-enactments in New York.

[3] 2 J. & V. 240, § 28; Id. 281, § 32.

[4] 1 K. & R. 134; Id. 357; 1 R. L. of 1813, 443; Id. 525.

[5] 1 R. S. 744, § 3; Id. 739, § 146.

[6] § 194, The Real Prop. Law; Id. § 213; O'Donnell v. McIntyre, 37 Hun, 623.

[7] § 194, *supra;* § 213, *infra.*

[8] 4 Anne, chap. 16; 11 Geo. II, chap. 19. These acts are set out in Archbold's Landl. & Ten. 76.

[9] 2 J. & V. 240; adopted with a verbal change or two in 1 K. & R. 134; 1 R. L. of 1813, 443.

[10] Van Schaack, 768; 2 J. & V. 281; § 32, 1 R. L. 525; 1 R S. 739, § 146. *Vide* under § 213, The Real Prop. Law, *infra.*

Attornment to Mortgagee. The statutes mentioned above have almost dispensed with the necessity of attornment, but not entirely.[1] Even at the present day in New York, attornment to a mortgagee is necessary where mortgagor in possession executes a lease, and then defaults. The mortgagee cannot take advantage of a lease, made subsequent to his mortgage, without tenant attorns.[2] As such a lease is ineffectual against the prior mortgage[3] without an attornment, it is not, and ought not to be, binding on the tenant.[4] An attornment to mortgagee is, however, expressly allowed by this section of the act.[5] As to whether such attornment constitutes a new tenancy or a continuance of the old for the purpose of back rents, there is a decided difference of opinion.[6]

Attornment to Stranger. While an attornment to a stranger is void as to the landlord since 11 George II,[7] it may be binding as to the tenant,[8] and valid with the consent of the landlord,[9] or if made pursuant to a judgment of a competent court.[10] But where the judgment is reversed, the attornment is a nullity again.[11]

[1] 2 Bingh. 59; 1 Powell, Mortgages, 174, n.; Austin v. Ahearne, 61 N. Y. 6; O'Donnell v. McIntyre, 118 id. 156.

[2] Moran v. The Pittsburgh, Cin. & St. Louis R. R. Co., 32 Fed. Rep. 78; Sprague Nat. Bank v. Erie R. R. Co., 22 App. Div. 526; Archbold, Landl. & Ten. 77.

[3] Whalin v. White, 25 N. Y. 462; Cowley v. Cart, 44 id. 382.

[4] Taylor, Landl. & Ten. 121.

[5] O'Donnell v. McIntyre, 118 N. Y. 156; Austin v. Ahearne, 61 id. 6; Jones v. Clark, 20 Johns. 51; Brown v. Dean, 3 Wend. 208; Simers v. Saltus, 3 Den. 214. *Cf.* 1 R. S. 744, § 3; 1 R. L. 443, § 28; 11 Geo. II, chap 19.

[6] *Cf.* Austin v. Ahearne, 61 N. Y. 6; Taylor, Landl. & Ten. (8th ed.) §§ 121, 442, notes; McGregor v. The Board of Ed. City N. Y., 107 N. Y. 511.

[7] O'Donnell v. McIntyre, 118 N. Y. 156; S. C. below, 37 Hun, 623; Lawrence v. Brown, 5 N. Y. 394, 405; Freeman v. Ogden, 40 id. 105, 109; Jackson ex dem., etc., v. De Lancey, 13 Johns. 537; Jackson ex dem., etc., v. Harper, 5 Wend. 246; Jackson v. Miller, 6 id. 228.

[8] Kenada v. Gardner, 3 Barb. 589.

[9] § 194, *supra;* Jackson v. Brush, 20 Johns. 5. *Cf.* Moffatt v. Smith, 4 N. Y. 126.

[10] § 194, The Real Prop. Law, *supra.*

[11] Ross v. Kernan, 31 Hun, 164.

§ 195. **Notice of action adverse to possession of tenant.**— Where a process or summons in an action to recover the real property occupied by him, or the possession thereof, is served upon a tenant, he must forthwith give notice thereof to his landlord; otherwise he forfeits the value of three years' rent of such property, to the landlord or other person of whom he holds.

Formerly 1 Revised Statutes, 748, section 27:

§ 27. Every tenant to whom a declaration in ejectment, or any other process, proceeding or notice of any proceeding, to recover the land occupied by him, or the possession thereof, shall be served, shall forthwith give notice thereof to his landlord, under the penalty of forfeiting the value of three years rent of the premises so occupied by him, which may be sued for and recovered by the landlord or person of whom such tenant holds.[1]

Comment on this Enactment. Since ejectment became a possessory action, the tenant in possession is always *prima facie* the real party in interest in actions of this nature.[2] But the landlords were, at an early time, deemed proper parties to this action and were let in to defend by statute;[3] but as an ejectment might still be brought against the tenant alone by a stranger, in order to prevent collusion, the statute 11 George II, chapter 19, section 12, provided: "That every tenant to whom a declaration in ejectment shall be delivered shall give notice thereof to his landlord, under penalty of forfeiting the value of three years improved, or rack, rent." This statute did not extend to the province of New York, but was re-enacted here in 1774,[4] and from time to time thereafter,[5] and thus passed into the Revised Statutes[6] and the present law.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] Tyler, Ejectment, 442; § 3343, subd. 20, Code Civ. Proc.; Fiero, Special Actions, chap. 1.

[3] 11 Geo. II, § 13; chap. 14, N. Y. Laws of 1774; 2 J. & V. 241, § 30.

[4] Chap. 14, Laws of 1774.

[5] 2 J. & V. 241, § 29; 1 K. & R. 134; 1 R. L. 443.

[6] 1 R. S. 748, § 27.

[7] § 195, *supra;* Stewart v. Smith, 4 Abb. Ct. App. Dec. 306, 307; Rigney v. Coles, 6 Bosw. 479, 493.

§ 196. **Effect of renewal on sub-lease.**—The surrender of an under-lease is not requisite to the validity of the surrender of the original lease, where a new lease is given by the chief landlord. Such a surrender and renewal do not impair any right or interest of the chief landlord, his lessee or the holder of an under-lease, under the original lease; including the chief landlord's remedy by entry, for the rent or duties secured by the new lease, not exceeding the rent and duties reserved in the original lease surrendered.

Formerly 1 Revised Statutes, 744, section 2:

§ 2. If any lease be surrendered in order to be renewed, and a new lease be made by the chief landlord, such new lease shall be good and valid to all intents and purposes, without a surrender of all or any of the under leases derived out of such original lease so surrendered; and the chief landlord, his lessee, and the holders of such under leases, shall enjoy all their rights and interests, in the same manner and to the same extent, as if the original lease had been still continued; and the chief landlord shall have the same remedy by distress, or entry upon the demised premises for the rents and duties secured by such new lease, so far as the same do not exceed the rents and duties reserved in the original lease so surrendered.[1] (Amended by chap. 274, Laws of 1846, abolishing distress.)[2]

History of this Enactment. At common law a lease for lives or years could not be renewed without a surrender, not only of the lease itself but of all the under leases which had been derived out of it; so that it was in the power of the under tenants to prevent or delay the renewal of the principal lease by refusing to surrender their under leases.[3] But by statute 4 George II, chapter 28, section 6, this hardship was remedied, and the new lessee was given remedies against the original sub-tenants, holding under the original demise. This statute being passed only in 1731, did not extend to the province of New York. But it was re-enacted here in 1774.[4] After "Independence" the statute was again re-enacted in the general revision of 1788,[5] and thence passed into subsequent revisions,[6] and finally into the Revised Statutes[7] and the present law.[8]

Effect of Surrender of a Lease. The effect of such a surrender as between the parties is to merge the terms. But the rights of

[1] Repealed, chap. 547, Laws of 1896.
[2] Conkey v. Hart, 14 N. Y. 22.
[3] Archbold, Landl. & Ten. 64.
[4] Chap. 14, N. Y. Laws of 1774.
[5] 2 J. & V. 233, § 26.
[6] 1 K. & R. 134, § 26; 1 R. L. 442, § 26.
[7] 1 R. S. 744, § 2; 4 Kent, Comm. 104.
[8] § 196, *supra*.

strangers and sub-tenants are not thereby affected; they are preserved, while the equitable rights of the original landlord against the under tenants are protected and secured by this statute.[1]

Surrender, how Made. A surrender of a demise for a term of years must now be in writing,[2] unless it have less than a year to run.[3] But the acceptance of a valid and complete new lease, contract, or deed of the fee, may operate as a surrender in law without an express surrender.[4]

Surrender not an Abandonment. A surrender is not an abandonment under a special law permitting lessees to vacate.[5]

[1] Archbold, Landl. & Ten. 84; 4 Kent, Comm. 104. *Cf.* Coe v. Hobby, 72 N. Y. 141, 146; Ballou v. Baxter, 28 N. Y. St. Repr. 431.

[2] § 207, The Real Prop. Law; Rowan v. Lytle, 11 Wend. 616; Allen v. Jaquish, 21 Wend. 628.

[3] Smith v. Devlin, 23 N. Y. 363; Tallman v. Earle, 37 N. Y. St. Repr. 271; Sherman v. Engel, 18 Misc. Rep. 484.

[4] Bailey v. Delaplaine, 1 Sandf. 5; Livingston v. Potts, 16 Johns. 28; Van Rensselaer's Heirs v. Penniman, 6 Wend. 569; Schieffelin v. Carpenter, 15 id. 400; Smith v. Niver, 2 Barb. 180; Bedford v. Terhune, 30 N. Y. 453; Coe v. Hobby, 72 id. 141; Chamberlain v. Dunlop, 126 id. 45; Lewis v. Angermiller, 89 Hun, 65; Underhill v. Collins, 132 N. Y. 269, 272.

[5] § 197, The Real Prop. Law; Laws of 1860, chap. 345.

§ 197. **When tenant may surrender premises.**— Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender.

Formerly chapter 345, Laws of 1860:

AN ACT in relation to the rights and liabilities of owners and lessors, and of lessees and of occupants of buildings.

Passed April 13, 1860.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The lessees or occupants of any building which shall, without any fault 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 premises, and of the land so leased or occupied.

§ 3. This act shall take effect immediately.[1]

Common Law. At common law, if a lease contain no provision to the contrary, and there is a covenant to pay rent, the tenant can be compelled to pay rent though the buildings are destroyed by fire[2] or lightning,[3] provided such destruction was not before entry,[4] and the lease covers the ground.[5] The landlord is not obliged to rebuild in the absence of an express covenant so to do,[6] nor can he be compelled to rebuild by an action in equity, even if there is a covenant to rebuild.[7] A covenant to rebuild, if express, binds personal representatives.[8] An ordinary covenant to repair is not, however, a covenant to rebuild.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] Hallett v. Wylie, 3 Johns. 44; Gates v. Green, 3 Paige, 355; Graves v. Berdan, 26 N. Y. 498, 501.

[3] Babcock v. The Montgomery Co. Mut. Ins. Co., 4 N. Y. 326.

[4] Wood v. Hubbell, 5 Barb. 601.

[5] Graves v. Berdan, 26 N. Y. 498; Doupe v. Genin, 45 id. 119, 123.

[6] Doupe v. Genin, 45 N. Y. 119; Smith v. Kerr, 108 id. 31, 34.

[7] Beck v. Allison, 56 N. Y. 366.

[8] Chamberlain v. Dunlop, 126 N. Y. 45.

[9] Butler v. Kidder, 87 N. Y. 98. *Cf.* Allen v. Culver, 3 Den. 284.

The Statute of 1860. The statute of 1860 introduced a new rule in the construction of leases, the benefit of which may be waived, if the parties themselves covenant in respect of the matters controlled by the statute in the absence of such covenant.[1] But a mere covenant to repair is not a waiver of the benefit of the statute.[2] Where the building is destroyed by fire, or rendered unfit for occupation, under this act, the tenant must surrender possession in order to escape liability,[3] and such surrender must be within a reasonable time.[4] A notice of abandonment from the tenant to the landlord is unnecessary; the statute dissolves the relation unless the tenant elects to continue it.[5] The statute was intended to modify the rigor of the common law, and not to create a new relation or contract.[6] Where the tenant gives notice that he elects to terminate the lease and stops on to protect his property, it seems that he does not thereby waive the benefit of this statute.[7]

Causes for Surrender. Dampness may render the building untenantable, within this act, if injurious to health;[8] so offensive odors;[9] very defective plumbing in apartment houses;[10] defectively con-

[1] N. Y. R. E., etc., Co. v. Motley, 143 N. Y. 156; Nimmo v. Harway, 23 Misc. Rep. 126; Butler v. Kidder, 87 N. Y. 98; Tocci v. Powell, 9 App. Div. 283. *Cf.* Witty v. Matthews, 52 N. Y. 512; N. Y., etc., Imp. Co. v. Motley, 20 N. Y. Supp. 947; Achlers v. Rehlinger, 1 City Ct. Rep. 79.

[2] Butler v. Kidder, 87 N. Y. 98; N. Y., etc., Co. v. Motley, 143 id. 156; Warner v. Hitchins, 5 Barb. 666; U. S. v. Bostwick, 4 Otto (U. S.), 53.

[3] Johnson v. Oppenheim, 55 N. Y. 280, 285; Smith v. Kerr, 108 id. 31, 34; Danziger v. Falkenberg, 18 N. Y. Supp. 927; Copeland v. Luttgen, 17 Misc. Rep. 604; Lansing v. Thompson, 8 App. Div. 54.

[4] Bassett v. Dean, 34 Hun, 250; Copeland v. Luttgen, 17 Misc. Rep. 604; Stein v. Rice, 23 id. 348. As to what is a reasonable time, see Decker v. Morton, 31 App. Div. 469.

[5] Fleischman v. Toplitz, 134 N. Y. 349; Smith v. Kerr, 108 id. 31, 34.

[6] Suydam v. Jackson, 45 N. Y. 450; Chadwick v. Woodward, 13 Abb. N. C. 441; Connor v. Bernheimer, 6 Daly, 295; Lansing v. Thompson, 8 App. Div. 54.

[7] Decker v. Morton, 31 App. Div. 469.

[8] Franke v. Youmans, 17 Week. Dig. 252.

[9] Tallman v. Murphy, 120 N. Y. 345; Lathers v. Coates, 18 Misc. Rep. 231 and cases there cited. *Cf.* Sutphen v. Seebass, 14 Abb. N. C. 67, n.; Coulsen v. Whiting, Id. 60.

[10] Lathers v. Coates, 18 Misc. Rep. 231; Bradley v. De Goicouria, 14 Abb. N. C. 53; Fitch v. Armour, 49 N. Y. St. Repr. 246. *Cf.* Chadwick v. Woodward, 13 Abb. N. C. 441; Thalheimer v. Lempert, 17 N. Y. St. Repr. 346; Strauss v. Hamersley, 37 id. 749;

structed heating apparatus in apartment houses.[1] Apartment houses seem to stand on a separate legal footing in some respects.[2] But it must be remembered that acts constituting an eviction do not depend on this statute.[3]

When this Section does not Apply. This act refers to a destruction, or injury, resulting from some sudden and unexpected action of the elements, and not to gradual deterioration and decay.[4] It cannot apply where the tenant knew the premises to be untenantable,[5] or presumably where tenant enters under a covenant to repair;[6] and even without covenant tenant is obliged to make ordinary repairs.[7]

Tenant not Released from Accrued Rent. This act does not release tenant from rent accrued at the time of the cessation of the tenancy.[8]

S. C., 13 N. Y. Supp. 816; Stein v. Rice, 23 Misc. Rep. 348.

[1] O'Gorman v. Harby, 18 Misc. Rep. 228; Lawrence v. Burrell, 17 Abb. N. C. 312.

[2] Fitch v. Armour, 39 N. Y. St. Repr. 246; see note 20 Abb. N. C. 330; Gale v. Heckman, 16 Misc. Rep. 376; Stewart v. Frost, 15 id. 621; Graves v. Berdan, 26 N. Y. 498.

[3] Hamilton v. Graybill, 19 Misc. Rep. 521; Wyse v. Russell, 16 id. 53; Boreel v. Lawton, 90 N. Y. 293; Sully v. Schmitt, 147 id. 248.

[4] Lansing v. Thompson, 8 App. Div. 54; Suydam v. Jackson, 54 N. Y. 450; Edwards v. McLean, 122 id. 302, 308.

[5] Alsheimer v. Krohn, 45 How. Pr. 127.

[6] Sheary v. Adams, 18 Hun, 181; Suydam v. Jackson, 54 N. Y. 540.

[7] Lynch v. Sauer, 16 Misc. Rep. 1, 3; Franklin v. Brown, 118 N. Y. 110, 113.

[8] Cheesebrough v. Lieber, 18 Misc. Rep. 459: Craig v. Butler, 83 Hun, 286. *Cf.* Hecht v. Heerwagen, 13 Misc. Rep. 316; Kelly v. Partridge, 4 id. 205.

§ 198. **Termination of tenancies at will or by sufferance by notice.**—A tenancy at will or by sufferance, however created, may be terminated by a written notice of not less than thirty days given in behalf of the landlord, to the tenant, requiring him to remove from the premises; which notice must be served, either by delivering to the tenant or to a person of suitable age and discretion, residing upon the premises, or if neither the tenant nor such a person can be found, by affixing it upon a conspicuous part of the premises, where it may be conveniently read. At the expiration of thirty days after the service of such notice, the landlord may re-enter, maintain ejectment, or proceed, in the manner prescribed by law, to remove the tenant, without further or other notice to quit.

Formerly 1 Revised Statutes, 745, sections 7, 8 and 9:

§ 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 remove therefrom.[1]

§ 8. Such notice shall be served by delivering the same to such tenant, or to some person of proper age residing on the premises; or if the tenant can not be found, and there be no such 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.[2]

§ 9. At the expiration of one month from the service of such notice, the landlord may re-enter, or maintain ejectment, or proceed in the manner prescribed by law, to remove such tenant, without any further or other notice to quit.[3]

Tenancy at Will or by Sufferance, how Determined. What constitutes a tenancy at will, or by sufferance, has been already noticed under the section enumerating estates.[4] At common law a tenancy by sufferance might be determined by mere entry.[5] This was the law of this State until 1820, when an act was passed requiring three months' notice, in writing, to the tenant, before summary procedings could be instituted for an unlawful holding over.[6] The Revised Statutes incorporated the statute of 1820, in substance, in the foregoing sections,[7] and, at the present time, tenan-

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Repealed, chap. 547, Laws of 1896.

[4] § 20, The Real Prop. Law, *supra*, p. 92.

[5] Archbold, Landl. & Ten. 78; Jackson ex dem. v. Bryan, 1 Johns. 322; Jackson v. Parkhurst, 5 id. 128; Jackson v. McLeod, 12 id. 182; Reckhow v. Schanck, 43 N. Y. 448, 451.

[6] Chap. 194, Laws of 1820, p. 177.

[7] 1 R. S. 745, §§ 8, 9. See note of Revisers to original section of 1 R. S. 745.

cies at will and by sufferance are to be terminated by notice under this section.[1]

The Revised Statutes. The Revised Statutes formerly declared a tenant holding over a trespasser,[2] and a notice to quit under section 7[3] was held inapplicable to one so holding over.[4] But a holding over may ripen into a tenancy by sufferance, where it is continued for such a time and under such circumstances as to authorize the implication of an assent by the landlord.[5]

Application of Section 198, Supra. This section applies to tenancies at will and by sufferance only.[6] A holding over is still made unlawful, at landlord's option; but this section does not apply to unlawful tenures,[7] or to trespassers,[8] and to like occupants. This section may, however, apply to a case where one enters by consent under a void lease for years.[9]

Section 198 does not Apply to Tenancies from Year to Year. This section does not apply to definite tenancies from year to year, and a tenant from year to year is not entitled to notice to quit before ejectment or summary proceedings,[10] although it has been said that a formal half-year's notice to quit may be necessary to terminate a tenancy from year to year;[11] and this is so under the next sec-

[1] § 198, The Real Prop. Law; Bristor v. Burr, 12 N. Y. St. Repr. 638; Burns v. Bryant, 31 N. Y. 453; Larned v. Hudson, 60 id. 102; Post v. Post, 14 Barb. 253; Nowlan v. Trevor, 2 Sweeny, 67.

[2] 1 R. S. 749, § 7, now repealed; but § 200, The Real Prop. Law, still makes a holding over unlawful.

[3] *Supra*, 1 R. S. 745.

[4] Livingston v. Tanner, 14 N. Y. 64; Smith v. Littlefield, 51 id. 539; Rowan v. Lytle, 11 Wend. 616. Note to § 64, Taylor, Landl. & Ten.

[5] Smith v. Littlefield, 51 N. Y. 539. *Cf.* Coudert v. Cohn, 118 id. 309; Talamo v. Spitzmiller, 120 id. 37; Adams v. City of Cohoes, 127 id. 175.

[6] Burns v. Bryant, 31 N. Y. 453; Larned v. Hudson, 60 id. 102; Morgan v. Powers, 83 Hun, 298; Adams v. City of Cohoes, 127 N. Y. 183, 184; Hungerford v. Wagoner, 5 App. Div. 590.

[7] § 200, The Real Prop. Law, *et ut supra*.

[8] Reckhow v. Schanck, 43 N. Y. 448, 451.

[9] Reeder v. Sayre, 70 N. Y. 180; People v. Rickert, 8 Cow. 226, 231; Coudert v. Cohn, 118 N. Y. 309. *Cf.* Jackson v. Rogers, 1 Johns. Cas. 33; S. C., 2 Cai. Cas. 314; Jackson v. Cuerden, 2 Johns. Cas. 353; Jackson v. Ellis, 13 Johns. 118; Craske v. The Christian Union Pub. Co., 17 Hun, 319; Hungerford v. Wagoner, 5 App. Div. 590; People ex rel., etc., v. Darling, 47 N. Y. 666; Talamo v. Spitzmiller, 120 id. 37; Prindle v. Anderson, 19 Wend. 391; Adams v. City of Cohoes, 127 N. Y. 175.

[10] Nichols v. Williams, 8 Cow. 13 Post v. Post, 14 Barb. 253; Park v. Castle, 19 How. Pr. 29; Adams v. City of Cohoes, 127 N. Y. 175.

[11] Pugsley v. Aikin, 11 N. Y. 494; Reeder v. Sayre, 70 id. 180, 186; Hun-

tions.[1] Where a tenant for years, without notice, holds over, the law implies an agreement to hold for another year, on terms of lease, at landlord's option;[2] and the tenancy then ends at the expiration of the year held over, without notice.[3]

Contents of Written Notice. A written notice, though it specify a wrong date, is good thirty days after service under this section.[4] It may be served by any one designated by the landlord,[5] and it seems must contain a warning of summary proceedings for default of removal,[6] although no particular form is necessary.[7] The effect of notice may be waived by subsequent unqualified acceptance of rent.[8]

Monthly Tenant Entitled to Five Days' Notice. A monthly tenant is entitled to five days' notice before summary proceedings can be begun in the cities of New York and Brooklyn to dispossess for holding over the term.[9] But not where tenant gives notice of surrender.[10] A notice of thirty days is not necessary where the tenancy is from month to month.[11]

gerford v. Wagoner, 5 App. Div. 590, 592; Merritt v. Merritt, 3 N. Y. St. Repr. 484; Nowlan v. Trevor, 2 Sweeny, 67, 70. *Cf.* Rorbach v. Crossett, 46 N. Y. St. Repr. 426; Coudert v. Cohn, 118 N. Y. 309; Talamo v. Spitzmiller, 120 id. 37; Park v. Castle, 19 How. Pr. 29; Jackson ex dem., etc., v. Bryan, 1 Johns. 322.

[1] §§ 199, 200, The Real Prop. Law. At common law, though no notice was necessary for a term certain, it was necessary, if the landlord wished to recover, for a holding over, a double penalty under the statute. Comyn, Landl. & Ten. 350.

[2] Conway v. Starkweather, 1 Den. 113; Schuyler v. Smith, 51 N. Y. 309; Ackley v. Westervelt, 86 id. 448; Haynes v. Aldrich, 133 id. 287; Herter v. Mullen, 9 App. Div. 593; Cram v. Springer Lith. Co., 10 Misc. Rep. 660; Garrick v. Menut, 41 N. Y. St. Repr. 46; Wood v. Gordon, 44 id. 640.

[3] Rorbach v. Crossett, 46 N. Y. St. Repr. 426; Adams v. City of Cohoes, 127 N. Y. 175; Witt v. Mayor, etc., 5 Robt. 248. *Cf.* McKay v. Mumford, 10 Wend. 351, 353; Crouch v. Trimby, etc., 83 Hun, 276; Frost v. Akron Iron Co., 12 Misc. Rep. 348; People ex rel. Botsford v. Darling, 47 N. Y. 666; Luger v. Goerke, 18 App. Div. 291.

[4] Burns v. Bryant, 31 N. Y. 453; People v. Shackno, 48 Barb. 551; Nowlan v. Trevor, 2 Sweeny, 67. *Cf.* Morgan v. Powers, 83 Hun, 298.

[5] Simpson v. Masson, 11 Misc. Rep. 351.

[6] Folz v. Shalow, 16 N. Y. Supp. 942.

[7] Adams v. City of Cohoes, 127 N. Y. at p. 184.

[8] Prindle v. Anderson, 19 Wend. 391.

[9] Chap. 303, Laws of 1882; amd., chap. 357, Laws of 1889.

[10] Hoske v. Gentzlinger, 87 Hun, 3.

[11] People ex rel. Oldhouse v. Goelet, 64 Barb. 476. *Cf.* Hungerford v. Wagoner, 5 App. Div. 590.

§ 199. **Liability of tenant holding over after giving notice of intention to quit.**— If a tenant gives notice of his intention to quit the premises held by him, and does not accordingly deliver up the possession thereof, at the time specified in such notice, he or his personal representatives must, so long as he continues in possession, pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, to be recovered at the same time, and in the same manner, as the single rent.

Formerly 1 Revised Statutes, 745, section 10:

§ 10. If any tenant shall give notice of his intention to quit the premises by him holden, and shall not accordingly deliver up the possession thereof, at the time in such notice specified, such tenant, his executors or administrators, shall, from thenceforward, pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, to be levied, sued for and recovered, at the same time and in the same manner, as the single rent; and such double rent shall be continued to be paid during all the time such tenant shall continue in possession as aforesaid.[1]

Origin of Section 199, Supra. This provision of The Real Property Law was originally taken from an act of parliament.[2] It was re-enacted here only in 1774,[3] the act 11 George II not theretofore extending to New York. After independence of the Crown the State Legislature formally re-enacted the provision in 1788.[4] Thence, through the two subsequent revisions of the statutes,[5] it passed into the Revised Statutes,[6] and is now incorporated in the present law.[7]

Practice. Before the Codes of Procedure (and the overthrow of equity as a distinct practice), as the statute provided that double rent might be recovered in the same manner as the single rent, the landlord could maintain the action of debt, or if on a parol demise, assumpsit, or he might even distrain for it.[8] Since the abolition of distraint and of the distinction between suits in equity and actions at law, the landlord can only maintain the one form of action provided by the Code for all penalties or forms of indebtedness. Rent defaults only are remedied by summary proceedings to recover possession of the demised premises, and the penalty cannot be recovered in proceedings to dispossess.

[1] Repealed, chap. 547, Laws of 1896.
[2] 11 Geo. II, chap. 19, § 18.
[3] Chap. 14, Laws of 1774.
[4] 2 J. & V. 238, § 22; Regan v. Fosdick, 19 Misc. Rep. 489, 491.
[5] 1 K. & R. 134, § 22; 1 R. L. 440, § 22.
[6] 1 R. S. 745, § 10.
[7] § 199, The Real Prop. Law.
[8] Comyn, Landl. & Ten. 352.

Parol Lease and Notice. A lease by parol is a holding within this statute,[1] and a parol notice of quitting is sufficient to render tenant liable to double rent in case he hold over.[2]

Landlord's Remedies. Even though the tenant gives notice to quit, if he hold over, the landlord may treat the tenant either as a trespasser, or waive the penalty and treat him as holding under an implied tenancy for another year.[3]

Application of this Section 199. This section applies, and tenant is liable for double rent even where holding over is occasioned by sickness.[4]

Partners. Where partners are tenants, and one holds over after partnership expires, he, and not the others, is liable.[5]

Holding Over under Privilege. Where the lease is for two years, with privilege of three more upon a written notice from tenant, and tenant holds over without serving notice, the holding over is an election to avail of the option,[6] and not a holding over under the statute.

[1] Burr. 1603.

[2] Burr. 1603; and see Comyn, Landl. & Ten. 352, on this statute.

[3] Haynes v. Aldrich, 133 N. Y. 287; Vosburgh v. Corn, 23 App. Div. 147; Conway v. Starkweather, 1 Den. 113. But the privilege is not reciprocal. Merritt v. Merritt, 3 N. Y. St. Repr. 484.

[4] Regan v. Fosdick, 18 Misc. Rep. 556; S. C., 23 id. 623; Herter v. Mullen, 9 App. Div. 593. *Cf.* Hammond v. Eckhartt, 30 N. Y. St. Repr. 856.

[5] James v. Pope, 19 N. Y. 324; Buchanan v. Whitman, 151 id. 253, 257; Mason v. Tietig, 23 Misc. Rep. 443.

[6] Bailie v. Plant, 11 Misc. Rep. 30.

§ 200. **Liability of tenant holding over after giving[1] notice to quit.**—Where, on the termination of an estate for life, or for years, the person entitled to the possession demands the same, and serves, in the same manner as for the termination of a tenancy at will, a written notice to quit, if the tenant, or any person in possession under him, or by collusion with him, willfully holds over, after the expiration of thirty days from such service, he must pay to the person so kept out of possession, or his representatives, at the rate of double the yearly value of the property detained, for the time while he so detains the same, together with all damages incurred by the person so kept out by reason of such detention. There is no equitable defense or relief against a demand accrued, or a recovery had, under this section.

Formerly 1 Revised Statutes, 745, section 11:

§ 11. If any tenant, for life or years, or if any other person who may have come into possession of any lands or tenements, under or by collusion with such tenant, shall wilfully hold over any lands or tenements after the termination of such term, and after demand made and one month's notice, in writing, given in the manner herein before prescribed, requiring the possession thereof by the person entitled thereto, such person so holding over shall pay to the person so kept out of possession, or his representatives, at the rate of double the yearly value of the lands or tenements so detained, for so long a time as he shall so hold over or keep the person entitled, out of possession; and shall also pay and remunerate all special damages whatever, to which the person so kept out of possession may be subjected by reason of such holding over; and there shall be no relief in equity against any recovery had at law under this section.[2]

Origin of Section 200, Supra. The tenant's neglect to deliver up demised premises after notice to quit and the expiration of the demise was remedied in England by a statute giving double rent.[3] This statute, not extending to New York, was re-enacted here in 1774.[4] It was again re-enacted in 1788, in the first great revision of the English statutes extended to New York.[5] Thence it passed through several other revisions of the State laws.[6] In 1820 it was amended,[7] and then adopted by the Revised Statutes.[8] From the

[1] This word "giving" should have been omitted in caption of this section.

[2] Repealed, chap. 547, Laws of 1896.

[3] 4 Geo. II, chap. 28, § 1.

[4] Chap. 14, Laws of 1774.

[5] 2 J. & V. 238, § 21.

[6] 1 K. & R. 134, § 21; 1 R. L. 440, § 21.

[7] Chap. 194, Laws of 1820, § 8. This amendment gave special damages in addition to double rent.

[8] 1 R. S. 745, § 11.

Revised Statutes it was incorporated in the present law.[1] Thus, with the exception of the clause taken from the amendment of 1820, giving special damage in addition to double rent, this section under consideration is virtually the act of 4 George II, chapter 28.

Construction of this Section 200. It has been held, in England, that a weekly tenant, although strictly "a tenant for years," is not within this statute, which is penal and to be strictly construed.[2] Whether, therefore, this statute extends in New York to monthly tenants, entitled under special laws to five days' notice, may be doubted.[3]

When Section Does Not Apply. Nor does the statute extend to those cases where tenants maintain possession in good faith and not willfully in violation of clear legal right.[4]

Where Tenant holds over. Where the landlord does not serve notice and tenant holds over, the latter now holds, at landlord's election, upon an implied tenancy for a year;[5] and if the landlord accepts rent, he cannot then terminate tenancy before the end of such year, under this section. Where the landlord serves notice to quit and tenant *non obstante* holds over, the landlord may then elect to treat the tenant either as a trespasser, or as in lawful possession for another year on an implied demise on the same terms.[6] But where the landlord's notice is, in effect, that if tenant hold over, the rent will be increased to a sum specified, and tenant holds over, it seems he is liable for the rent specified in the notice, and not under the statute.[7]

Lease for Lives Begins Day after its Date. A lease for lives does not include the day of its date, but begins from the following day.[8]

[1] *Supra*, § 200, The Real Prop. Law.

[2] Lloyd v. Rosbee, 2 Camp. 453.

[3] Chap. 303, Laws of 1882; amd., chap. 357, Laws of 1889. *Cf.* People ex rel. Auldhause v. Goelet, 64 Barb. 476.

[4] Comyn, Landl. & Ten. 349; Hall v. Ballantine, 7 Johns. 536. *Cf.* Mumford v. Brown, 1 Wend. 52; McKay v. Mumford, 10 id. 351, as to tenants in common; and under another statute, 11 Geo. II, chap. 19 (now § 199, The Real Prop. Law). See Regan v. Fosdick, 18 Misc. Rep. 556; Herter v. Mullen, 9 App. Div. 593; Haynes v. Aldrich, 133 N. Y. 287; Hausaer v. Dahlman, 18 App. Div. 475.

[5] Johnson v. Doll, 11 Misc. Rep. 345; Haynes v. Aldrich, 133 N. Y. 287; Cram v. Springer Lith. Co., 10 Misc. Rep. 660. *Cf.* Adams v. City of Cohoes, 127 N. Y. 175; McKay v. Mumford, 10 Wend. 351, 353; Luger v. Goerke, 18 App. Div. 291.

[6] Schuyler v. Smith, 51 N. Y. 309.

[7] Frost v. Akron Iron Co., 12 Misc. Rep. 348. *Cf.* Mitchell v. Clary, 20 id. 595.

[8] Challis, 83.

When Lease for Years Begins and Expires. When a lease for years begins and ends, has been a subject of some diversity of opinion in England and this country. But when a lease for a year has been practically construed to commence on the day of its date by taking possession, that day is included in computing the year, and the term expires at midnight on the preceding day in the next year.[1] But ordinarily the day from which a lease begins is excluded in the reckoning.[2]

[1] Buchanan v. Whitman, 151 N. Y. 253, and cases there cited.

[2] Hungerford v. Wagoner, 5 App. Div. 590.

§ 201. **Liability of landlord where premises are occupied for unlawful purposes.**— The owner of real property, knowingly leasing or giving possession of the same to be used or occupied, wholly or partly, for any unlawful trade, manufacture or business, or knowingly permitting the same to be so used, is liable severally, and also jointly with one or more of the tenants or occupants thereof, for any damage resulting from such unlawful use, occupancy, trade, manufacture or business.

This section purports to be taken from section 2, chapter 583, Laws of 1873,[1] which is as follows:

§ 2. The owner or owners of any building or premises knowingly leasing or giving possession of the same, to be used or occupied, in whole or in part, for any illegal trade, manufacture or business, or knowingly permitting the same to be used for any illegal trade, manufacture or business, shall be jointly and severally liable with the tenant or tenants, occupant or occupants, for any damage that may result by reason of such illegal use, occupancy, trade, manufacture or business.[2]

Comment on Section 201. This section states a general principle of the common law that *injuria et damnum* combined give a right of action for damages.[3] Upon general principles a contract which provides for anything contrary to law is void,[4] and a lease of premises to be used for immoral purposes is void.[5]

[1] Note of Commissioners of Statutory Revision to this section of The Real Prop. Law.

[2] *Cf.* chap. 646, Laws of 1873, as to sales of liquor, "an act to suppress intemperance, pauperism and crime."

[3] See Broom, Common Law, chap. 3.

[4] Taylor, Landl. & Ten. § 521.

[5] Ernst v. Crosby, 140 N. Y. 364; *supra*, p. 449.

§ 202. **Duration of certain agreements in New York.**— An agreement, for the occupation of real property in the city of New York, which shall not particularly specify the duration of the occupation, shall be deemed to continue until the first day of May, next after the possession commences under the agreement; and rent thereunder is payable at the usual quarter days, for the payment of rent in that city, unless otherwise expressed in the agreement.

Formerly 1 Revised Statutes, 744, section 1:

§ 1. 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 the said city, unless otherwise expressed in the agreement.[1]

Origin and Construction of Section 202, Supra. The substance of this section was first enacted in 1820.[2] It controls only those agreements for the occupation of real property in the city of New York which are silent or incomplete, in the particulars denoted in the statute.[3] Under this statute the tenancy, where no term is specified, ends the first of May succeeding entry, and no notice to quit is necessary.[4] The rent is payable quarterly where no time of payment is agreed on,[5] unless a contrary custom is established in regard to the particular tenancy.[6]

This Section Does not Apply to a Holding Over by Tenant for Years. This section cannot have any reference to a holding over by tenant for years in the city of New York. Such holding over is always for a year, and on the terms of the original demise, if assented to by the landlord.[7]

Omitted Sections of this Article. The reader will observe that at present there are no sections of The Real Property Law numbered 203 and 204.

[1] Repealed, chap. 547, Laws of 1896.

[2] Chap. 194, Laws of 1820, § 4.

[3] Craske v. The Christian Union Pub. Co., 17 Hun, 318; Wolf v. Merritt, 21 Wend. 336; Nowlan v. Trevor, 2 Sweeny, 67; Coit v. Planer, 7 Robt. 413; S. C., 4 Abb. Pr. (N. S.) 144; Maquart v. La Farge, 5 Duer, 559; Clarke v. Richardson, 4 E. D. Smith. 173, 176; Taggart v. Roosevelt, 2 id. 100, 105; S. C., 8 How. Pr. 141. *Cf.* Wilson v. Taylor, 8 Daly, 253; Schloss v. Huber, 21 Misc. Rep. 28.

[4] Nowlan v. Trevor, 2 Sweeny, 67.

[5] See the cases cited, *supra.*

[6] Wilson v. Taylor, 8 Daly, 253.

[7] Haynes v. Aldrich, 133 N. Y. 287; Herter v. Mullen, 9 App. Div. 593; Conway v. Starkweather, 1 Den. 113. *Cf.* §§ 199, 200, 202, The Real Prop Law.

ARTICLE VII.

Conveyances and Mortgages.

SECTION 205. Definitions and use of terms.
206. Livery of seizin abolished.
207. When written conveyance necessary.
208. Grant of fee or freehold.
209. When grant takes effect.
210. Estate which passes by grant or devise.
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214. Covenants in mortgages.
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SECTION 205. **Definitions and use of terms.**—The term "heirs," or other words of inheritance, are not requisite to create or convey an estate in fee. The term "conveyance," as used in this article, includes every instrument,

in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered. Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law. The terms "estate" and "interest in real property," include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent.

Formerly 1 Revised Statutes, 748, sections 1, 2, and 2 Revised Statutes, 137, sections 6, 7:

§ 1. 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, hereafter 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.[1]

§ 2. 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 can be collected from the whole instrument, and is consistent with the rules of law.[2]

§ 6. The term "lands," as used in this Chapter,[3] shall be construed as coextensive 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.[4]

§ 7. The term "conveyance," as used in this Chapter,[5] shall be construed to embrace every instrument in writing, (except a last will and testament) whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands, is created, aliened, assigned or surrendered.[6]

Section 205 Composed of Four former Sections. Since the Commissioners of Statutory Revision have combined four sections of the Revised Statutes in one section of the present law, it is necessary to resolve such section back to its elements in any exposition or construction of its contents.

The Term "Heirs," and Other Words of Inheritance, no Longer Necessary to Carry a Fee. The term "heirs," and other words of

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Chap. VII, part II, R. S. "Of Fraudulent Conveyances and Contracts, Relative to Real and Personal Property."

[4] Repealed, chap. 417, Laws of 1897.

[5] Chap. VII, part II, R. S. *ut supra.*

[6] Repealed, chap. 417, Laws of 1897.

inheritance, are rendered unnecessary to carry an estate in fee by this provision, taken out of the Revised Statutes.[1]

The Common Law. At common law, the fee did not pass by a deed, without the employment of the word "heirs;" it being *præsumptio juris* that without the word "heirs," a life estate was created.[2] But the construction was otherwise in a devise, where the intention of testator was to be followed; and consequently the words "to A. all my estate," or to "A. in perpetuity," etc., in a will, were equivalent to a limitation to "A. and his heirs" in a deed, and carried a fee to devisee.[3]

The Revised Statutes. The original revisers did not approve of such distinction which was no doubt founded on the feudal law, and formulated during the time of the discussion concerning the inheritable character of "feuds."[4] Yet, as the common-law rule was very well understood by conveyancers, it only conduced to technical precision, for few laymen drew their own deeds. The practice was otherwise with wills. The revisers thought best to introduce uniformity, and subjected all instruments of conveyance, wills and deeds alike, to the same rule of construction — the intention of the parties.[5] This rule they gave particular expression to in the next section of the Revised Statutes,[6] and now the intent of the parties to all manner of conveyances is the key to their construction in all cases.[7]

Effect of the Revised Statutes. The above-mentioned statutory rules of construction are said to have reversed antecedent common-law rules.[8] But this is, perhaps, putting the effect of the statute in general too strongly, as the intention of parties governed even in deeds in some cases before the statute,[9] while the intention was

[1] 1 R. S. 748, §§ 1, 2; Guernsey v. Guernsey, 36 N. Y. 267, 268; Crain v. Wright, 114 id. 307.

[2] 2 Black. Comm. 107. But the intention was also sometimes followed in construing a deed informally expressed. Jackson ex dem., etc., v. Waltermire, 7 Cow. 353; Darling v. Rogers, 22 Wend. at pp. 483, 489; Bridger v. Pierson, 45 N. Y. 601, 604.

[3] See Cruise, Dig. tit. 38, chap. 11, generally; Bradstreet v. Clarke, 12 Wend. 602; Terry v. Wiggins, 47 N. Y. 512, 514. *Cf.* Burlingham v. Belden, 21 Wend. 463; Wheaton v. Andress, 23 id. 452.

[4] *Supra*, p. 6.

[5] Note to 1 R. S. 748, §§ 1, 2.

[6] 1 R. S. 748, § 2.

[7] Bennett v. Culver, 97 N. Y. 250, 257; Coleman v. Beach, Id. 545, 554; Purdy v. Hayt, 92 id. 446, 454; Howland v. The Union Theolog. Seminary, 3 Sandf. 82, 110; Parks v. Parks, 9 Paige, 107, 117.

[8] Lalor, Real Prop. 306, citing Parks v. Parks, 9 Paige, 107, 121.

[9] Jackson ex dem., etc., v. Waltermire, 7 Cow. 353. *Cf.* Sparrow v. Kingman, 1 N. Y. 242, 257.

not always conclusive in the case of devises.[1] The presumption of law was, however, reversed by the statute in the construction of the *quantum* of estates, as under the statute all the estate of grantor passes, unless the intent to pass a less estate appears;[2] while at common law an estate not of inheritance passed, unless the intent to pass an estate of inheritance expressly appeared or the devisee was the heir at law.

What Words now Pass a Fee. No form of words is now necessary to pass an estate in fee, provided the intent so to do is obvious.[3] But the description of the property to be conveyed is not supplied by intendment, whatever the intent of the parties may have been.[4]

1 Revised Statutes, 748, Section 2. Intent of the Parties to Prevail. This section was originally a legislative mandate for a *cy pres* construction of documents.[5] It binds the court in some respects.[6] But it was the rule before the statute, that a deed must be construed so as to give effect to the intent and design of the parties,[7] and such was always the principle applied in the construction of last wills.[8] If a deed is inartificial and does not employ technical terms, the intention is to be ascertained from the whole instrument.[9]

[1] Olmstead v. Olmstead, 4 N. Y. 56.

[2] Williams v. Williams, 8 N. Y. 525, 539; Nicoll v. The N. Y. & Erie R. R. Co., 12 id. 121, 128; Heath v. Barmore, 50 id. 302, 306; Taggart v. Murray, 53 id. 233; Moore v. Pitts, Id. 85, 89; Freeborn v. Wagner, 2 Abb. Ct. App. Dec. 175, 179; Sheehan v. Hamilton, 4 id. 211, 216; Wood v. Taylor, 9 Misc. Rep. 640.

[3] The Long Island R. R. Co. v. Conklin, 29 N. Y. 572; Kirtz v. Peck, 113 id. 222, 229; Campbell v. Morgan, 22 N. Y. Supp. 1001.

[4] Coleman v. Manhattan Beach Imp. Co., 94 N. Y. 229, 232, *et infra*, p. 494.

[5] Coster v. Lorillard, 14 Wend. at pp. 308, 309; Mayell v. Brown, 16 Fed. Cas. at p. 438; note to 4 Kent, Comm. 508.

[6] Morris v. Ward, 36 N. Y. 587, 595.

[7] French v. Carhart, 1 N. Y. 96; Bridger v. Pierson, 45 id. 601, 604; Bennett v. Culver, 97 id. 250, 256.

[8] Purdy v. Hayt, 92 N. Y. 446, 454.

[9] Speed v. St. Louis M. B. T. Co., 86 Fed. Rep. 235.

§ 206. **Livery of seizin abolished.**— The conveyance of real property by feoffment, with livery of seizin, has been abolished.

Formerly 1 Revised Statutes, 738, section 136:

§ 136. The mode of conveying lands by feoffment with livery of seisin, is abolished.[1]

Common Law. At common law a writing, or deed of conveyance, was not essential to the transfer of title to real property.[2] The title passed by a feoffment with livery of seisin. A feoffment was a formal oral grant: "I enfeoff thee and thy heirs forever of black acre" was a sufficient form of feoffment at common law. But a feoffment, without livery of seisin, was both incomplete and ineffectual.[3] A written charter, or deed of feoffment, at an early date was used simply to record the transaction, and was, therefore, usually expressed in the past tense.[4] On the written charter the witnesses then customarily indorsed the fact that they had witnessed livery of seisin. But the charter and indorsement were only modes of preserving evidence and not a conveyance. Not until ancient did a charter become a sort of Scotch, or hearsay, evidence,[5] provided it was not suspicious on its face. Chancellor Kent thought that the mode of conveyance by feoffment with livery of seisin was not used in New York.[6] But opposed to this opinion is the fact that certain early charters at Albany bear an indorsement of livery of seisin. Chancellor Kent is clearly wrong in his statement that it was also obsolete in England,[7] as persons now living have taken part in this form of conveyance.[8]

Livery of Seisin. Livery of seisin (which presumably corresponds to "*traditio*," or delivery of possession, in the Roman Law)[9] was the primary element of a freehold at common law. It is called the "investitive fact"[10] in the common law.[11] Originally

[1] Repealed, chap. 547, Laws of 1896.

[2] Shep. Touch. 203; Mr. Hargrave's note 310, Co. Litt. 48a.

[3] Challis, 321.

[4] "Has conveyed, enfeoffed, etc." Bracton, lib. 2, cap. 16, fol. 34.

[5] Our doctrine of ancient deeds corresponds to the Scotch law which admits hearsay evidence in all cases when it is not suspicious.

[6] 4 Kent, Comm. 489.

[7] 4 Kent, Comm. 489.

[8] Challis, 321.

[9] *Cf.* Digby, Hist. Real Prop. § 12, chap. II.

[10] Bisset, Estates for Life, 13.

[11] *Vide supra*, p. 19.

the act of feudal investment,[1] livery became in law the ultimate sign of a perfected transfer *inter vivos* of title to a freehold estate.

When Written Deeds Became Necessary to Conveyance of Lands. Precisely when deeds became essential in English law to the transfer of freeholds is not certain. Yet the use of deeds or charters is more ancient than the feudal settlement in England. But from the Conquest, certainly until the Statute of Inrolments,[2] a writing was not necessary to the legal transfer of freeholds.[3] Yet during all this period written deeds were commonly used for purposes of the preservation of evidence or the recording of transactions. The Statute of Uses[4] brought into practice as legal conveyances deeds of bargain and sale, and by the mere operation of that statute the legal estate was transferred to the bargainee.[5] No ceremony was made necessary by the Statute of Inrolments to such bargain and sale, and, therefore, both livery of seisin and attornment were superseded by it.[6] To prevent secret conveyances the Statute of Inrolments[7] soon required deeds of bargain and sale to be enrolled. This was virtually to require a writing, at least for this species of conveyances.[8] But the common-law conveyance by feoffment, with livery of seisin, continued legal, and, indeed, essential to make a perfect disseisin in some cases,[9] and to such mode of conveyance no writing was necessary until the Statute of Frauds.[10] A deed was still unnecessary to satisfy that statute; any writing would do.[11] If the writing were a deed it need not be signed; sealing and delivery sufficed.[12] The English Statute of Frauds did not, however, extend to New York, being enacted only after the English law was established here.[13] But the Duke's Laws, established in New York in 1664–5, required a conveyance to be by deed.[14] In 1683,[15] and in 1684,[16] the Legislature of New

[1] 1 Black. Comm. 311; Sparrow v. Kingman, 1 N. Y. 242, 250.

[2] 27 Hen. VIII, chap. 16.

[3] Shep. Touch. 203; Co. Litt. 48a, note.

[4] 27 Hen. VIII, chap. 10.

[5] Co. Litt. 48a, note 310.

[6] 2 Sanders, Uses & Trusts, 42.

[7] 27 Hen. VIII, chap. 16.

[8] Note 310; Co. Litt. 48a.

[9] Sparrow v. Kingman, 1 N. Y. at pp. 250, 251; McGregor v. Comstock, 17 id. at p. 171; Varick v. Jackson, 2 Wend. 158, 203; Shep. Touch. 203.

[10] 29 Car. II, chap. 3. Unless in writing feoffment with livery under this statute could create only an estate at will, determinable by feoffor. Co. Litt. 56b.

[11] Prest. Shep. Touch. 203.

[12] 1 Prest. Abs. of Title, 236.

[13] Burton, Compend. Real Prop. 499. *Cf.* Cahill Iron Works v. Pemberton, 30 Abb. N. C. 450.

[14] Duke's Lawes, tit. "Conveyances, Deeds and Writings," 1 Col. Laws of N. Y. 30.

[15] "An act to prevent frauds in conveyancing," 1 Col. Laws of N. Y. 141.

[16] "A bill to prevent deceipt and fforgerye," 1 Col. Laws of N. Y. 148.

York required such deeds to be acknowledged and recorded before they had legal effect as to third persons. At a later day the English Statute of Frauds[1] seems, however, to have been extended here by judicial legislation, and in 1787 it was revised and formally re-enacted in Jones & Varick's revision,[2] and so passed into the Revised Statutes.[3] Thus, until the Revised Statutes, conveyance by feoffment, with livery of seisin, was valid, but it must have been accompanied by a deed under the Statute of Frauds. As late as 1827 a conveyance by feoffment with livery of seisin was made in New York by a Mr. Edgerton Winthrop. It was, of course, accompanied by a deed to satisfy the Statute of Frauds.[4] In 1830 the Revised Statutes abolished altogether this form of conveyance.[5]

Written Conveyances. The law regulating written conveyances in this State is now largely embodied in the next succeeding section of this act.[6]

[1] 29 Car. II, chap. 3.

[2] 2 J. & V. 88. *Cf.* Cahill Iron Works v. Pemberton, 30 Abb. N. C. 540.

[3] *Supra* under § 207, The Real Prop. Law.

[4] McGregor v. Comstock, 17 N. Y. 162, 164, 171.

[5] *Vide supra*, 1 R. S. 738, § 136; § 206, The Real Prop. Law; Moore v. Littel, 41 N. Y. at p. 78.

[6] § 207, The Real Prop. Law.

§ 207. **When written conveyance necessary.**— An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, can not 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 person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this section does not affect the power of a testator in the disposition of his real property by will; nor prevent any trust from arising or being extinguished by implication or operation of law, nor any declaration of trust from being proved by a writing subscribed by the person declaring the same.

Formerly 2 Revised Statutes, 134, section 6, and 2 Revised Statutes, 135, section 7, and 2 Revised Statutes, 137, section 2:

§ 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 authorised by writing.[1]

§ 7. The preceding section shall not be construed to affect in any manner, the power of a testator in the disposition of his real estate, by a last will and testament; nor to prevent any trust from arising, or being extinguished, by implication or operation of law; nor to prevent, after a fine[2] shall have been levied, the execution of a deed or other instrument, in writing, declaring the uses of such fine. (Amended by chap. 322, Laws of 1860, by inserting the words "Nor to prevent any declaration of trust from being proved by any writing subscribed by the party declaring the same.")[3]

§ 2. 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 authorised, shall be void.[4]

Conveyances to be in Writing. The history of the statute requiring conveyances of lands to be in writing, has been outlined under the preceding section of this act,[5] and need not be repeated.

Statute of Frauds. When Jones & Varick came to revise for re-enactment the English Statute of Frauds[6] in 1787, they did not

[1] Repealed, chap. 547, Laws of 1896.

[2] As to fines, see note of the Commissioners of Statutory Revision to § 207, The Real Prop. Law.

[3] Repealed, chap. 547, Laws of 1896.

[4] Repealed, chap. 418, Laws of 1897.

[5] *Supra*, p. 482.

[6] 29 Car. II, chap. 3.

depart far from the phraseology of the original statute.[1] They, however, consolidated into one act the Elizabethan statutes[2] against fraudulent conveyances and the act of Charles II for the prevention of frauds and perjuries.[3] Section 9 of 2 Jones & Varick, 88, corresponded to sections 1 and 2, 29 Charles II, chapter 3; section 10 of 2 Jones & Varick, to section 3, 29 Charles II, chapter 3; section 11 of 2 Jones & Varick, 88, to section 4, 29 Charles II, chapter 3; section 12 of 2 Jones & Varick, 88, to section 7, 29 Charles II, chapter 3; section 13 of 2 Jones & Varick, 88, to section 8, 29 Charles II, chapter 3; section 14 of 2 Jones & Varick, 88, to section 9, 29 Charles II, chapter 3.[4] The subsequent revisions in New York in 1802[5] and 1813[6] preserved the language of Jones & Varick's edition of the English Statute of Frauds. The Revised Statutes[7] altered the language of that great statute while preserving the sense.[8]

Derivation of New York Statute. Section 207 of The Real Property Law is composed of sections 6 and 7 of 2 Revised Statutes, 134, 135, and section 2 of 2 Revised Statutes, 137. Section 207 thus indirectly came from the English Statute of Frauds (29 Car. II).[9] But the Revised Statutes often bore a different construction from the English act.[10]

Construction of the Revised Statutes. The construction of the Revised Statutes establishes that *no estate or interest in* lands, except a term not exceeding one year,[11] can be passed or surrendered by act of the parties unless in writing.[12] But nevertheless a parol gift of estate in lands may be rendered a valid transfer, where donee has entered on the lands and made valuable improvements.[13]

What now Constitutes a Deed or Conveyance in Writing. As to what now constitutes a deed or conveyance in writing subscribed by the party under this section, the subsequent sections of this act

[1] 2 J. & V. 88, §§ 9, 10, 12; 1 K. & R. 75; 1 R. L. 75; Hutchins v. Van Vechten, 140 N. Y. 115, 118.

[2] 13 Eliz. chap. 5; 27 id. chap. 4.

[3] 29 Car. II, chap. 3.

[4] See note of Revisers of R. S. to chap. 7, part 2, R. S.

[5] 1 K. & R. 75.

[6] 1 R. L. 75.

[7] 2 R. S. 134, § 6; Id. 135, § 7; Id. 137, § 2.

[8] Revisers' note to chap. 7, part II, R. S.

[9] Revisers' note to chap. 7, part 2, R. S.

[10] White v. Douglass, 7 N.Y. 564, 569.

[11] By the original statute, an estate for years, created without writing, for a period longer than three years, had the force of an estate at will. Jackson ex dem. v. Wood, 12 Johns. 73.

[12] Wheeler v. Reynolds, 66 N. Y. 227; McGregor v. Brown, 10 id. 114; Leonard v. Clough, 133 id. 292.

[13] Young v. Overbaugh, 145 N. Y. 158; Freeman v. Freeman, 43 id. 34;

determine.[1] Attestations or acknowledgments are not necessary to effectuate a deed *inter partes*, but only to record it.[2] No particular form of words is necessary to the validity of a conveyance.[3]

Easement; Equity of Redemption; Incorporeal Hereditaments. An easement is an interest in real property within this section;[4] but an equity of redemption is not.[5] Incorporeal hereditaments, however, fall within this statute.[6]

Demises. A demise void under this section may, nevertheless, support an action for use and occupation,[7] or create a tenancy from year to year.[8] Demise for a year by parol may begin *in futuro*.[9]

Surrender. An unexpired term for a year may be surrendered by parol, even though the original term was of longer duration.[10] So certain agreements originally required to be in writing may be surrendered by parol.[11]

Some Oral Promises not Within the Statute. All oral promises by vendors, at the time of conveyance, are not within the prohibition of this statute, nor are they merged; *e. g.*, a promise to pay an assessment as a condition of vendee's acceptance of the deed;[12] partnership dealings in realty.[13]

Trusts in Lands. Under the Revised Statutes no trust of lands could be created by act of the parties except it be by a deed or conveyance in writing.[14] The act, chapter 322, Laws of 1860, introduced a more liberal rule, and letters and informal memoranda are now sufficient to prove a trust.[15] This statute requiring a trust

Babcock v. Utter, 1 Abb. Ct. App. Dec. 27, 37. *Cf.* McCray v. McCray, 30 Barb. 633.

[1] *Vide infra*, §§ 208, 211, The Real Prop. Law. *Cf.* Willard, Real Est. & Conv. 372; 4 Kent, Comm. chap. 67.

[2] Wood v. Chapin, 13 N. Y. 509; Strough v. Wilder, 119 id. 530, 535.

[3] *Vide supra*, p. 480; § 205, The Real Prop. Law.

[4] Arnold v. Hudson River R. R. Co., 55 N. Y. 661; Wiseman v. Lucksinger, 84 id. 31.

[5] Stoddard v. Whiting, 46 N. Y. 627.

[6] Brown v. Woodworth, 5 Barb. 550.

[7] *Supra*, § 190, The Real Prop. Law.

[8] Reeder v. Sayre, 70 N. Y. 180.

[9] Young v. Dake, 5 N. Y. 463.

[10] Smith v. Devlin, 23 N. Y. 363.

[11] Proctor v. Thompson, 13 Abb. N. C. 340, 346.

[12] Remington v. Palmer, 62 N. Y. 31; Robbins v. Robbins, 89 id. 251; Purdy v. Collyer, 26 App. Div. 338.

[13] Traphagen v. Burt, 67 N. Y. 30.

[14] White v. Douglass, 7 N. Y. 564; Hutchins v. Van Vechten, 140 id. 115, 118; 2 R. S. 137, § 2.

[15] Hutchins v. Van Vechten, 140 N. Y. 115, 118; Dillaye v. Greenough, 45 id. 445; Cook v. Barr, 44 id. 156; McArthur v. Gordon, 51 Hun, 511, 515. *Cf.* Crouse v. Frothingham, 97 N. Y. 105.

in lands to be manifested in writing has, however, no relation to a case where title is acquired by covin or fraud,[1] or to implied[2] or resulting trusts,[3] which may be established by oral evidence.[4]

Power. No "power" respecting estates in lands can be given except by deed or by will.[5]

Contracts. Other sections of this act refer to contracts in writing.[6]

[1] Ryan v. Dox, 34 N. Y. 307; Hall v. Erwin, 66 id. 649; Wheeler v. Reynolds, Id. 227; Newman v. Nellis, 97 id. 285.

[2] Foote v. Bryant, 47 N. Y. 544; Wood v. Rabe, 96 id. 414, 422.

[3] Foote v. Bryant, 47 N. Y. 544.

[4] Chester v. Dickinson, 54 N. Y. 1; Traphagen v. Burt, 67 id. 30, 33; Swinburne v. Swinburne, 28 id. 568; Foote v. Bryant, 47 id. 544.

[5] *Vide supra*, pp. 333–336, § 120, The Real Prop. Law.

[6] *Vide*, § 224, *infra*.

§ 208. **Grant of fee or freehold.**—A grant in fee or of a freehold estate, must be subscribed by the person from whom the estate or interest conveyed is intended to pass, or by his lawful agent. If not duly acknowledged before its delivery, according to the provisions of this chapter, its execution and delivery must be attested by at least one witness, or, if not so attested, it does not take effect as against a subsequent purchaser or encumbrancer until so acknowledged.

Formerly 1 Revised Statutes, 738, section 137:

§ 137. Every grant in fee or of a freehold estate, shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent; if not duly acknowledged, previous to its delivery, according to the provisions of the third Chapter of this Act, its execution and delivery 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.[1]

Requisites of a Grant in Fee. A grant in fee or of an estate of freehold now requires a writing;[2] but this section no longer requires that such a grant be under seal.[3] At common law more attention was paid to the act of sealing than to the act of signing, and a deed unsigned, but sealed, was good.[4] The Statute of Frauds first made signing essential to the validity of a conveyance *inter vivos* of a freehold,[5] and this signature the Revised Statutes required to be subscribed.[6] Both at common law, and under the Revised Statutes, a conveyance of a freehold estate must be sealed to be effectual.[7]

Sealing. A statute of 1892 permitted a substitutional or symbolic seal to be affixed to any deed of a private person.[8] The foregoing section of this act was intended to dispense with the necessity of sealing a grant of an estate of freehold.[9] But it

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, § 207, The Real Prop. Law.

[3] *Vide*, note to section 208, The Real Prop. Law, by Commissioners of Statutory Revision and cases cited under § 208, The Real Prop. Law.

[4] Wright v. Wakeford, 17 Ves. 459; 3 Prest. Abs. of Title, 62.

[5] 29 Car. II. chap. 3, § 1; 2 J. & V. 88; 1 R. L. 78, § 9.

[6] 1 R. S. 738, § 137.

[7] 3 Prest. Abs. of Title, 61; 1 R. S. 738, § 137; Morse v. Salisbury, 48 N. Y. 636.

[8] Chap. 677, Laws of 1892, "The Statutory Construction Law," chap. 1, General Laws, § 13. *Cf.* § 12, chap. 677, Laws of 1892.

[9] Note of Commissioners of Statutory Revision to § 208, The Real Prop. Law. *Cf.* § 12, chap. 677, Laws of 1892.

does not expressly abrogate other common-law rules touching the effect of sealing.

Attestation and Acknowledgment. Neither attestation nor acknowledgment is necessary to the validity of a deed *inter partes* but only to effectuate it as to subsequent purchasers or encumbrancers.[1]

[1] Wood v. Chapin, 13 N. Y. 509; Voorhees v. Presby. Church, 17 Barb. Chamberlain v. Spargur, 86 id. 603; 103, 108. *Cf.* Roggen v. Avery, 63 id. Strough v. Wilder, 119 id. 530, 535; 65.

§ 209. **When grant takes effect.**— A grant takes effect, so as to vest the estate or interest intended to be conveyed, only from its delivery; and all the rules of law, now in force, in respect to the delivery of deeds, apply to grants hereafter executed.

Formerly 1 Revised Statutes, 738, section 138:

§ 138. A grant shall take effect, so as to vest the estate or interest intended to be conveyed, only from its delivery; and all the rules of law now in force in respect to the delivery of deeds, shall apply to grants hereafter to be executed.[1]

"Grant." At common law the term "grant" was usually[2] confined to a charter made by the sovereign, or else to the conveyance of an incorporeal hereditament where livery of seisin could not take place. An incorporeal hereditament was, therefore, said to lie in grant.[3] Grants, like all other deeds, had no effect without a delivery.[4] As the revisers applied the same principle to all conveyances of freeholds by act of the parties,[5] it seemed proper to call these conveyances "grants."[6] Grants were, however, regarded by the revisers of New York as synonymous with deeds of realty,[7] although at the common law a deed did not *ex vi termini* import a deed of real property.[8]

Delivery. At common law a conveyance did not take effect from delivery of the charter or deed, but from the date of the livery of seisin.[9] Since the Revised Statutes deeds of conveyance, or grants, take effect only from delivery of the deed[10] to the grantee,[11] or to another for the use of such grantee.[12] While deeds of conveyance may be delivered to a third party in escrow, they may not be delivered conditionally to a party to the deed.[13] By this section the intention of the original revisers was to place those conveyances of land operating under the Statute of Uses upon the basis of all written deeds, good at the common law.

[1] Repealed, chap. 547, Laws of 1896.

[2] *In regno* Hen. VIII, Perkins' Profitable Handbook, p. 1, treated "grant" as applicable to any form of conveyance.

[3] 2 Black. Comm. 317.

[4] 2 Black. Comm. 307.

[5] 1 R. S. 738, § 137; § 209, The Real Prop. Law.

[6] *Cf.* 4 Kent, Comm. 490; 2 Sanders, Uses & Trusts, 29.

[7] 1 R. S. 739, § 142; Bucklin v. Bucklin, 1 Abb. Ct. App. Dec. 242, 247.

[8] Blewitt v. Boorum, 142 N. Y. 357, 360.

[9] Challis, 83.

[10] Schafer v. Reilly, 50 N. Y. 61, 66; Mitchell v. Bartlett, 51 id. 447; Rosseau v. Bleau, 131 id. 177; Ten Eyck v. Whitbeck, 156 id. 341.

[11] Chauncey v. Arnold, 24 N. Y. 330, 335; People v. Bostwick, 32 id. 445.

[12] Diefendorf v. Diefendorf, 132 id. 100.

[13] Blewitt v. Boorum, 142 N. Y. 357, 363.

§ 210. **Estate which passes by grant or devise.**— A grant or devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass a less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom. A greater estate or interest does not pass by any grant or conveyance, than the grantor possessed or could lawfully convey, at the time of the delivery of the deed; except that every grant is conclusive against the grantor and his heirs claiming from him by descent, and as against a subsequent purchaser or encumbrancer from such grantor, or from such heirs claiming as such, other than a subsequent purchaser or encumbrancer, in good faith and for a valuable consideration, who acquires a superior title by a conveyance that has been first duly recorded.

Formerly 1 Revised Statutes, 739, sections 143, 144, and 1 Revised Statutes, 748, section 1:

§ 143. No greater estate or interest shall be construed to pass by any grant or conveyance, hereafter 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.[1]

§ 144. 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 that shall have been first duly recorded.[2]

§ 1. 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, hereafter 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.[3]

Construction of Section 210, Supra. The first part of section 210 was, as it stood in the Revised Statutes, addressed to that rule of the common law, that a fee did not pass by deed without an express limitation to the grantee and his heirs;[4] it being a presumption that a limitation in a deed to "A." alone was a finite grant, or one to "A." for life only.[5] This rule arose in feudal times, before devises were legal, and was intended to determine when a fief was one of inheritance and when one for life only. The term "heirs,"

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] Repealed, chap. 547, Laws of 1896.
[4] 2 Black. Comm. 107; *supra*, p. 479.
[5] The same presumption was not indulged in, in case of a devise. Cruise, Dig. tit. 38, chap. 11, § 1; *supra*, p. 478.

or words of inheritance, being no longer necessary to convey a fee,[1] it seemed desirable to make the construction of both grants and devises uniform. The presumption now is that all the grantor's or devisor's estate passes under either a devise or a grant.[2]

Tortious Conveyances Abolished. The provision of the Revised Statutes now incorporated in this section, to the effect that a greater interest does not pass by any conveyance than the grantor had, was intended to abolish tortious conveyances. At common law a tortious feoffment with livery of seisin by a person without title passed a fee,[3] and after descent cast the real owner's right of entry was tolled and the remedies of the person thus disseised became very complicated,[4] as presumptions of law then favored mere possession to a greater extent than at present.[5]

Estoppel. While the Revised Statutes precluded grants by wrong, every grant was made conclusive against the grantor and his heirs.[6] Every grant was also made conclusive as against subsequent purchasers from a grantor or his heirs, except a *bona fide* purchaser who acquired a superior title by a conveyance first recorded.[7]

[1] 1 R. S. 748, § 1; § 205, The Real Prop. Law.

[2] Nicoll v. N. Y. & E. R. R. Co., 12 N. Y. 121, 129; Sheehan v. Hamilton, 4 Abb. Ct. App. Dec. 211, 216; Heath v. Barmore, 50 N. Y. 302, 306; Terry v. Wiggins, 47 id. 512; Byrnes v. Baer, 86 id. 210.

[3] A bargain and sale, or lease and release, never passed more than grantor's estate. A feoffment with livery of seisin did. Jackson ex dem., etc., v. Mancius, 2 Wend. 357; Sparrow v. Kingman, 1 N. Y. 242, 250; Thompson v. Simpson, 128 id. 270, 285.

[4] 2 Black. Comm. 176.

[5] Sage v. Cartwright, 9 N. Y. 49; Moore v. Littel, 41 id. 66, 78.

[6] 1 R. S. 739, § 143; Thompson v. Simpson, 120 N. Y. 270, 286.

[7] 1 R. S. 739, § 144; Hetzel v. Barber, 69 N. Y. 1, 9.

§ 211. **Certain deeds declared grants.**— Deeds of bargain and sale, and of lease and release, may continue to be used; and are to be deemed grants, subject to all the provisions of law in relation thereto.

Formerly 1 Revised Statutes, 739, section 142:

§ 142. 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 this Chapter, concerning grants.[1]

"Bargain and Sale." While conveyance by deed of bargain and sale was familiar before the Statute of Uses[2] (27 Hen. VIII, chap. 10), this form of conveyance in after times came to owe its force entirely to the Statute of Uses.[3] There must have been some one seised to the use in every bargain and sale, or else there could be no execution by force of the statute. If A., being seised, bargained to sell, and received a valuable consideration, the use vested in the bargainee by force of the statute. By statute 27 Henry VIII, chapter 16, all bargains and sales were thereafter to be enrolled. In this way written deeds of bargain and sale became necessary by law before the Statute of Frauds required other conveyances to be in writing.

"Lease and Release." A conveyance by way of lease and release was probably known before the Statute of Uses, but this form of conveyance became popular after it was known to dispense with the necessity of enrollments of bargain and sale. A bargain and sale for a year upon a pecuniary consideration being made, the legal estate immediately vested in the bargainee by force of the Statute of Uses. This did not require enrollment. The bargainee could then receive a release of the reversion. Ultimately the lease and release came to be contained in the same deed. Prior to 1788, and while it was thought the English Statute of Inrolments might extend to New York, the common form of conveyance here was by lease and release. But when the English statutes were all repealed or re-enacted, bargain and sale became the commoner form of conveyance in New York.[4]

Conveyance Prior to the Revised Statutes. Both forms of conveyance just mentioned were in such common use in 1830, that their retention was deemed necessary after the Revised Statutes,[5]

[1] Repealed, chap. 547, Laws of 1896.
[2] 2 Sand. Uses & Trusts, 53.
[3] Gilb. Uses & Trusts, 285.
[4] 4 Kent, Comm, 495.
[5] *Supra*, 1 R. S. 739.

although such conveyances were, as Mr. Sanders acutely observed, nothing more than declarations of uses,[1] and derived their force and effect primarily from the Statute of Uses. But the revisers of 1829 evidently had in contemplation the deed associated with these forms of conveyance and not the Statute of Uses, for they placed them on the same footing as "grants,"[2] which take effect only from delivery; and on this footing they continue under the present law, taking effect only from delivery of the deed.[3] It is obvious that these types of conveyance were thus intended to be put, for the future, on the basis of all written contracts, and thus taken out of the historic realm of conveyances operating under the Statute of Uses.[4] Although the real differences between "grants" and contracts may not be wide, the historical differences are most marked.

Language of Such Deeds. No particular form of words is necessary to constitute a deed of bargain and sale.[5]

[1] 1 Sand. Uses & Trusts, 219.
[2] 1 R. S. 738, § 138.
[3] § 209, *supra*.
[4] *Cf.* Bucklin v. Bucklin, 1 Abb. Ct. App. Dec. 242, 247; Cunningham v. Freeborn, 11 Wend. 240, 248.
[5] Long Island R. R. Co. v. Conklin, 29 N. Y. 572, 584; *et vide supra*, p. 480.

§ 212. **Conveyance by tenant for life or years of greater estate than possessed.**— A conveyance made by a tenant for life or years, of a greater estate than he possesses, or can lawfully convey, does not work a forfeiture of his estate, but passes to the grantee all the title, estate or interest which such tenant can lawfully convey.

Formerly 1 Revised Statutes, 739, section 145:

§ 145. 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.[1]

Comment on Section 212, Supra. At the common law alienations by particular tenants[2] of a greater estate than they had, severed the feudal relation, or in other words, was a cause of forfeiture to the feudal superiors, and thus in time, no doubt, by analogy, a cause of forfeiture to him in reversion or remainder.[3] In New York, this rule existed until the Revised Statutes abolished every vestige of it.[4] But before the Revised Statutes a conveyance by tenant by the curtesy, although purporting to convey a fee, would not always work a forfeiture unless made by feoffment with livery of seisin.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] Not tenants in tail, 2 Black. Comm. 274.

[3] Litt. 415; 2 Black. Comm. 274.

[4] 4 Kent, Comm. 34; 1 R. S. 739, §§ 143, 145; Grout v. Townsend, 2 Hill, 554; Sparrow v. Kingman, 1 N. Y. 242, 257; Moore v. Littel, 41 id. 66, 78.

[5] Jackson v. Mancius, 2 Wend. 357. *Cf.* Christie v. Gage, 71 N. Y. 189.

§ 213. **Effect of conveyance where property is leased.**— An attornment to a grantee is not requisite to the validity of a conveyance of real property occupied by a tenant, or of the rents or profits thereof, or any other interest therein. But the payment of rent to a grantor, by his tenant, before notice of the conveyance, binds the grantee; and the tenant is not liable to such grantee, before such notice, for the breach of any condition of the lease.

Formerly 1 Revised Statutes, 739, section 146:

§ 146. 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.[1]

Attornment. In the feudal law the rights of lord and tenant were reciprocal and the lord could not assign the seigniory (sometimes called the "escheat") without the tenant's consent.[2] The attornment was originally *coram paribus* and in later days sufficiently attested.[3] With the decline of the feudal system attornments became compulsory.[4] The necessity of *attornment* was much avoided by the Statute of Uses and taken away by statute 4 Anne, chapter 16, and 11 George II, chapter 19, re-enacted in New York in 1773, 1774 and 1788.[5] The Revised Statutes simply re-enacted the substance of the earlier acts.[6] Attornment has been treated of under a preceding section.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Cf.* 2 Poll. & Mait. Hist. Eng. Law, 93, 127; note 272, Co. Litt. 309a; *et supra* under § 194, The Real Prop. Law, pp. 458, 459, 460.

[3] Watkins, Descents, 116.

[4] 1 Poll. & Mait. Hist. Eng. Law, 329; 2 id. 93. *Vide* under § 194, The Real Prop. Law, pp. 458–460, *supra.*

[5] 2 J. & V. 281; 1 R. L. 525. *Vide*, pp. 459, 460, *supra.*

[6] 1 R. S. 739, § 146; Moffatt v. Smith, 4 N. Y. 126; O'Donnell v. McIntyre, 37 Hun, 623.

[7] 194, The Real Prop. Law.

§ 214. **Covenants in mortgages.**—A mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment, has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage.

Formerly 1 Revised Statutes, 738, section 139:

§ 139. No mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured; and where there shall be no express covenant for such payment, contained in the mortgage, and no bond or other separate instrument to secure such payment, shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage.[1]

Object of this Enactment. The original revisers intended by this section to nullify an intimation of the courts, to the effect that, even without an express covenant a mortgage imported a covenant to pay the money.[2]

No Covenant now Implied. No covenant is now implied in any conveyance.[3]

Mortgages without Covenant to Repay. But where a mortgage, without a covenant to repay, is taken for the security of a pre-existing debt, such indebtedness is not discharged, unless it is so intended.[4] Without a pre-existing debt, or a covenant to pay the sum loaned, a mortgagee can look only to the land.[5] If the mortgage discloses an intention to make the obligation personal, the covenant to pay need not be in any particular form.[6] The absence of a personal liability does not, however, make the instrument any the less a mortgage,[7] and, consequently, the mortgagor can redeem before foreclosure. Even where a bond is void for want of consideration, a mortgage being under seal, is *prima facie* valid.[8] This section has no application to mortgages of lands situated out of this State.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] Revisers' note to 1 R. S. 738, § 139.

[3] § 216, The Real Prop. Law.

[4] Hone v. Fisher, 2 Barb. Ch. 559.

[5] Spencer v. Spencer, 95 N. Y. 353; Mack v. Austin, Id. 513; Hone v. Fisher, 2 Barb. Ch. 559; Coleman v. Van Rensselaer, 44 How. Pr. 368.

[6] Elder v. Rouse, 15 Wend. 218; Coleman v. Van Rensselaer, 44 How. Pr. 368; Smith v. Rice, 12 Daly, 307.

[7] Brown v. Dewey, 1 Sandf. Ch. 56; Matthews v. Sheehan, 69 N. Y. 585, 591.

[8] Kidd v. Conway, 65 Barb. 158.

[9] Thayer v. Marsh, 11 Hun, 501; S. C., 75 N. Y. 340.

§ 215. **Mortgages on real property inherited or devised.**— Where real property, subject to a mortgage executed by any ancestor or testator, descends to an heir, or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.

Formerly 1 Revised Statutes, 749, section 4:

§ 4. 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]

Old Law. Prior to the Revised Statutes, where the testator or intestate had given a bond or other personal security for a mortgage debt, the personal estate was the primary fund for the payment of the debt, and the heir or devisee might have thrown the charge on the personal representatives.[2]

The Revised Statutes. The Revised Statutes changed the rule last mentioned in respect of wills taking effect after January 1, 1830,[3] and in regard to both devises and intestacy.[4]

Land now Primary Security for Mortgage Debts. Land mortgaged is now the primary fund for the payment of mortgage debts,[5] unless the decedent by his will makes a different provision.[6] This section applies as well to mortgages assumed by decedents as to those made by them.[7] The personal estates of decedents are now liable only for deficiencies, unless the will makes different provision.[8] The heir or devisee is not personally liable.[9]

Equitable Liens. But this section does not apply to equitable liens growing out of contracts to purchase estates by decedents.[10]

[1] Repealed, chap. 547, Laws of 1896.

[2] Revisers' note to 1 R. S. 749. § 4; Cumberland v. Codrington, 3 Johns. Ch. 229; Mollan v. Griffith, 3 Paige, 402.

[3] Mollan v. Griffith, 3 Paige, 402, 404; Halsey v. Reed, 9 id. 446, 454; Johnson v. Corbett, 11 id. 265; Wright v. Holbrook, 32 N. Y. 587.

[4] House v. House, 10 Paige, 158.

[5] Erwin v. Loper, 43 N. Y. 521, 525.

[6] Van Vechten v. Kealor, 63 N. Y. 52, 56.

[7] Halsey v. Reed, 9 Paige, 446, 454.

[8] Glacius v. Fogel, 88 N. Y. 434.

[9] Hauselt v. Patterson, 124 N. Y. 349.

[10] Wright v. Holbrook, 32 N. Y. 587.

When Equity Compels Mortgagee to Seek Payment out of Real Estate. While the mortgagee is not precluded by this section from resorting to either real or personal estates of decedents, a court of equity will not permit him to seek payment out of the personal estate where it is inequitable.[1] It was also held that "the provision of the Revised Statutes (1 R. S. 749, § 4) requiring a devisee or heir to satisfy, out of his own property, a mortgage executed by his testator or ancestor upon real estate which has passed or descended to him, unless there is an express testamentary direction that such mortgage shall be otherwise paid, does not contemplate that the devisee or heir should be so liable irrespective of the property which descended to him, but rather that his liability to pay the mortgage should be measured by and not exceed the value of that property. The law was designed to make the realty primarily chargeable with the mortgaged debt, and that the heir should take it *cum onere*. It was not, however, intended to give a mortgage creditor preference over other creditors in respect to property not covered by the mortgage.[2]

[1] Hauselt v. Patterson, 124 N. Y. 349; Rice v. Harbeson, 63 id. 493.

[2] Hauselt v. Patterson, Id. *supra;* Matter of Berry, 23 Misc. Rep. 230.

§ 216. **Covenants not implied.**—A covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not.

Formerly 1 Revised Statutes, 738, section 140:

§ 140. No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not.[1]

Common Law. In their note to this section the original revisers stated the former common law of this State very concisely:

"(1) A conveyance in fee does not, of itself, imply a covenant of title,[2] but the word *give*, in such a conveyance, implied a warranty for the wife of the grantor.[3]

"(2) The words *grant* and *infeoff* imported a warranty in an estate for years, but not in an estate in fee.[4]

"(3) An express covenant in the deed takes away all implied covenants."[5]

Revised Statutes. The Revised Statutes produced uniformity in the foregoing rules by the abolition of all implied covenants.[6]

Enactment did not Extend to Leases. At first there was doubt whether this section extended to leases, or was to be confined to conveyances.[7] It was finally adjudged that it did not extend to leases or executory agreements.[8] How far this decision is now reopened by the re-enactment of this article of this act may be a question, as section 205 declares that the term "conveyance," as used in this article, includes every instrument, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered; and the qualifying section on which the decision rests, does not seem strictly to be re-enacted.

Purchasers must now see to Insertion of Appropriate Covenants. As covenants are not now implied in conveyances, the law throws upon purchasers the responsibility of protecting themselves by the insertion of proper covenants in deeds.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] Frost v. Raymond, 2 Caines, 188.

[3] Id. at p. 195; Kent v. Welch, 7 Johns. 258.

[4] Frost v. Raymond, 2 Caines, 188.

[5] Vanderkarr v. Vanderkarr, 11 Johns. 122.

[6] Revisers' note to 1 R. S. 738, § 140.

[7] Kinney v. Watts, 14 Wend. 38; Tone v. Brace, 8 Paige, 597; Burr v. Stenton, 43 N. Y. 462, 464; Burwell v. Jackson, 9 id. 535, 541.

[8] Mayor, etc., of New York v. Mabie, 13 N. Y. 151, 158. *Cf.* Zorkowski v. Astor, 156 id. 393.

[9] Leggett v. Mut. Life Ins. Co., 53 N. Y. 394, 398; Sandford v. Travers,

Certain Words no Longer Import Covenants. The words "*dedi*," "*concessi*," "*demisi*," and their English equivalents, no longer import covenants in conveyances as they did at common law.[1] At common law these words in themselves imported and made a covenant in law,[2] as if a man, by deed, demised land for years, and the lessee was ousted, covenant lay upon the word "demised."[3] It was said in Kinney v. Watts, no doctrine was better settled, and it was this doctrine which the Revised Statutes designed to abrogate.[4]

40 id. 140; Burrell v. Jackson, 9 id. 535, 541; Read v. The Erie Railway Co., 97 id. 341, 348.

[1] Kinney v. Watts, 14 Wend. 38.

[2] Comyn, Dig. tit. Cov. art. 4.

[3] Elphinstone, Interpretation of Deeds, 423.

[4] Kinney v. Watts, 14 Wend. at p. 40.

§ 217. **Lineal and collateral warranties abolished.**— Lineal and collateral warranties, with all their incidents, have been abolished; but the heirs and devisees of a person, who has made a covenant or agreement, are answerable thereon, to the extent of the real property descended or devised to them, in the cases and in the manner prescribed by law.

Formerly 1 Revised Statutes, 739, section 141:

§ 141. Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement, shall be answerable upon such covenant or agreement, to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law.[1]

Warranties at Common Law. A warranty, by the common law, is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same.[2] Warranties were divided into three divisions — *lineal, collateral* and *those that commenced by disseisin.*[3] By lineal warranty was meant the lineal heir's legal obligation to give to the ancestor's warrantee lands of equal value (in case the warranty was broken) out of other real assets if he received any.[4] Collateral warranty was founded on a fiction by which the collateral heir was presumed to have assets and was made liable in like manner.[5] Collateral warranties were restricted long before the Revised Statutes abolished them.[6]

The Revised Statutes. The Revised Statutes abolished both lineal and collateral warranties with all their incidents, but regulated lineal warranties or the heir's obligations for the ancestor's warranty by appropriate provision of the statute.[7]

Statute of Limitations. The heir may avail of the Statute of Limitations to the same extent that the ancestor might, in an action.[8]

[1] Repealed, chap. 547, Laws of 1896.

[2] Co. Litt. 365a.

[3] Litt. § 697, and see Tom. Litt. 648; Gilb. Tenures, 140, 141; 2 Black. Comm. 301.

[4] Cruise, Dig. tit. 32, chap. 25, §§ 22, 23.

[5] Cruise, Dig. tit. 32, chap. 25, § 27.

[6] 2 J. & V. 281; 1 R. L. 525, § 26; 4, 5 Anne, chap. 16.

[7] 2 R. S. 109, § 53; Id. 452; Id. 453; Revisers' note to 1 R. S. 739, § 141; Hill v. Ressegieu, 17 Barb. 162, 168; Trolan v. Rogers, 88 Hun, 422; Pyatt v. Waldo, 85 Fed. Rep. 399.

[8] Pyatt v. Waldo, 85 Fed. Rep. 399.

§ 218. **Construction of covenants in grants of freehold interests.**— In grants of freehold interests in real property, the following or similar covenants must be construed as follows:

1. **Seizin.**— A covenant that the grantor "is seized of the said premises (described) in fee simple, and has good right to convey the same," must be construed as meaning that such grantor, at the time of the execution and delivery of the conveyance, is lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the premises thereby conveyed, with the tenements, hereditaments and appurtenances thereto belonging, and has good right, full power and lawful authority to grant and convey the same by the said conveyance.

2. **Quiet enjoyment.**— A covenant that the grantee "shall quietly enjoy the said premises," must be construed as meaning that such grantee, his heirs, successors and assigns, shall and may, at all times thereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the grantor, his heirs, successors or assigns, or any person or persons lawfully claiming or to claim the same.

3. **Freedom from encumbrances.**— A covenant "that the said premises are free from encumbrances," must be construed as meaning that such premises are free, clear, discharged and unencumbered of and from all former and other gifts, grants, titles, charges, estates, judgments, taxes, assessments, liens and incumbrances, of what nature or kind soever.

4. **Further assurance.**— A covenant that the grantor will "execute or procure any further necessary assurance of the title to said premises," must be construed as meaning that the grantor and his heirs, or successors, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in, or to the premises conveyed by, from, under, or in trust for him or them, shall and will at any time or times thereafter upon the reasonable request, and at the proper costs and charges of the grantee, his heirs, successors and assigns, make, do, and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises thereby granted or so intended to

be, in and to the grantee, his heirs, successors or assigns forever, as by the grantee, his heirs, successors or assigns, or his or their counsel learned in the law shall be reasonably advised or required.

5. **Warranty of title.**— A covenant that the grantor "will for ever warrant the title" to the said premises, must be construed as meaning that the grantor and his heirs, or successors, the premises granted, and every part and parcel thereof, with the appurtenances, unto the grantee, his heirs, successors or assigns, against the grantor and his heirs or successors, and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and forever defend.

6. **Grantor has not encumbered.**— A covenant that the grantor "has not done or suffered anything whereby the said premises have been encumbered," must be construed as meaning that the grantor has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or incumbered in any manner or way whatsoever.

Comment on Section 218, Supra. This section was taken from section 1, chapter 475, Laws of 1890,[1] designed to encourage the use of short forms of deeds and mortgages. It is to be read in connection with sections 223 and 274 of this act.

[1] Repealed, chap. 547, Laws of 1896.

§ 219. **Construction of covenants in mortgages and bonds.** — In mortgages of real property, and in bonds secured thereby, the following or similar covenants must be construed as follows:

1. **Agreement that whole sum shall become due.**— The words "and it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of said mortgagee or obligee after default in the payment of any installment of principal or of interest for ..... days, or after default in the payment of any tax or assessment for .... days after notice and demand," must be construed as meaning that should any default be made in the payment of any installment of principal or any part thereof, or in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, or should any tax or assessment, which now is or may be hereafter imposed upon the premises hereinafter described, become due or payable, and should the said interest remain unpaid and in arrear for the space of ..... days, or such tax or assessment remain unpaid and in arrear for ....., days after written notice by the mortgagee or obligee, his executors, administrators, successors or assigns, that such tax or assessment is unpaid, and demand for the payment thereof, then and from thenceforth, that is to say, after the lapse of either one of said periods, as the case may be, the aforesaid principal sum, with all arrearage of interest thereon, shall, at the option of the said mortgagee or obligee, his executors, administrators, successors or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in any wise notwithstanding.

2. **In default of payment, mortgagee to have power to sell.**— A covenant that the mortgagor "will pay the indebtedness, as provided in the mortgage, and if default be made in the payment of any part thereof, the mortgagee shall have power to sell the premises therein described, according to law," must be construed as meaning that the mortgagor for himself, his heirs, executors and administrators or successors, doth covenant and agree to pay to the mortgagee, his executors, administrators, successors and assigns, the principal sum of money secured by said mortgage, and also the interest thereon as provided by said mortgage. And if default shall be made in the payment of the said principal sum or the

interest that may grow due thereon, or of any part thereof, that then and from thenceforth it shall be lawful for the mortgagee, his executors, administrators or successors to enter into and upon all and singular the premises granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said mortgagor, his heirs, executors, administrators, successors and assigns therein, at public auction, according to the act in such case made and provided, and as the attorney of the mortgagor for that purpose duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance for the same in fee simple (or otherwise, as the case may be) and out of the money arising from such sale, to retain the principal and interest which shall then be due, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase-money, if any there shall be, unto the mortgagor, his heirs, executors, administrators, successors or assigns, which sale so to be made shall forever be a perpetual bar both in law and equity against the mortgagor, his heirs, successors and assigns, and against all other persons claiming or to claim the premises, or any part thereof by, from or under him, them or any of them.

3. **Mortgagor to keep buildings insured.**— A covenant "that the mortgagor will keep the buildings on the said premises insured against loss by fire, for the benefit of the mortgagee," must be construed as meaning that the mortgagor, his heirs, successors and assigns will, during all the time until the money secured by the mortgage shall be fully paid and satisfied, keep the buildings erected on the premises insured against loss or damage by fire, to an amount and in a company to be approved by the mortgagee, and will assign and deliver the policy or policies of such insurance to the mortgagee, his executors, administrators, successors or assigns, so and in such manner and form that he and they shall at all time and times, until the full payment of said moneys, have and hold the said policy or policies as a collateral and further security for the payment of said money, and in default of so doing, that the mortgagee or his executors, administrators, successors or assigns, may make such insurance from year to year, in a sum not exceeding the principal sum for the purposes aforesaid, and pay the premium or premiums therefor, and that the mortgagor will pay to the mortgagee, his executors, administrators, successors or assigns,

such premium or premiums so paid, with interest from the time of payment, on demand, and that the same shall be deemed to be secured by the mortgage, and shall be collectible thereupon and thereby in like manner as the principal moneys, and in default of such payment by the mortgagor, his heirs, executors, administrators, successors or assigns, or of assignment and delivery of policies as aforesaid the whole of the principal sum and interest secured by the mortgage shall, at the option of the mortgagee, his executors, administrators, successors or assigns, immediately become due and payable.

4. **Mortgagor to give further assurance of title.**— A covenant that the mortgagor "will execute any further necessary assurance of the title to said premises, and will forever warrant said title," must be construed as meaning that the mortgagor shall and will make, execute, acknowledge and deliver in due form of law, all such further or other deeds or assurances as may at any time hereafter be reasonably desired or required for the more fully and effectually conveying the premises by the mortgage described, and thereby granted or intended so to be, unto the said mortgagee, his executors, administrators, successors or assigns, for the purpose aforesaid, and unto all and every person or persons, corporation or corporations, deriving any estate, right, title or interest therein, under the said indenture of mortgage, or the power of sale therein contained, and the said granted premises against the said mortgagor, and all persons claiming through him will warrant and defend.

Comment on Section 219, Supra. This section was originally taken from section 4, chapter 475, Laws of 1890,[1] an act designed to relieve the public record offices by encouraging shorter forms of conveyance. An error in the original enactment of this section of The Real Property Law was corrected by chapter 277, Laws of 1897, so as to read as that section now stands in this edition of The Real Property Law. This section is to be read in connection with sections 223 and 274 of this act.

[1] Repealed, chap. 547, Laws of 1896.

§ 220. **Construction of grant of appurtenances and of all the rights and estate of grantor.**— In any grant or mortgage of freehold interests in real estate, the words, "together with the appurtenances and all the estate and rights of the grantor in and to said premises," must be construed as meaning, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, dower and right of dower, curtesy, and right of curtesy, property, possession, claim and demand whatsoever, both in law and in equity, of the said grantor of, in and to the said granted premises and every part and parcel thereof, with the appurtenances.

Comment on Section 220. This section of The Real Property Law was originally enacted in section 2 of chapter 475, Laws of 1890,[1] and was taken verbatim from that law by the Commissioners of Statutory Revision.

Object of Section 220. This section was designed to relieve the public record offices, without the necessity of changing established forms of conveyance. It was not designed to enlarge or diminish the reciprocal obligations of grantor and grantee, mortgagor and mortgagee, of freehold estates and interests. It would be quite competent for the Legislature to abridge still further the records of ancient forms of conveyance by acts declaring that certain words or signs should stand for stereotyped clauses of such conveyances.

Penalty for Using Long Forms of Covenants. Section 220 of The Real Property Law should be read in connection with section 223 and section 274 of the same act, prescribing the penalty for using long forms of covenants.

[1] Repealed, chap. 547, Laws of 1896.

§ 221. **Construction of grant in executor's or trustee's deed of appurtenances, and of the estate of testator and grantor.**— In any deed by an executor of, or trustee under a will, the words "together with the appurtenances and also all the estate which the said testator had at the time of his decease in said premises, and also the estate therein which said grantor has or has power to convey or dispose of, whether individually or by virtue of said will or otherwise," must be construed as meaning, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease, or which the said grantor has or has power to convey or dispose of, whether individually or by virtue of the said last will and testament or otherwise, or in and to the said granted premises, and every part and parcel thereof, with the appurtenances.

Comment on Section 221. This section of The Real Property Law was originally enacted in section 3, chapter 475, Laws of 1890.[1] This section is to be read in connection with section 223 of this act.

Object of Section 221. This section is a re-enactment of part of a law which was originally designed to aid the public record offices by dispensing with the necessity of repeating in the record of conveyances long stereotyped forms. The section was not designed to alter or change the reciprocal rights of grantor or grantee, under the longer forms of executors' or trustees' deeds.

Penalty for Using Long Forms of Covenants. Section 221 of this act should be read in connection with section 223 and section 274 of this act, which prescribe a penalty for the use of long forms of covenants.

[1] Repealed, chap. 547, Laws of 1896.

§ 222. **Covenants to bind representatives of grantor and mortgagor and enure to the benefit of whom.**—All covenants contained in any grant or mortgage of real estate bind the heirs, executors, administrators, successors and assigns, of the grantor or mortgagor, and enure to the benefit of the heirs, executors, administrators, successors and assigns of the grantee or mortgagee in the same manner and to the same extent, and with like effect as if such heirs, executors, administrators, successors and assigns were so named in such covenants, unless otherwise in said grant or mortgage expressly provided.

Comment on Section 222. This section of "The Real Property Law" was originally enacted in section 5, chapter 475, Laws of 1890.[1] The design of the act from which this section of The Real Property Law is taken was to relieve the various public record offices from the necessity of spreading out on the records long forms, commonly employed in conveyances of real estate. This section is not designed to change the established reciprocal relations of grantor and grantee or mortgagor and mortgagee. It is to be read in connection with the next section of this act.[2]

Covenants Running with the Land. This section cannot in any way affect those rules of law which, before this act, determined what covenants ran with the land. No covenant in regard to real estate will run with the land, unless the covenantor has some interest in the land to which the covenant may be attached, and by the conveyance of which it will pass. However clearly it is expressed by the parties, that a covenant shall run with the land, if it be of such a character that the law does not permit it to be attached to the land, it will not be a covenant running with the land.[3]

Restrictive Covenants. Nor can this section have any effect upon that large class of covenants known as restrictive covenants or that class of covenants which inure to the benefit of property owners in a vicinity.[4]

[1] Repealed, chap. 547, Laws of 1896.

[2] The Real Prop. Law, § 223.

[3] Wilmurt v. McGrane, 16 App. Div. 412.

[4] See examples of such covenants: Equitable Life Ins. Co. v. Brennan, 148 N. Y. 661, 672; Leonard v. The Hotel Majestic Co., 17 Misc. Rep. 229; Levy v. Schreyer, 19 id. 227; Turner v. Howard, 10 App. Div. 555; Bimpson v. The German Amer. Imp. Co., 3 id. 198.

§ 223. **Short forms of deeds and mortgages.**— The use of the following forms of instruments for the conveyance and mortgage of real property is lawful, but this section does not prevent or invalidate the use of other forms:

SCHEDULE A.

Deed with Full Covenants.

This indenture, made the .....day of....., in the year eighteen hundred and ....., between ... . of (insert residence) of the first part, and ..... of (insert residence) of the second part.

Witnesseth, that the said party of the first part, in consideration of .... dollars lawful money of the United States, paid by the party of the second part, doth hereby grant and release unto the said party of the second part, his heirs and assigns forever (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever. And the said party of the first part doth covenant with said party of the second part as follows:

First. That the party of the first part is seized of said premises in fee simple, and has good right to convey the same.

Second. That the party of the second part shall quietly enjoy the said premises.

Third. That the said premises are free from encumbrances.

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises.

Fifth. That the party of the first part will forever warrant the title to said premises.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

In presence of:

SCHEDULE B.

Executor's Deed.

This indenture, made the ..... day of ....., eighteen hundred and ....., between ..... as executor of the last will and testament of ....., late of ....., deceased. of the first part, and ..... , of the second part, witnessseth:

That the said party of the first part, by virtue of the power and authority to him given in and by the said last will and testatment, and in consideration of .... dollars, lawful money of the United States, paid by the said party of the second part, doth hereby grant and release unto the said party of the second part, his heirs and assigns forever (description) together with the appurtenances, and also all the estate which the said testator had at the time of his decease in said premises, and also the estate therein, which the said party of the first part has or has power to dispose of, whether individually, or by virtue of said will or otherwise.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever.

And the said party of the first part covenants with said party of the second part that the party of the first part has not done or suffered anything whereby the said premises have been encumbered in any way whatever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

SCHEDULE C.

Mortgage.

This indenture, made the ..... day of ....., in the year eighteen hundred and ....., between ...., of ....., party of the first part, and ....., of ....., party of the second part.

Whereas, the said ..... is justly indebted to the said party of the second part in the sum of .... dollars, lawful money of the United States, secured to be paid by his certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of ..... dollars, on the ..... day of ....., eighteen hundred and ....., and the interest thereon, to be computed from ....., at the rate of ..... per centum per annum, and to be paid .....

It being thereby expressly agreed that the whole of the said principal sum shall become due after default in the payment of any installment of principal, interest, taxes or assessments, as hereinafter provided.

Now, this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the

said bond or obligation, with interest thereon, and also for and in consideration of one dollar, paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth hereby grant and release unto the said party of the second part, and to his heirs (or successors) and assigns for ever (description), together with the appurtenances, and all the estate and rights of the party of the first part in and to said premises.

To have and hold the above granted premises unto the said party of the second part, his heirs and assigns forever.

Provided, always, that if the said party of the first part, his heirs, executors or administrators, shall pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents, and the estate hereby granted, shall cease, determine and be void.

And the said party of the first part covenants with the party of the second part as follows:

1. That the said party of the first part will pay the indebtedness as hereinbefore provided, and if default be made in the payment of any part thereof, the party of the second part shall have power to sell the premises therein described according to law.

2. That the said party of the first part will keep the buildings on the said premises insured against loss by fire for the benefit of the mortgagee.

3. And it is hereby expressly agreed that the whole of said prineipal sum shall become due at the option of the said party of the second part after default in the payment of any installment of principal or of interest for ..... days, or after default in the payment of any tax or assessment for ..... days after notice and demand.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

In the presence of .....

Formerly schedules to chapter 475, section 6, Laws of 1890.[1]

Comment. This section (223) of "The Real Property Law," was corrected by chapter 278, Laws of 1897, so as to read as it now stands in this edition.

[1] Repealed, chap. 547, Laws of 1896.

§ 224. When contract to lease or sell void.—A contract for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agent.

Formerly 2 Revised Statutes, 135, sections 8, 9:

§ 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party, by whom the lease or sale is to be made.[1]

§ 9. Every instrument required to be subscribed by any party, under the ast preceding section, may be subscribed by the agent of such party lawfully authorized.[2]

Origin of this Enactment. This section, as it stood in the Revised Statutes, was taken from the act of 1787,[3] revising the English Statute of Frauds.[4] The English act tolerated parol leases for three years. But parol contracts for the leasing of any lands longer than one year were made void in New York.[5]

Effect of this Enactment. A contract void by the statute is void for all purposes. It confers no right and creates no obligation.[6] A contract for the leasing of lands for a longer term than a year is void unless in writing.[7] But a parol lease for a year may commence *in futuro* under our statute.[8] If a parol lease for years, though void originally, is executed, the landlord may, however, recover rent according to the agreement.[9]

Contracts for Sale of Lands. A contract for the sale of lands or interest in lands in New York is void unless in writing.[10] Part payment on a parol contract for the sale of an interest in lands

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] 2 J. & V. 88.

[4] 29 Car. II, chap. 3; Marie v. Garrison, 13 Abb. N. C. 210.

[5] 2 J. & V. 88; 1 R. L. 75.

[6] Dung v. Parker, 52 N. Y. 494; Durand v. Curtis, 57 id. 7, 11. *Cf.* Crane v. Powell, 139 id. 379, 384, *et infra* under this section.

[7] *Supra*, § 224; Cleves v. Willoughby, 7 Hill, 83; Prindle v. Anderson, 19 Wend. 391; Talamo v. Spitzmiller, 120 N. Y. 37; Durand v. Smith, 57 id. 7.

[8] Young v. Dake, 5 N. Y. 463; Green v. Weckle, 16 Misc. Rep. 76; Goldberg v. Lavinski, 3 id. 607; 2 E. D. Smith, 100. *Cf.* Gilis v. O'Toole, 4 Barb. 261.

[9] *Vide* § 190, The Real Prop. Law; Sherwood v. Phillips, 13 Wend. 479, 484; People ex rel. v. Rickert, 8 Cow. 227; Henning v. Miller, 83 Hun, 403; Schuyler v. Leggett, 2 Cow. 660; Thomas v. Nelson, 69 N. Y. 118; Laughran v. Smith, 75 id. 205; Crane v. Powell, 139 id. 379, 384.

[10] *Supra*, § 224; Green v. Armstrong, 1 Den. 550; Duncan v. Blair, 5 id.

does not take the contract out of the statute.[1] But the statute does not refer to a promise to pay for lands sold and conveyed.[2] The statute refers to lands situate in this State, not in another.[3] A written contract may, however, be rescinded by parol.[4]

The Writing Required to Satisfy the Statute. The writing or memorandum must embody the required contract, for the latter cannot be partly in writing and partly by parol.[5] But the writing may be composed of several papers.[6] The terms "writing" and "written" include every legible representation of letters upon a material substance, except when applied to the signature of an instrument.[7] The contract must be subscribed by the vendor or the person to be charged;[8] it is not enough that vendee or lessee sign.[9] But it need not be subscribed by both parties.[10] Auctioneers are the agents of both parties.[11] An agent duly authorized may sign for his principal,[12] and the authority need not be in writing,[13] unless the contract is a specialty.[14] On this principle may rest partnership dealings in realty.[15]

Statute of Frauds, how Construed. In this connection it should be remembered that a court of equity will not permit the Statute of Frauds to be used as an instrument of fraud.[16]

196; Thayer v. Rock, 13 Wend. 53; King v. Brown, 2 Hill, 485; Thompson v. Poor, 57 Hun, 285.

[1] Rhodes v. Rhodes, 3 Sandf. Ch. 279; Cagger v. Cagger, 43 N. Y. 550; Levy v. Bush, 45 id. 589. *Cf.* Malins v. Brown, 4 id. 403, 407.

[2] Thomas v. Dickinson, 12 N. Y. 364.

[3] Burrell v. Root, 40 N. Y. 496, 498; Marie v. Garrison, 13 Abb. N. C. 210.

[4] Proctor v. Thompson, 13 Abb. N. C. 340; Marie v. Garrison, Id. 210, 296.

[5] Wright v. Weeks, 25 N. Y. 153; Odell v. Montross, 68 id. 499; Mentz v. Newwitter, 122 id. 491.

[6] Coe v. Touch, 116 N. Y. 273, 277; Tallman v. Franklin, 14 id. 584.

[7] Chap. 677, Laws of 1892, § 12.

[8] Edwards v. The Farmers' Fire Ins. Co., 21 Wend. 467; Champlin v. Parish, 11 Paige, 405.

[9] Haydock v. Stow, 40 N. Y. 363; De Beerski v. Paige, 36 id. 537; Laughran v. Smith, 75 id. 205.

[10] McCrea v. Purmont, 16 Wend. 460; Nat. Fire Ins. Co. v. Loomis, 11 Paige, 431.

[11] Trustees Baptist Church v. Bigelow, 16 Wend. 28.

[12] Haydock v. Stow, 40 N. Y. 363, 370; Dykers v. Townsend, 24 id. 57; Hyatt v. Clark, 118 id. 563.

[13] Moody v. Smith, 70 N. Y. 598; Newton v. Bronson, 13 id. 587; Worrall v. Munn, 5 id. 229, 243. *Cf.* Griffin v. Baust, 26 App. Div. 553.

[14] Briggs v. Partridge, 64 N. Y. 357, 363. *Cf.* Kernochan v. Wilkins, 3 App. Div. 596, where specialty was made by trustees in their individual names.

[15] Traphagen v. Burt, 67 N. Y. 30; Babcock v. Read, 99 id. 609.

[16] Wood v. Rabe, 96 N. Y. 414; Noble v. McGurk, 16 Misc. Rep. 461; *et vide supra*, p. 247.

§ 225. **Effect of grant or mortgage of real property adversely possessed.**— A grant of real property is absolutely void, if at the time of the delivery thereof, such property is in the actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, and has preference over any judgment or other instrument, subsequent to the recording thereof; and if there are two or more such mortgages, they severally have preference according to the time of recording thereof, respectively.

Formerly 1 Revised Statutes, 739, sections 147, 148:

§ 147. Every grant of lands shall be absolutely void, if at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor.[1]

§ 148. But every person having a just title to lands, of which there shall be an adverse possession, may execute a mortgage on such lands; and such mortgage, if duly recorded, shall bind the lands from the time the possession thereof shall be recovered, by the mortgagor or his representatives. And every such mortgage shall have preference over any judgment or other instrument, subsequent to the recording thereof; and if there be two or more such mortgages, they shall severally have preference according to the time of recording the same respectively.[2]

Origin of this Enactment. The origin of this section is to be found in ancient statutes. It is professedly taken from the revision of 1813,[3] which in turn revised and consolidated the great English statutes in force in New York, prior to independence.[4] By the common law, a conveyance to a third person of lands held adversely at the time was void as an act of maintenance.[5] The original statute (32 Hen. VIII, chap. 9) prohibited the sale of any right or title to hereditaments, unless the seller, or his ancestor, or those by whom he claimed, had been in possession of the same, etc., etc., for one year next before the sale. The Revised Statutes omitted the exception in regard to one year's possession.[6]

Conveyance of Lands Adversely Held Void, when. A conveyance of lands adversely held is void as against the possessor, even

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Revisers' note to 1 R. S. 739, § 147; 1 R. L. 173.

[4] 2 Greenl. 38; 1 K. & R. 343; 2 J. & V. 208; *supra*, pp. 60, 230.

[5] Co. Litt. 214a; Plowden, 88; Crary v. Goodman, 22 N. Y. 170, 176.

[6] Revisers' note to 1 R. S. 739, § 147; Lalor, Real Prop. in N. Y. 253.

though the title under which the possessor holds may be bad.[1] But in respect to the rest of the world, such a conveyance is *prima facie* operative and passes title from grantor to grantee.[2]

This Section for the Benefit of Claimants. The statute declaring the deed void is for the benefit of the claimant, and he may renounce the benefit of it.[3]

Is this Section Applicable to Conveyances by Executor under Power? Whether this section is applicable to a conveyance by an executor acting under a power of sale given by a will, where the property is held adversely, is in doubt.[4]

Section does not Apply to Assignees in Bankruptcy. This provision does not apply to a deed from an assignee in bankruptcy made in pursuance of an order of the bankruptcy court.[5]

Section does not Apply to Disputed Boundaries. This statute does not invalidate a grant where grantor is possessed of the greater part of the lands conveyed, but by reason of a disputed boundary is kept out of part of the land thus conveyed,[6] or out of appurtenances thereto.[7]

Actual Possession under Adverse Title. To make the possession of land adverse so as to avoid a deed thereof under this statute against champerty, such possession must be under claim of some specific title, or else under some judgment, decree or executed process of some court.[8]

[1] Jackson v. Todd, 2 Caines, 183; Roseboom v. Van Vechten, 5 Den. 414; Livingston v. Proseus, 2 Hill, 526; Poor v. Horton, 15 Barb. 485; Howard v. Howard, 17 id. 663; Jackson v. Brinkerhoff, 3 Johns. Cas. 101; Towle v. Remsen, 70 N. Y. 303; Lambert v. Huber, 22 Misc. Rep. 462. *Cf.* Arents v. Long Island R. R. Co., 156 N. Y. 1.

[2] Poor v. Horton, 15 Barb. 485; Livingston v. Proseus, 2 Hill, 526; Hamilton v. Wright, 37 N. Y. 502.

[3] Keneda v. Gardner, 4 Hill, 469; Cameron v. Irvin, 5 id. 272, 279.

[4] Bullard v. Bicknell, 26 App. Div. 319.

[5] Coleman v. Manhattan Beach Imp. Co., 94 N. Y. 229.

[6] Northport R. E. & I. Co. v. Hendrickson, 139 N. Y. 440; Danziger v. Boyd, 120 id. 628, and cases there cited; Thompson v. Burhans, 79 id. 93; Code Civ. Proc. § 370. *Cf.* Hallas v. Bell, 53 Barb. 247; Archbald v. N. Y. Cent. R. R. Co., 1 App. Div. 251.

[7] Corning v. Troy Iron & Nail Factory, 40 N. Y. 191; 39 Barb. 311.

[8] Code Civ. Proc. § 370, and see tit. 1 of chap. 4, Code Civ. Proc. generally. Crary v. Goodman, 22 N. Y. 170; Stevens v. Hauser, 39 id. 302; Higinbottom v. Stoddard, 72 id. 94; Christie v. Gage, 71 id. 189, 192; In Matter of Dept. of Parks, 73 id. 560; Danziger v. Boyd, 120 id. 628; Kneller v. Lang, 137 id. 589; Arents v. Long Island R. R. Co., 156 id. 1; Moody v. Moody, 16 Hun, 189; Fish v. Fish, 39 Barb. 513; Hallas v. Bell, 53 id. 247; Nash v. Kemp, 12 Hun, 592; Fortmann v. Wheeler, 84 id. 278; Jones v. Wright, 85 id. 35.

Title Adverse to Grantor. In order to avoid a conveyance under this section the title of the actual possessor, if *bona fide*, may be derivative from a mere occupant or a claimant,[1] provided it be hostile in its inception and not subservient to a higher title,[2] and be a written instrument in due form.[3]

Actual Possession Requisite. To avoid a deed for champerty actual, not constructive, adverse possession in another is required.[4] The presumption is that possession is subordinate to a legal title,[5] and a single statement by a possessor that he claims no title fastens a character upon his possession which makes it unavailable for the establishment of a right by adverse possession.[6] Adverse possession cannot be established under a tax lease.[7]

Conveyance by Reversioners or Remaindermen. Where tenant for life conveys a fee, the possession thereunder is not adverse during the life of such life tenant, and a conveyance by reversioner or remainderman is not void under this section.[8]

Section does not Apply to Conveyances from the State. The objection that a conveyance is void because the grantor is out of possession does not apply to a patent or deed of land from the people of the State.[9]

Exception Tolerating Mortgage of Lands Adversely Held by Claimant. The exception allowing a claimant to lands held adversely to mortgage them was a compromise with the old law.[10] It was introduced in the Revised Statutes[11] by the revisers,[12] and permits a mortgage in a case where a deed would be invalid.[13]

[1] § 369, Code Civ. Proc.; Jackson v. Elston, 12 Johns. 452; Jackson v. Foster, Id. 488; Bradstreet v. Clarke, 12 Wend. 602, 674; Briggs v. Prosser, 14 id. 227; Jackson v. Woodruff, 1 Cow. 276, 286; Clapp v. Bromagham, 9 id. 530; Livingston v. The Peru Iron Co., 9 Wend. 511; Vrooman v. Shephard, 14 Barb. 441; City of La Crosse v. Cameron, 40 Fed. Rep. 264; Farrar v. Bernheim, 74 id. 435. *Cf.* Bissing v. Smith, 85 Hun, 564.

[2] Jackson v. Brainard, 5 Cow. 74; Jackson v. Hill, 5 Wend. 532; Church v. Wright, 4 App. Div. 312; Church v. Shultes, Id. 378.

[3] Arents v. Long Island R. R. Co., 156 N. Y. 1, 7.

[4] Dawley v. Brown, 79 N. Y. 390.

[5] De Lancey v. Piepgras, 138 N. Y. 26.

[6] De Lancey v. Hawkins, 23 App. Div. 8.

[7] Sanders v. Riedinger, 19 Misc. Rep. 289; S. C., 30 App. Div. 277.

[8] Christie v. Gage, 71 N. Y. 189; Clarke v. Hughes, 13 Barb. 147; Clute v. N. Y. Cent. & H. R. R. R. Co., 120 N. Y. 267, 273.

[9] Jackson v. Gumaer, 2 Cow. 552; Candee v. Hayward, 37 N. Y. 653, 656; Brady v. Begun, 36 Barb. 533.

[10] 1 R. L. 172.

[11] 1 R. S. 739, § 148; § 225, The Real Prop. Law; Penal Code, §§ 130, 131.

[12] Note of Revisers to 1 R. S. 739, § 148.

[13] Penal Code, § 131; Ten Eyck v. Craig, 62 N. Y. 406, and *vide* brief

Section Does not Apply to Reconveyances by Reason of Defects in Former Deeds. A conveyance by a grantor to a grantee, both out of possession, given to remedy a defect because of failure to express a consideration in a former deed executed by the grantor, and to fortify the title of the possessor of the premises, or a title derived from him, is valid for that purpose, and to estop the grantor from setting up the defect.[1]

at p. 411; Towle v. Remsen, 70 id. 303, 318.

[1] Fryer v. Rockefeller, 63 N. Y. 268; Lambert v. Huber, 22 Misc. Rep. 462.

§ 226. **Conveyances with intent to defraud purchasers and encumbrancers void.**—A conveyance of an estate or interest in real property, or the rents and profits thereof, and every charge thereon, made or created with intent to defraud prior or subsequent purchasers or encumbrancers, for a valuable consideration, of the same real property, rents or profits, is void as against such purchasers and encumbrancers. Such a conveyance or charge shall not be deemed fraudulent in favor of a subsequent purchaser or encumbrancer, who, at the time of his purchase or encumbrance, has actual or legal notice thereof, unless it appears that the grantee in the conveyance, or the person to be benefited by the charge, was privy to the fraud intended.

Formerly 2 Revised Statutes, 134, sections 1, 2:

SECTION 1. Every conveyance of any estate or interest in lands, or the rents and profits of lands, and every charge upon lands, or upon the rents and profits thereof, made or created, with the intent to defraud prior or subsequent purchasers for a valuable consideration, of the same lands, rents or profits, as against such purchasers, shall be void.[1]

§ 2. No such conveyance or charge, shall be deemed fraudulent, in favor of a subsequent purchaser, who shall have actual or legal notice thereof, at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefitted[2] by such charge, was privy to the fraud intended.[3]

Origin of this Enactment. These sections of the Revised Statutes were taken from an act of 1813,[4] which in turn was derived from an act of 1787, reported by Messrs. Jones & Varick, and contained in their Revision,[5] purporting to re-enact in the State of New York those English statutes, in force in the province of New York, prior to Independence.[6] The act of 1787[7] was taken from 27 Elizabeth, chapter 4, section 1 (made perpetual by 30 Eliz. chap. 18). Prior to Independence, the act 27 Elizabeth, chapter 4, was, therefore, in force in New York, although not expressly re-enacted.[8] The history of the New York statutes against fraudulent conveyances prior to the above above-mentioned year 1787 is briefly told. The "Duke's Lawes" of 1664 contained several

[1] Repealed, chap. 547, Laws of 1896.

[2] "Benefitted." So in original authorized edition of the Revised Statutes.

[3] Repealed, chap. 547, Laws of 1896.

[4] 1 R. L. 75; note of Revisers to 2 R. S. 134, § 1.

[5] 2 J. & V. 88, § 3, "An act for the Prevention of Frauds."

[6] *Supra*, pp. 60, 230.

[7] 2 J. & V. 88, § 3.

[8] 4 Kent, Comm. 462.

general provisions.[1] In 1683 "an act to prevent frauds in conveyancing of lands" was enacted, but it refers only to the registration of deeds.[2] In 1771, conveyance of lands, in pusuance of any lottery scheme, was made void.[3] In 1775 a more extended act was passed, regulating bills of sale only.[4] With these exceptions, the law of New York, prior to 1787, in so far as it concerned fraudulent conveyances, stood wholly on the statutes of Elizabeth.[5]

Application of the Statute 27 Elizabeth. The object of the statute 27 Elizabeth, being to give full protection to subsequent purchasers against prior voluntary conveyances, it was decided in England that, in consequence, a prior conveyance was void as against a subsequent purchaser or mortgagee (from or of the voluntary grantor), whether with or without notice, but not from or of his heir or devisee; and even after a bill filed to enforce such prior conveyance, if not actually on valuable consideration, although such conveyance might be *bona fide* and on good consideration, * * * it was void on the ground that the statute in every such case inferred fraud.[6]

The Statutes of Elizabeth. The statute 27 Elizabeth, chapter 4, was not at variance with the common law.[7] It protected subsequent purchasers. The statute 13 Elizabeth, now embodied in the next section of this act,[8] governed creditors and their actions.[9] The statute 27 Elizabeth, chapter 4, has received a thorough discussion in England,[10] and a very slender one in this State, owing to the local necessity of recording all conveyances, and their constructive notice when recorded.

2 Revised Statutes, 134, Section 2. The portion of section 226 of The Real Property Law which was formerly embodied in 2 Revised Statutes 134, section 2,[11] was intended to settle negatively the question whether a subsequent purchaser with notice could set aside a prior voluntary conveyance, as the affirmative rule then prevailing in England was deemed illogical and improper.[12] Such convey-

[1] Tit. "Conveyances, Deeds and Writings." Vol. 1, p. 30, State Rev. Col. Laws, ed. of 1897.

[2] Vol. I, p. 141, State Rev. Col. Laws.

[3] Van Schaack, 676.

[4] Chap. 72, Laws of 1775.

[5] 4 Kent, Comm. 462, 463.

[6] Smith, Real & Pers. Prop. 683.

[7] May, Fr. Conv. 3. *Cf.* Rob. Conv. pp. 13, 14.

[8] § 227, The Real Prop. Law.

[9] Roberts v. Anderson, 3 Johns Ch. 371.

[10] *Vide*, Roberts on Conveyances under this statute, and remarks, *supra*, p. 344, under § 124, The Real Prop. Law.

[11] *Supra*, p. 520.

[12] Revisers' note to 2 R. S. 134, § 2; Verplanck v. Sterry, 12 Johns. 536;

ances, like other assignments, were always regarded as valid between the immediate parties, so far as executed;[1] but courts would not lend their aid to enforce them, even *inter partes*, when wholly executory.[2]

Conveyance to Defraud Intending Wife and Marriage Settlement. A conveyance to defraud intending wife is void, and after marriage she may bring an action to set it aside.[3] Marriage is itself the highest consideration known to the law, and a settlement on an intending wife will often be supported, if the inducement of the marriage, as against subsequent purchasers or prior creditors.[4]

Connection of this Section. This section of this act must be read in connection with sections 228 and 229 of the same act.

Cathcart v. Robinson, 5 Pet. (U. S.) 264; Roberts v. Anderson, 3 Johns. Ch. 371; 4 Kent, Comm. 463, *seq.*

[1] Ames v. Blunt, 5 Paige, 13; Jackson v. Cadwell, 1 Cow. 622; Jackson v. Garnsey, 16 Johns. 189; Mosely v. Mosely, 15 N. Y. 334; Matter of Jacobs, 98 id. 87, 98; Becknell v. Lancaster Ins. Co., 1 T. & C. 215; affd., 58 N. Y. 677.

[2] Mosely v. Mosely, 15 N. Y. 334.

[3] Youngs v. Carter, 1 Abb. N. C. 136; affd., 10 Hun, 194.

[4] Verplank v. Sterry, 12 Johns. 536; Whelan v. Whelan, 3 Cow. 537; Prewit v. Wilson, 103 U. S. 22; Wood v. Jackson, 8 Wend. 9; 4 Kent, Comm. 464; Carr v. Breese, 81 N. Y. 584; Neuberger v. Kein, 134 id. 35. *Cf.* Flory v. Houck, 40 Atl. Rep. 482.

§ 227. **Conveyances with intent to defraud creditors void.**—A conveyance or assignment in writing or otherwise, of an estate, interest, or existing trust in real property, or the rents or profits issuing therefrom, or a charge on real property, or on the rents or profits thereof, made with the intent to hinder, delay or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands, or a bond or other evidence of debt given, suit commenced or decree or judgment suffered, with the like intent, is void as against every person so hindered, delayed or defrauded.

Formerly 2 Revised Statutes, 137, section 1:

§ 1. 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, goods, or things in action, or upon the rents or profits thereof, made with the 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.[1]

Origin of this Enactment. This section of The Real Property Law and its prototype in the Revised Statutes, are to be considered in connection with the 2d section of the "Act for the prevention of frauds,"[2] which, in turn, was taken by Messrs. Jones & Varick, the revisers of 1786–87, from the English act, 13 Elizabeth, chapter 5, made perpetual by the act 29 Elizabeth, chapter 5.[3] These English acts were in force in New York prior to independence of the Crown.[4]

Section 227, Supra. This section of The Real Property Law is to be read in connection with section 230 thereof, which is a saving clause embodying section 6 of "The Act for the prevention of Frauds."[5]

Rights and Remedies under this Section. The rights and remedies under this section can best be discovered in the voluminous treatises devoted to creditors' actions and bills,[6] and to fraudulent conveyances.[7] It is impossible even to outline the authorities on so extensive a subject under a single section of The Real Property Law. It must suffice to point out the leading propositions.

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 J. & V. 88; 1 K. & R. 75; 1 R. L. 75; note of Revisers to 2 R. S. 137, § 1.

[3] *Vide* remarks, *supra*, under § 226, The Real Prop. Law; Wilder v. Winne, 6 Cow. 284, 287.

[4] 4 Kent, Comm. 462; 2 id. 440.

[5] *Supra.*

[6] 4 Cruise, Dig. tit. 32, chap. 28.

[7] Rob. Conv.; Bump, Fr. Conv.; Wait, Fr. Conv.; Bish. Insolv. Assign.

Conveyances with Intent to Defraud, How Far Void. Under this statute conveyances are void as against creditors (though they may be good in other respects[1]), when made with an express intent to defraud them.[2]

Intent to Defraud a Question of Fact. The question whether a conveyance is made with intent to defraud, etc., is a question of fact.[3]

Voluntary Conveyances. The fact that a conveyance by an insolvent is voluntary, or without consideration, may be controlling as to creditors.[4] So if upon a partly fictitious consideration,[5] or one grossly inadequate,[6] or if upon a long or indeterminate credit.[7] But a pre-existing debt affords a sufficient consideration.[8] The adequacy of the consideration is only material as evidence of fraudulent intent.[9] But a voluntary conveyance is not *per se* fraudulent.[10]

Marriage a Sufficient Consideration. Marriage, if the inducing cause of a settlement, is a valid consideration, even as against existing creditors of the settlor,[11] unless the intending wife is aware at the time that the settlor is insolvent.[12]

[1] Bicknell v. Lancaster, etc., Ins. Co., 1 T. & C. 215; affd., 58 N. Y. 677.

[2] Cruise, Dig. tit. 32, chap. 28; *vide* § 229, The Real Prop. Law.

[3] § 229, The Real Prop. Law.

[4] *Vide infra*, § 229, The Real Prop. Law; Erickson v. Quinn, 47 N. Y. 410; Coleman v. Burr, 93 id. 17; Smith v. Reid, 134 id. 568; Wood v. Hunt, 38 Barb. 302; Fuller v. Brown, 76 Hun, 557; Royer Wheel Co. v. Fielding, 31 id. 274, 279; O'Connell v. Madden, 26 N. Y. St. Repr. 251; Jackson v. Seward, 5 Cow. 67; Reade v. Livingston, 3 Johns. Ch. 481; 4 Kent, Comm. 464. *Cf.* Jackson v. Peck, 4 Wend. 300; Jaeger v. Kelley, 52 N. Y. 274; Young v. Heermans, 66 id. 374; Fox v. Moyer, 54 id. 125; Jacobs v. Morrison, 136 id. 101.

[5] Lee v. Hunter, 1 Paige, 519.

[6] Van Wyck v. Baker, 16 Hun, 168; Donohue v. Joyce, 46 N. Y. St. Repr. 373.

[7] Hendricks v. Robinson, 2 Johns. Ch. 283; affd. as Hendricks v. Walden, 17 Johns. 438; Browning v. Hart, 6 Barb. 91; Starin v. Kelly, 36 N. Y. Super. Ct. (J. & S.) 366; Evans v. Sims, 82 Hun, 396; Downing v. Kelly, 49 Barb. 547. *Cf.* Scheitlin v. Stone, 43 id. 634.

[8] Murphy v. Briggs, 89 N. Y. 446. *Cf.* Flory v. Houck, 40 Atl. Rep. 482.

[9] Dygert v. Remerschnider, 32 N. Y. 629; Jaeger v. Kelley, 52 id. 274; Dunlap v. Hawkins, 59 id. 342, 345; Smith v. Reid, 134 id. 568.

[10] Holden v. Burnham, 63 N. Y. 74; Young v. Heermans, 66 id. 374; Carr v. Breese, 81 id. 584; Billings v. Russell, 101 id. 226; Jackson v. Badger, 109 id. 632; Johnson v. Johnson, 37 N. Y. St. Repr. 524.

[11] Verplank v. Sterry, 12 Johns. 536; Whelan v. Whelan, 3 Cow. 537; Wood v. Jackson, 8 Wend. 9; Dygert v. Remerschnider, 32 N. Y. 629; Starkey v. Kelly, 50 id. 676; Prewit v. Wilson, 103 U. S. 22.

[12] Keep v. Keep, 7 Abb. N. C. 240. *Cf.* Birdsall v. Schwarz, 26 App. Div. 343.

Post-nuptial Settlement. A post-nuptial settlement is presumptively fraudulent as to creditors.[1]

Outlawed Debt. A debt barred by statute may afford a sufficient moral obligation to support a conveyance.[2]

Fraudulent Grantee. A person who with fraudulent intent takes a conveyance even for value is without remedy on the conveyance to recover the consideration.[3]

Subsequent Creditors. The statute avoids conveyances not only as to existing creditors, but as to subsequent creditors, where the conveyance was given with a view of continuing in business, creating future debts and defrauding them.[4]

Creditors' Remedies. While courts of law and courts of equity have concurrent jurisdiction over fraud under this statute,[5] in cases where the property cannot be reached by execution proceeding by bill or action is necessary.[6] And such bill cannot ordinarily[7] be filed until after the creditor has reduced his claim to judgment and execution is returned unsatisfied in whole or in part.[8] Several creditors standing in the same situation[9] may file the bill in their own behalf and in behalf of others similarly situated.[10]

[1] Smith v. Reid, 134 N. Y. 568; Adee v. Hallett, 3 App. Div. 308; Allee v. Slane, 26 id. 455; Flory v. Houck, 40 Atl. Rep. 482; *et vide* under § 229, The Real Prop. Law.

[2] Livermore v. Northrup, 44 N. Y. 107; McConnell v. Barber, 86 Hun, 360.

[3] Union Nat. Bank v. Warner, 12 Hun, 306; Burnham v. Brennen, 42 N. Y. Super. Ct. 49; Shand v. Handley, 71 N. Y. 319; Bank of Beloit v. Beale, 34 id. 473; Billings v. Russell, 101 id. 226; Manchester v. Tibbetts, 121 id. 219; Davis v. Leopold, 87 id. 620; Babcock v. Jones, 62 Hun, 565; Central Nat. Bank v. Seligman, 64 id. 615; S. C., 138 N. Y. 435. *Cf.* Loos v. Wilkinson, 113 id. 485.

[4] Savage v. Murphy, 34 N. Y. 508; Case v. Phelps, 39 id. 164; Teed v. Valentine, 65 id. 471; Dewey v. Moyer, 72 id. 70; Todd v. Nelson, 109 id. 316; Neuberger v. Keim, 53 Hun, 60; Talcott v. Levy, 29 Abb. N. C. 3. *Cf.* Dygert v. Remerschnider, 32 N. Y. 629; Dunlap v. Hawkins, 59 id. 342.

[5] Bergen v. Snedeker, 79 N. Y. 146; Bockes v. Lansing, 74 id. 437; Lichtenberg v. Herdtfelder, 103 id. 302.

[6] Harding v. Elliott, 12 Misc. Rep. 521; Mosely v. Mosely, 15 N. Y. 334.

[7] Executors, assignees, etc., are enabled to set aside such conveyances (Chap. 341, Laws of 1858, as amended by chap. 740, Laws of 1894, and chap. 487, Laws of 1889), without being judgment creditors. Harvey v. McDonnell, 113 N. Y. 526; Southard v. Pinckney, 5 Abb. N. C. 184; § 232, *infra*, The Real Prop. Law.

[8] Prentiss v. Bowden, 145 N. Y. 342; N. T. Bank v. Wetmore, 124 id. 241, 248; Adee v. Bigler, 81 id. 349; Geery v. Geery, 63 id. 252; Mechanics', etc., Bank v. Dakin, 51 id. 522; Beardsley Scythe Co. v. Foster, 36 id. 561; Estes v. Wilcox, 67 id. 264; Adsit v. Butler, 87 id. 585. *Cf.* Le Fevre v. Phillips, 81 Hun, 232.

[9] Tabor v. Bunnell, 10 Wkly. Dig. 551; Reid v. The Evergreens, 21 How. Pr. 39; § 97, Story Eq. Pl.

[10] § 448, Code Civ. Proc.; White's Bank v. Farthing, 101 N. Y. 344.

§ 228. **Conveyances void as to creditors, purchasers and encumbrancers, void as to heirs and assigns.**—A conveyance, charge, instrument or proceeding, declared by this article to be void as against creditors, purchasers or encumbrancers, is equally void as against their heirs, successors, personal representatives or assigns.

Formerly 2 Revised Statutes, 137, section 3:

§ 3. Every conveyance, charge, instrument or proceeding declared to be void, by the provisions of this Chapter, as against creditors or purchasers, shall be equally void against the heirs, successors, personal representatives or assignees, of such creditors or purchasers.[1]

Note on Section 228. The Revised Statutes gave the benefit of the statute, directed against fraudulent conveyances, to heirs, successors, executors and assigns of purchasers and creditors.[2] This enactment was for superabundant caution. In some instances the courts showed a disposition to narrow the effect of the statutes against fraudulent conveyances, so as to limit the remedies to the persons specified in the statute. There was a disposition to give a stronger effect to the statute of 27 Elizabeth in favor of purchasers than to that of 13 Elizabeth in favor of creditors, as purchasers had actually paid money for the estate. This section of the Revised Statutes prevented any disputation and expressly declared that the remedy given to creditors should extend to their heirs and assigns.[3]

[1] Repealed, chap. 547, Laws of 1896.

[2] See Revisers' note to 2 R. S. 137, § 3.

[3] See Roberts, Fraud. Conv. 61, note a.

§ 229. **Fraudulent intent, question of fact.**— The question of fraudulent intent in a case arising under this article, shall be deemed a question of fact and not of law; and a conveyance or charge shall not be adjudged fraudulent as against creditors, purchasers or encumbrancers, solely on the ground that it was not founded on a valuable consideration.

Formerly 2 Revised Statutes, 137, section 4:

§ 4. The question of fraudulent intent in all cases arising under the provisions of this Chapter, shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers, solely on the ground, that it was not founded on a valuable consideration.[1]

Older Law. Fraudulent intent was, before the Revised Statutes, sometimes deemed to be a question of law, and sometimes a question of fact. The original revisers determined to settle the doubt.[2]

The Revised Statutes. Since the Revised Statutes, whether a voluntary conveyance is fraudulent or not, is a question of fact for the jury,[3] and the fraud must be proved affirmatively as alleged.[4] But where the construction of such an instrument is doubtful, the maxim "*ut res magis valeat quam pereat*" is applied.[5]

Probative Facts. The vendee must participate in the intent to defraud.[6] The intent of vendor alone to defraud or delay existing creditors is not sufficient to avoid the conveyance,[7] unless the conveyance is purely voluntary.[8]

[1] Repealed, chap. 547, Laws of 1896.

[2] Revisers' note to 2 R. S. 137, § 4; Hanford v. Artcher, 4 Hill, 271; Babcock v. Eckler, 24 N. Y. 623, 633; Manchester v. Tibbetts, 121 id. 219, 222.

[3] Babcock v. Eckler, 24 N. Y. 623, 633; Dygert v. Remerschnider, 32 id. 629; Fuller v. Brown, 76 Hun, 557; Dunlap v. Hawkins, 59 N. Y. 342, 345; Stanley v. Union Nat. Bank, 115 id. 122, 138; Manchester v. Tibbetts, 121 id. 219, 222; Goff v. Eames, 20 Misc. Rep. 498; Wright v. Seaman, 32 App. Div. 106.

[4] Parfitt v. Kings Co. Gas Co., 12 Misc. Rep. 278; Jaeger v. Kelley, 52 N. Y. 274; Greenough v. Greenough, 21 Misc. Rep. 727.

[5] Roberts & Co. v. Buckley, 145 N. Y. 215.

[6] Dudley v. Danforth, 61 N. Y. 626; Benedict v. Eldredge, 14 App. Div. 625; Smith v. Post, 1 Hun, 516; Sumner v. Skinner, 80 id. 201; Sommers v. Contentin. 26 App. Div. 241.

[7] Jaeger v. Kelley, 52 N. Y. 274; Bush v. Roberts, 41 id. 278; Jacobs v. Morrison, 136 id. 101; Hyde v. Bloomingdale, 23 Misc. Rep. 728.

[8] Fuller v. Brown, 76 Hun, 557; Erickson v. Quinn, 47 N. Y. 410; Coleman v. Burr, 93 id. 17, and see cases cited under § 227, *supra*.

Creditors. A creditor is allowed to take property from a failing firm in satisfaction of a demand, even though he know of the insolvency, unless he participate in the intent to delay, defraud, etc., other creditors.[1]

Post-nuptial Settlements. A post-nuptial settlement may be valid as to subsequent creditors of the settlor, unless made secretly or with intent to defraud them.[2] But it will be remembered that ordinarily a voluntary conveyance is presumptively fraudulent as to existing creditors.[3]

Effect of Consideration. Where intent to defraud exists, a good or valuable consideration will not save the conveyance from the condemnation of the statute.[4] But a valuable consideration affords *prima facie* evidence of good faith,[5] though the presumption may be overcome by proof.[6]

[1] Dudley v. Danforth, 61 N. Y. 626; Hine v. Bowe, 114 id. 350; Stanley v. Union Nat. Bank, 115 id. 122; Knower v. Cent. Nat. Bank, 124 id. 552; Central Nat. Bank v. Seligman, 30 Abb. N. C. 245; 138 N. Y. 435; Abegg v. Bishop, 142 id. 286; Billings v. Billings, 31 Hun, 65; McNaney v. Hall, 86 id. 415; Prewit v. Wilson, 103 U. S. 22; Tompkins v. Hunter, 24 N. Y. Supp. 8; H. B. Claflin Co. v. Arnheim, 87 Hun, 236; Dewey v. Wilson, 4 App. Div. 232; Hoffman v. Susemihl, 15 id. 405.

[2] Babcock v. Eckler, 24 N. Y. 623; Neuberger v. Keim, 134 id. 35; Holden v. Burnham, 63 id. 74; Talcott v. Levy, 29 Abb. N. C. 3; Schreyer v. Scott, 134 U. S. 405; Flory v. Houck, 40 Atl. Rep. 482.

[3] Smith v. Reid, 134 N. Y. 568; Allee v. Slane, 26 App. Div. 455; Wright v. Seaman, 32 id. 106. *Cf.* Adee v. Hallett, 3 id. 308.

[4] Billings v. Russell, 101 N. Y. 226. *Cf.* Adee v. Hallett, 3 App. Div. 308, as to consideration.

[5] Nugent v. Jacobs, 103 N. Y. 125.

[6] Taylor v. Hoey, 36 N. Y. Super. Ct. 402.

§ 230. **Rights of purchaser or encumbrancer for valuable consideration protected.**— This article does not in any manner affect or impair the title of a purchaser or encumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

Formerly 2 Revised Statutes, 137, section 5:

§ 5. The provisions of this Chapter shall not be construed, in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear, that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.[1]

Origin of Section 230. 2 Revised Statutes, 137, section 5, was taken from the act of 1787[2] by the original revisers;[3] but its substance was contained in the English statutes on which the New York act of 1787 was in turn founded.[4]

Voluntary Assignee not a Purchaser. An assignee for the benefit of creditors is not a purchaser for a valuable consideration.[5] A *bona fide* purchaser is one who pays value without notice of the claim or interest of another.[6]

Notice. Ordinarily a person who has notice of facts sufficient to put him on inquiry is not to be regarded as a purchaser without notice.[7]

Burden of Proof. If a purchaser show that he purchased for a valuable consideration, the creditor must then show that the purchaser had actual notice of the fraudulent intent specified in the statute.[8] A purchaser, or a mortgagee for value, is not chargeable with constructive notice under this statute.[9] Such knowledge need not be established by positive evidence, but may be inferred from circumstances.[10]

Bona Fide Purchasers. An innocent purchaser for value, without notice, from one who had actual notice of a conveyance in

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 J. & V. 88; 1 R. L. 75.

[3] Note 2 R. S. 137, § 5.

[4] 13 Eliz. chap. 5, § 6; 27 id. chap. 4, § 4. *Vide*, pp. 520–523, *supra*, under §§ 226, 227, The Real Prop. Law.

[5] Griffin v. Marquardt, 17 N. Y. 28.

[6] Spicer v. Waters, 65 Barb. 227.

[7] Williamson v. Brown, 15 N. Y. 354; Stearns v. Gage, 79 id. 102; Parker v. Conner, 93 id. 118; Bush v. Roberts, 111 id. 278; Jacobs v. Morrison, 136 id. 101; Anderson v. Blood, 152 id. 285.

[8] Starin v. Kelly, 88 N.Y. 418; Taylor v. Hoey, 36 N. Y. Super. Ct. 402.

[9] Stearns v. Gage, 79 N. Y. 102; Murphy v. Briggs, 89 id. 446; Parker v. Conner, 93 id. 118.

[10] Ross v. Caywood, 16 App. Div. 591.

fraud of creditors, is a *bona fide* purchaser under this statute.[1] So, a purchaser with notice from one who bought without notice, takes the title of his grantor, and is protected to the same extent.[2]

Fraudulent Grantee. Where grantee has actual notice, or is *particeps fraudis*, he cannot recover the money paid on the conveyance,[3] and subsequent improvements are also forfeited where he had actual notice.[4] But actual disbursements, such as taxes or interest on mortgages, are sometimes allowed such a grantee,[5] especially when his guilt is constructive only.[6]

[1] Jackson v. Walsh, 14 Johns. 407; Noyes v. Burton, 29 Barb. 631; Frazer v. Weston, 1 Barb. Ch. 220; affd., 3 Den. 610; How. Cas. 448; *et vide infra*, p. 554.

[2] Griffith v. Griffith, 9 Paige, 315.

[3] *Vide supra*, p. 525, cases cited under § 227, The Real Prop. Law.

[4] Shand v. Handley, 71 N. Y. 319.

[5] Loos v. Wilkinson, 113 N. Y. 485.

[6] Lore v. Dierkes, 16 Abb. N. C. 47.

§ 231. **Conveyances with power to revoke, determine or alter.**— A conveyance of or charge on an estate or interest in real property, containing a provision for the revocation, determination or alteration of the estate or interest, or any part thereof, at the will of the grantor, is void, as against subsequent purchasers and encumbrancers, from the grantor, for a valuable consideration, of any estate or interest so liable to be revoked or determined, although the same be not expressly revoked, determined or altered by the grantor, by virtue of the power reserved or expressed in the prior conveyance or charge. Where a power to revoke a conveyance of real property or the rents and profits thereof, and to reconvey the same, is given to any person, other than the grantor in such conveyance, and such person thereafter conveys the same real property, rents or profits to a purchaser or encumbrancer for a valuable consideration, such subsequent conveyance is valid, in the same manner and to the same extent as if the power of revocation were recited therein, and the intent to revoke the former conveyance expressly declared. If a conveyance to a purchaser or encumbrancer, under this section, be made before the person making it is entitled to execute his power of revocation, it is nevertheless valid, from the time the power of revocation actually vests in such person, in the same manner, and to the same extent, as if then made.

Formerly 2 Revised Statutes, 134, sections 3, 4 and 5:

§ 3. Every conveyance or charge of, or upon, any estate or interest 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 from such grantor for a valuable consideration, of any estate or interest so liable to be revoked or determined, 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]

§ 4. Where a power to revoke a conveyance of any lands, or the rents and profits thereof, 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 or profits, to a purchaser for a valuable consideration, such subsequent conveyance shall be valid, in the same manner and to the same extent, as if the power of revocation were recited therein, and the intent to revoke the former conveyance expressly declared.[2]

§ 5. If a conveyance to a purchaser, under either of the two last preceding sections, shall be made, before the person making the same, shall be entitled to execute his power of revocation, it shall nevertheless be valid,

[1] Repealed, chap. 547, Laws of 1896. [2] Repealed, chap. 547, Laws of 1896.

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.[1]

Origin of Section 231, Supra. That provision formerly contained in 2 Revised Statutes, 134, section 3, concerning conveyances with power of revocation, was originally taken from the act of 1787,[2] which, in turn, was derived from the statute 27 Elizabeth, chapter 4, section 5.[3] The provisions contained in 2 Revised Statutes, 134, sections 4 and 5, were introduced by the original revisers themselves, because they deemed them to be within the equity of the statute against fraudulent conveyances.[4]

Trusts for the Benefit of the Settlor. Trusts for the benefit of settlors are still void as to creditors.[5] So even where part of a consideration for a conveyance is valid, yet if it is founded upon an agreement by a grantee for the future support of grantor it is void as to grantor's creditors.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] 2 J. & V. 88; 1 R. L. 75, § 5.

[3] *Vide supra*, pp. 347, 352, under §§ 125, 128, The Real Prop. Law.

[4] Revisers' notes to 2 R. S. 134, §§ 4, 5.

[5] 2 R. S. 135, § 1; chap. 418, Laws of 1897, constituting chap. 49, General Laws; Schenck v. Barnes, 156 N. Y. 316; Townsend v. Bumpus, 29 App. Div. 122; *et supra*, p. 268, note 8, for other cases cited.

[6] Kain v. Larkin, 4 App. Div. 209.

§ 232. **Disaffirmance of fraudulent act by executor and others.**—An executor, administrator, receiver, assignee or other trustee, may, for the benefit of creditors, or of others interested in real property held in trust, disaffirm, treat as void and resist any act done or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate or property; and a person who fraudulently receives, takes, or in any manner interferes with the real property of a deceased person, or an insolvent corporation, association, partnership, or individual, is liable to such executor, administrator, receiver or other trustee for the same, or the value thereof, and for all damages caused by such act to the trust estate. A creditor of a deceased insolvent debtor, having a claim or demand exceeding one hundred dollars against such deceased, may, for the benefit of creditors or others interested in the property of such deceased, disaffirm, treat as void, and resist any act done or conveyance, transfer or agreement made by such deceased in fraud of the rights of any creditor, including himself, and may maintain an action to set aside such act, conveyance, transfer or agreement, without having first obtained a judgment on such claim or demand; but the same, if disputed, may be established on the trial. The judgment in such action may provide for the sale of the premises or property involved, when a conveyance or transfer thereof is set aside, and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law.

Note on this Section. This section is taken from chapter 314, Laws of 1858, "An act to declare and extend the powers of executors, assignees, receivers and other trustees, and to protect the rights of creditors and others against frauds, and for other purposes," as amended by chapter 487, Laws of 1889, and chapter 740, Laws of 1894.

Administrators, Executors, etc. Administrators, etc., can now maintain an action to disaffirm or set aside transfers by the persons they represent, without liens or judgments first obtained.[1] And such right of action is now vested in such persons primarily.[2]

[1] Southard v. Benner, 72 N. Y. 424; Potts v. Hart, 99 id. 168; Harvey v. McDonnell, 113 id. 526; Barton v. Hosmer, 24 Hun, 567; Southard v. Pinckney, 5 Abb. N. C. 184; Truesdell v. Bourke, 29 App. Div. 95.

[2] McNaney v. Hall, 86 Hun, 415.

Creditors May Act if Executors, etc., Refuse. If executors, etc., refuse to act, creditors may do so.[1]

Section does not Extend to Next of Kin. This enabling act does not benefit next of kin.[2]

Effect of this Section. Before the Legislature invested voluntary assignees and insolvents' trustees with power to maintain actions or suits to set aside conveyances of their grantors, they could not maintain such actions or suits, for they stood in the shoes of their assignors, and *inter partes* such conveyances are good. But under the statutes, including the present section, assignees for creditors now have greater rights than their assignors, and may attack the conveyances of their predecessors in title.[3]

[1] Harvey v. McDonnell, 113 N. Y. 526; Natl. Tradesmen's Bank v. Wetmore, 124 id. 241.

[2] Lore v. Dierkes, 16 Abb. N. C. 47.

[3] Southard v. Benner, 72 N. Y. 424; The Nat. Tradesmen's Bank v. Wetmore, 124 id. 241, 254, 255.

§ 233. **When remainderman may pay interest owed by life tenant.**— Whenever real property held by any person for life is encumbered by mortgage or other lien, the interest on which should be paid by the life tenant, and such life tenant neglects or refuses to pay such interest, the remainderman may pay such interest, and recover the amount thereof, together with interest thereon from the time of such payment, of the life tenant.

Formerly sections 1, 2, Laws of 1894, chapter 315, "An act in relation to interest on mortgages and other liens upon real estate held by a life tenant.

SECTION 1. Whenever the real estate held by any person or persons for life shall be incumbered by mortgage or other lien, the interest on which should be paid by the life tenant, and such life tenant shall neglect or refuse to pay such interest, it shall be lawful for the remainderman to pay such interest, and to recover the amount so paid, together with interest thereon from the time of such payment, in an action against such life tenant whose duty it was to have paid such interest.

§ 2. This act shall take effect immediately."[1]

Former Law. Before the statute of 1894, set out above, a life tenant was bound in equity to keep down the interest on charges out of the rents and profits. He was not bound to extinguish the principal of the charges.[2] If he were forced to do so he became a creditor of the estate for the amount so paid.[3] He was not obliged to pay toward the interest anything beyond the amount of the rents, and if he did he became a creditor of the estate for the excess.[4] Where the payment of interest is charged by a testator on the estate in remainder and not on the life tenant, the latter is exempted from paying interest on incumbrances.[5] In some cases equity will apportion charges between the life tenant and the remaindermen.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] 4 Kent, Comm. 74; House v. House, 10 Paige, 158; Carter v. Youngs, 42 N. Y. Super. Ct. 418; Wilson v. Quimby, 73 Hun, 524.

[3] 1 Story, Eq. §§ 486, 488; Mosely v. Marshall, 27 Barb. 42.

[4] Doane v. Doane, 46 Vt. 485; Kensington v. Bonserie, 7 De G., M. & G. 134.

[5] Mosely v. Marshall, 22 N. Y. 200.

[6] Peck v. Sherwood, 56 N. Y. 615; Pom. Eq. Juris. § 1223; Story, Eq. Juris. § 487.

§ 234. **Powers of courts of equity not abridged.**— Nothing contained in this article abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance.

Formerly 2 Revised Statutes, 135, section 10:

§ 10. Nothing in this Title contained, 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.[1]

Note on this Enactment, How far the jurisdiction of the chancellor was established by the Constitution of 1821 may have been regarded as an open question at the time of the enactment of the Revised Statutes. But had it been fixed, the Legislature could not abridge it.[2]

Legislature may not Abridge Constitutional Jurisdiction. The Legislature cannot abridge the powers of a constitutional court.[3] In Alexander v. Bennett the Court of Appeals said on this point: "We are of opinion that, as the Constitution declares that the jurisdiction shall remain in the court, the court itself cannot relinquish that jurisdiction, and that any act authorizing it so to do violates the constitutional provision. If this provision were intended solely for the protection of the court or its judges they might waive it; but we do not think it was so intended. It was, in our judgment, like the whole judicial system of the State, intended for the benefit of the people, and to secure to litigants a forum in which they might have their controversies litigated. The jurisdiction which the Constitution preserves * * * is inalienable and carries with it the corresponding duty on the part of those courts to exercise it, when called upon in proper form so to do."

[1] Repealed, chap. 547, Laws of 1896.

[2] Alexander v. Bennett, 60 N. Y. 204.

[3] Id. *supra*.

§ 235. **Construction of covenants in mortgages on leases of real property and bonds.**— In mortgages on leases of real property and in bonds secured thereby, the following or similar covenants or agreements must be construed as follows:

1. **In default of payment, mortgagee to have power to sell.** A covenant that the mortgagor "will pay the indebtedness, as provided in the mortgage, and if default be made in the payment of any part thereof, the mortgagee or obligee shall have power to sell the premises therein described, according to law," must be construed as meaning that the mortgagor or obligor shall well and truly pay unto the mortgagee or obligee the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, according to the condition of the said bond or obligation. And if default shall be made in the payment of the said sum of money therein mentioned, or in the interest which shall accrue thereon, or of any part of either, that then and from thenceforth it shall be lawful for the said mortgagee or obligee, his legal representative or assigns, to sell, transfer and set over, all the rest, residue and remainder of the said term of years then yet to come, and all other, the right, title and interest of the said mortgagor or obligor of, in and to the same, at public auction, according to the act in such case made and provided. And as the attorney of the said mortgagor or obligor for that purpose by these presents duly authorized, constituted and appointed, to make, seal, execute and deliver to the purchaser or purchasers thereof, a good and sufficient assignment, transfer or other conveyance in the law, for the said premises, with the appurtenances; and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase money (if any there shall be) unto the said mortgagor or obligor, his legal representatives or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said mortgagor or obligor, and against all persons claiming or to claim the premises or any part thereof, by, from or under him or them, or any of them.

2. **Mortgagor to keep buildings insured.** A covenant "that the mortgagor will keep the buildings on the said premises insured against loss by fire, for the benefit of the mortgagee," must be construed as meaning that the said mortgagor or obligor shall and will keep the

buildings erected and to be erected upon the lands above conveyed, insured against loss and damage by fire, by insurance, and in an amount approved by the said mortgagee or obligee and his assigns, and either assign the policy and certificates thereof or have such insurance made payable to the said mortgagee or obligee or his assigns, and in default thereof it shall be lawful for the said mortgagee or obligee and his assigns to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand, with legal interest.

3. **Mortgagor to pay rent and charges on premises.** A covenant that the mortgagor "will pay the rent and other charges mentioned in and made payable by said indenture or lease within day after said rent or charges are payable," must be construed as meaning that the said mortgagor or obligor and his legal representatives and assigns, will pay or cause to be paid and discharge all rent and rents mentioned in and made payable by the indenture of lease aforesaid, and also all taxes, assessments or other charges that now are a lien, or hereafter shall or may be levied, assessed or imposed and become a lien upon the premises above described or any part thereof; and in default thereof, for the space of after such taxes or assessments or after the said rent or rents, or any of them shall have become due and payable by the terms of said lease or by law, then and in each and every such case the said mortgagee or obligee, his legal representatives or assigns may, at option, and without notice, pay such rent or rents, taxes, assessments or other charges and expenses, and the amount so paid, and interest thereon, from the time of such payment, shall forthwith be due and payable from the said mortgagor or obligor, his legal representatives or assigns, to the said mortgagee or obligee, his legal representatives or assigns, and shall be deemed to be secured by these presents, and shall be collectible in the same manner, and at the same time, and upon the same conditions as the interest then next maturing upon the principal sum hereinbefore mentioned.

4. **Agreement that whole sum shall become due.** The words "And it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of said mortgagee or obligee after default in the payment of any installment of principal or after default

in the payment of interest for days, or after default in the payment of any rent or other charge made payable in and by said indenture of lease for days, or after default in the payment of any tax or assessment for days after notice and demand," must be construed as meaning that should any default be made in the payment of any installment of principal or any part thereof, or of said interest or any part thereof, or of any rent or other charge made payable in and by said indenture of lease, on any day whereon the same is made payable, or should any tax or assessment, which now is or may be hereafter imposed upon the premises hereinafter described become due and payable, and should the said interest, rent or other charge aforesaid, remain unpaid and in arrear for the space of days, or such tax or assessment remain unpaid and in arrear for days after written notice by the mortgagee or obligee, his executors, administrators or assigns, that such tax or assessment is unpaid, and demand for the payment thereof, then and from thenceforth, that is to say, after the lapse of either one of said periods, as the case may be, the aforesaid principal sum, with all arrearage of interest thereon, rent and other charges paid by the mortgagee or obligee, shall, at the option of the said mortgagee or obligee, his executors, administrators or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in anywise notwithstanding.

Comment on Section 235, Supra. This section was not a part of The Real Property Law as originally passed. It was enacted by chapter 338, Laws of 1898, and became a law on July 1, 1898.

§ 236. **Construction of grant of appurtenances, et cetera, and all of the rights and estate of the mortgagor.** In any mortgage on lease of real property the words "together with the appurtenances and all the estate and rights of the part of the first part of, in and to said premises under and by virtue of the aforesaid indenture of lease," must be construed as meaning, together with all and singular the edifices, buildings, rights, members, privileges and appurtenances thereunto belonging or in anywise appertaining; and also all the estate, right, title, interest, term of years yet to come and unexpired, property, possession, claim and demand whatsoever, as well in law as in equity, of the said mortgagor or obligor, of, in and to the said demised premises, and every part and parcel thereof, with the appurtenances; and also the said indenture of lease, and the renewal therein provided for, and every clause, article and condition therein expressed and contained.

Comment on Section 236, Supra. This section was not a part of The Real Property Law, as originally passed, but it was enacted by chapter 338, Laws of 1898, and became a law on July 1, 1898. Section 236 of this act refers to the form set out in section 237 of the same act.

Mortgage on Lease. In former days the common way of mortgaging a lease, adopted by good conveyancers, was by an assignment of the same by way of mortgage.[1] It must be very doubtful whether a mortgage of a lease is not now virtually an assignment thereof, as the mortgagee must acquire the same *cum onere*. The form set out in this statute[2] seems defective in making no provision for the delivery up of the original lease or demise on default of the mortgagor to observe his covenants, and evidently contemplates a foreclosure, before the mortgagee shall succeed to the security mortgaged.

[1] See Jones, Conv. (London, 1826) *passim*.

[2] § 237, The Real Prop. Law.

§ 237. **What form of mortgage on lease of real property.** The use of the following form of instrument for mortgages on leases of real property is lawful but this section does not prevent or invalidate the use of other forms.

SCHEDULE D.

Mortgage on Lease of Real Property.

This indenture, made the day of in the year one thousand hundred and between of (insert residence) of the first part and of (insert residence) of the second part; whereas did, by a certain indenture of lease, bearing date the day of in the year one thousand eight hundred and ninety- demise, lease and to farm let unto and to executors, administrators and assigns, all and singular the premises hereinafter mentioned and described, together with their appurtenances; to have and to hold the same unto the said and to executors, administrators and assigns, for and during and until the full end and term of years, from the day of one thousand eight hundred and ninety- fully to be complete and ended, yielding and paying therefor unto the said and to or assigns, the yearly rent or sum of .

And whereas, the said part of the first part justly indebted to the said part of the second part, in the sum of lawful money of the United States of America, secured to be paid by certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of on the day of eighteen hundred and ninety- and the interest thereon to be computed from at the rate of per centum per annum and to be paid .

It being thereby expressly agreed that the whole of the said principal sum shall become due at the option of the mortgagee or obligee after default in the payment of interest, taxes or assessments or rents as hereinafter provided.

Now this indenture witnesseth that the said part of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of the sum of one dollar, paid by the said part of the second part, the receipt

whereof is hereby acknowledged, doth grant and release, assign, transfer and set over unto the said part of the second part, and to his heirs (or successors) and assigns forever.

(Description.)

Together with the appurtenances and all the estate and rights of the part of the first part of, in and to said premises under and by virtue of the aforesaid indenture of lease.

To have and hold the said indenture of lease and renewal, and the above granted premises, unto the said part of the second part, his heirs and assigns, for and during all the rest, residue and remainder of the said term of years yet to come and unexpired, in said indenture of lease and in the renewals therein provided for; subject, nevertheless, to the rents, covenants, conditions and provisions in the said indenture of lease mentioned.

Provided always that if the said part of the first part shall pay unto the said part of the second part, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents and the estate hereby granted, shall cease, determine and be void.

And the said part of the first part covenant with the said part of the second part as follows:

First. That the part of the first part will pay the indebtedness as hereinbefore provided.

And if default shall be made in the payment of any part thereof the said part of the second part shall have power to sell the premises therein described according to law.

Second. That the said premises now are free and clear of all incumbrances whatsoever, and that ha good right and lawful authority to convey the same in manner and form hereby conveyed.

Third. That the part of the first part will keep the buildings on the said premises insured against loss by fire, for the benefit of the mortgagee.

Fourth. That the part of the first part will pay the rents and other charges mentioned in and made payable by said indenture of lease within days after said rent or charges are payable.

Fifth. And it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of the said mortgagee or obligee after default in the pay-

ment of any instalment of principal, or after default in the payment of interest for days, or after default in the payment of any rent or other charge made payable by said indenture of lease for days, or after payment[1] of any tax or assessment for days after notice and demand.

In witness whereof, the said part of the first part to these presents ha hereunto set hand and seal the day and year first above written.

Sealed and delivered }
in the presence of[1] }

.....

Comment on Section 237, Supra. This section was not a part of The Real Property Law as originally passed. It was enacted by chapter 338, Laws of 1898, and became a law on July 1, 1898.

Omitted Sections of this Article. At present there are no sections of this article numbered 238 or 239.

[1] So in original law. It must mean "after default in the payment," etc.

ARTICLE VIII.

Recording Instruments Affecting Real Property.

SECTION 240. Definitions; effect of article.
241. Recording of conveyances.
242. By whom conveyance must be acknowledged or proved.
243. Recording of conveyances heretofore acknowledged or proved.
244. Recording executory contracts and powers of attorney.
245. Recording of letters patent.
246. Recording copies of instruments which are in secretary of state's office.
247. Certified copies may be recorded.
248. Acknowledgments and proofs within the state.
249. Acknowledgments and proofs in other states.
250. Acknowledgments and proofs in foreign countries.
251. Acknowledgments and proofs by married women.
252. Requisites of acknowledgments.
253. Proof by subscribing witness.
254. Compelling witnesses to testify.
255. Certificate of acknowledgment or proof.
256. When certificate to state time and place.
257. When certificate must be under seal.
258. Acknowledgment by corporation and form of certificate.
259. When county clerk's authentication necessary.
260. When other authentication necessary.
261. Contents of certificate of authentication.
262. Recording of conveyances acknowledged or proved without the state, when parties and certifying officer are dead.
263. Proof where witnesses are dead.
264. Recording books.
265. Indexes.
266. Order of recording.
267. Certificate to be recorded.
268. Time of recording.
269. Certain deeds deemed mortgages.
270. Recording discharge of mortgage.
271. Effect of recording assignment of mortgage.
272. Recording of conveyances made by treasurer of Connecticut.
273. Revocation to be recorded.
274. Penalty for using long forms of covenants.
275. Certain acts not affected.
276. Actions to have certain instruments canceled of record
277. Officers guilty of malfeasance liable for damages.

§ 240. **Definitions; effect of article.**—The term "real property," as used in this article, includes lands, tene-

ments and hereditaments and chattels real, except a lease for a term not exceeding three years. The term "purchaser," includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate. The term "conveyance," includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, and although the power be one of revocation only; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property. The term "recording officer," means the county clerk of the county, except in the counties of New York, Kings or Westchester, where it means the register of the county. This article does not apply to leases for life or lives, or for years, heretofore made, of lands in either of the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware or Schenectady.

Formerly 1 Revised Statutes, 736, section 114, and 1 Revised Statutes, 762, sections 36, 37, 38, 39, and 1 Revised Statues, 763, section 42

§ 114. Every instrument, except a will, in execution of a power, and although the power may be a power of revocation only, shall be deemed a conveyance within the meaning, and subject to the provisions, of the third Chapter of this Act.[1]

§ 36. The term "real estate," as used in this Chapter, shall be construed as coextensive in meaning with "lands, tenements and hereditaments," and as embracing all chattels real, except leases for a term not exceeding three years.[2]

§ 37. The term "purchaser," as used in this Chapter, shall be construed to embrace every person to whom any estate or interest in real estate, shall be conveyed for a valuable consideration, and also every assignee of a mortgage, or lease, or other conditional estate.[3]

§ 38. The term "conveyance," as used in this Chapter, shall be construed 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 last wills and testaments, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands.[4]

§ 39. The preceding section shall not be construed to extend to a letter of attorney, or other instrument containing a power to convey lands as

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] Repealed, chap. 547, Laws of 1896.
[4] Repealed, chap. 547, Laws of 1896.

agent or attorney for the owner of such lands; but every such letter or instrument, and every executory contract for the sale or purchase of lands, when proved or acknowledged, in the manner prescribed in this Chapter, 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 proved or acknowledged, and the record thereof when recorded, or the transcript of such record, may be read in evidence, in the same manner, and with the like effect, as a conveyance recorded in such county.[1]

§ 42. The provisions of this Chapter shall not extend to leases for life or lives, or for years, in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware and Schenectady.[2]

History of the Laws Concerning the Compulsory Recording of Conveyances. The laws concerning the legal effect of the record of conveyances are very ancient in New York. Prior to A. D. 1664, the Dutch government required certain instruments to be recorded in public offices.[3] But this does not prove that the existing laws were of Dutch origin. The recording of deeds had been made compulsory at a very early date in New England, and in Virginia. After the English conquest in 1664, the English public authorities passed a number of acts[4] giving legal effect to the record, or failure to record, instruments of conveyance in the province of New York. These laws were amplified from time to time, prior to the establishment of the independent State government.[5] But until the Revised Statutes there was no uniform or general law in the State on this subject.[6] Before that time such acts were local in operation and confined to particular counties, called "recording counties.[7] It is erroneous to suppose that the registration of conveyances in public offices was peculiar to America. Deeds of bargain and sale were required to be enrolled in the King's courts

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Laws and Ordinances of New Netherland, 114, 459; Van Cortlandt v. Tozer, 17 Wend. at p. 340. The last case does not refer to very early acts.

[4] Duke's Lawes of 1664, title "Conveyances, Deeds and Writings;" Charter of Libertys of 1683; An Act to Prevent Frauds in the Conveyanceing of Lands after December 25, 1683; "A bill to prevent Decept and Fforgerye," passed October, 1684.

[5] The history of the early legislation on this subject is given at length in "History of the Law of Real Property in New York" (Baker, Voorhis & Co., 1895) at pp. 86, 87, *et passim*.

[6] Jackson v. Chamberlain, 8 Wend. at p. 625.

[7] See 1st edition of the Revised Statutes, appendix to vol. 3 (pp. 25, 42) for the laws of this State enacted prior to the Revised Statutes. The Colonial laws were all repealed in 1828, Laws of 1828–9, chap. 21, § 4.

of record at Westminster by the "Statute of Inrolments."[1] In 1704, Yorkshire, in England, was made a recording county,[2] and four years later the great county of Middlesex followed.[3] The decisions of the English courts on the effect of these several acts were subsequently very influential in America.[4]

Section 240, Supra. As the present section of this act now incorporates a number of sections formerly in the Revised Statutes, the decisions bearing upon it are those which were formerly rendered upon the component sections. It is, therefore, necessary to arrange the notes of such decisions in the old order, in conjunction with the appropriate sections of the Revised Statutes.

1 Revised Statutes, 736, Section 114. Referring to 1 Revised Statutes, 736, section 114, above set forth, as now part of this act, it has been held that every instrument, except a will, in the execution of a power, was a conveyance which must be recorded to protect the estate conveyed against subsequent *bona fide* purchasers or grantees.[5] A recorded power of attorney to convey lands remains in force as to purchaser in good faith without notice from the attorney, though the grantor meanwhile conveys the lands by unrecorded deed.[6]

1 Revised Statutes, 736, Section 36. Having reference to 1 Revised Statutes, 736, section 36, now incorporated in this section, the term "real estate" has been held to include terms of years beyond three.[7] But while chattels real are personal property, they are not within the purview of the chattel mortgage statutes requiring filing and refiling to preserve the lien as against creditors.[8] The Revised Statutes in parts modified the meaning of the common-law term "estates in lands" by including terms of years.[9]

[1] 27 Hen. VIII, chap. 16; Van Cortlandt v. Tozer, 17 Wend. 338, 344, *et supra*, pp. 482, 493.

[2] 2, 3 Anne, chap. 4.

[3] 7 Anne, chap. 20.

[4] Jackson v. Burgott, 10 Johns. 457; Dunham v. Dey, 15 id. 555; Hurst v. Hurst, 2 Wash. Cir. Ct. 69, 74.

[5] Jackson v. Edwards, 7 Paige, 386, 402; 22 Wend. 498; Belmont v. O'Brien, 12 N. Y. 394, 404; Belden v. Meeker, 47 id. 307; Decker v. Boice, 83 id. 215; Frear v. Sweet, 118 id. 454.

[6] Gratz v. Land & River Imp. Co., 82 Fed. Rep. 381; and see § 273, The Real Prop. Law, and Williams v. Birbeck, Hoff. Ch. 359.

[7] The Mayor, etc., v. Mabie, 13 N. Y. 151, 158; Ely v. Schofield, 35 Barb. 330, 334; Broman v. Young, 35 Hun, 173, 180. *Cf.* Westervelt v. The People, 20 Wend. 416.

[8] Laws of 1833, chap. 279; Laws of 1892, chap. 677; Booth v. Kehoe, 71 N. Y. 341; State Trust Co. v. Casino Co., 19 App. Div. 344.

[9] *Supra*, pp. 81, 86, 87; Despard v. Churchill, 53 N. Y. 192, 199.

1 Revised Statutes, 762, Section 37. Referring to 1 Revised Statutes, 762, section 37, above set forth, and now incorporated in this section, the term "purchaser" has been authoritatively decided to include a vendee, in a contract of sale, who has paid the purchase money;[1] also, a person who acquires a subsequent mortgage on the faith of a prior "satisfaction piece," and an assignee of a mortgage.[2]

1 Revised Statutes, 762, Section 38. Referring to 1 Revised Statutes, 762, section 38, above set forth, the term "conveyance" has been held to include a mortgage;[3] an assignment of mortgage;[4] a release of a mortgage;[5] a covenant touching an easement,[6] but not a power to assign mortgages or convey.[7]

1 Revised Statutes, 762, Section 39. Referring to 1 Revised Statutes, 762, section 39, above set forth, see the case of Boyd v. Schlesinger.[8]

1 Revised Statutes, 763, Section 42. Referring to 1 Revised Statutes, 763, section 42, above set forth, the reader will observe that it was taken from an earlier statute,[9] which omitted, however, "original leases in fee."[10] These perpetual leases were probably originally excepted because they were thought to be of land within the precincts of manors, and consequently enrolled in the manor records.[11]

[1] Warner v. Winslow, 1 Sandf. Ch. 430, 438. *Cf.* Boyd v. Schlesinger, 59 N. Y. 301; Hunt v. Johnson, 19 id. 279.

[2] Van Keuren v. Corkins, 6 T. & C. 355; Clark v. Clark, 28 Hun, 510; Weaver v. Edwards, 39 id. 233, 235; Larned v. Donovan, 84 id. 533; Decker v. Boice, 83 N. Y. 215, 220; Bacon v. Van Schoonhoven, 87 id. 446; Frear v. Sweet, 118 id. 454, and see, under next section, "purchaser," pp. 554, 555, *infra*.

[3] Decker v. Boice, 83 N. Y. 215; Larned v. Donovan, 84 Hun, 533.

[4] Vanderkampf v. Shelton, 11 Paige, 28; Larned v. Donovan, 84 Hun, 533; Belden v. Meeker, 47 N. Y. 307; The Bank for Savings v. Frank, 45 N. Y. Super. Ct. 404; Briggs v. Thompson, 86 Hun, 607.

[5] Bacon v. Van Schoonhoven, 87 N. Y. 446; Frear v. Sweet, 118 id. 454; Briggs v. Thompson, 86 Hun, 607.

[6] Bradley v. Walker, 138 N. Y. 291; *et vide infra*, § 241, The Real Prop. Law.

[7] Williams v. Birbeck, Hoff. Ch. 359.

[8] 59 N. Y. 301.

[9] Laws of 1823, p. 413, § 5.

[10] Note of Revisers to 1 R. S. 763, § 42.

[11] *Vide supra*, pp. 104–112.

§ 241. **Recording of conveyances.**— A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded.

Formerly 1 Revised Statutes, 756, section 1:

§ 1. 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 purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.[1]

1 Revised Statutes, 756, Section 1. 1 Revised Statutes, 756, section 1, above set forth, was the result of many earlier laws on the same subject.[2]

What Recorded Instruments Operate as Notice. The record of a conveyance or mortgage by one having title at the time, operates as notice to all subsequent *bona fide* purchasers for value.[3] But the record of an instrument which does not create, alien, mortgage or assign some interest or estate in real property does not so operate.[4] The record of a conveyance by one having no title is ordinarily a nullity,[5] and so is the record of a paper not required to be recorded by law.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 R. L. 369, 372; Laws of 1819, p. 269; Laws of 1821, p. 127; Laws of 1822, pp. 261, 284; Laws of 1823, p. 412. Notes of Revisers to 1 R. S. part 2, chap. 3.

[3] Jackson v. Post, 15 Wend. 588; Raynor v. Wilson, 6 Hill, 469; Purdy v. Huntington, 42 N. Y. 334; Briggs v. Davis, 20 id. 15; Young v. Guy, 87 id. 457, 462; Ackerman v. Hunsicker, 85 id. 43; McPherson v. Rollins, 107 id. 316; Cambridge Bank v. Delano, 48 id. 326. *Cf.* Schutt v. Large, 6 Barb. 373.

[4] Ludlow v. Van Ness, 8 Bosw. 178; Gillig v. Maas, 28 N. Y. 191, 213; Dillaye v. Commercial Bank, 51 id. 345; Dunlop v. Avery, 89 id. 592; Bradley v. Walker, 138 id. 291; Edwards v. Meader, 33 N. Y. St. Repr. 126; Oliphant v. Burns, 146 N. Y. 218, 233. *Cf.* Grandin v. Hernandez, 29 Hun, 399; Heilbrun v. Hammond, 13 id. 474.

[5] Tefft v. Munson, 57 N. Y. 97; Oliphant v. Burns, 146 id. 218, 233.

[6] Williams v. Birbeck, Hoff. Ch. 359.

Effect of Record. The notice given by recording is not retrospective, and does not affect prior titles.[1] A purchaser for value cannot hold the land conveyed to him if previously to the conveyance to his grantor the premises were conveyed to a third person by deed, and such deed be recorded anterior to the last purchase, although the deed to his grantor be first recorded.[2]

Object of this Section. This statute is said to have been made to protect innocent purchasers against the frauds of sellers; to prevent those who once had title to land from making successive sales, and thereby defrauding one or more of the purchasers.[3] It applies only to successive purchases from the same seller.[4] The statute has, however, no reference to the relative priority of recorded instruments executed simultaneously.[5]

Priority of Record. A subsequent deed, if first recorded, ordinarily takes effect before a prior, unrecorded deed,[6] unless the subsequent purchaser has actual notice of such prior unrecorded conveyance.[7]

Effect of Actual Notice. A grantee, with notice of an unrecorded prior conveyance, even if he takes without consideration from a *bona fide* purchaser without such notice, acquires the title of his grantor, and is protected under the Recording Acts to the same extent that his grantor would have been.[8]

Unrecorded Mortgage has Priority over Judgment. An unrecorded mortgage has preference over a judgment, unless there is a superior equity.[9]

[1] Howard Ins. Co. v. Halsey, 8 N. Y. 271; Stuyvesant v. Hone, 1 Sandf. Ch. 419; affd., 2 Barb. Ch. 151; Pettus v. McGowan, 37 Hun, 409.

[2] Jackson ex dem. v. Post, 15 Wend. 588.

[3] Jackson v. Post, 15 Wend. 588, 594; Raynor v. Wilson, 6 Hill, 469.

[4] Raynor v. Wilson, 6 Hill, 469; Howard Ins. Co. v. Halsey, 8 N. Y. 271; Briggs v. Davis, 20 id. 15; Page v. Waring, 76 id. 463. *Sed. cf.* Schutt v. Large, 6 Barb. 373.

[5] Greene v. Warnick, 64 N. Y. 220; White v. Leslie, 54 How. Pr. 394; Granger v. Crouch, 86 N. Y. 494. *Cf.* Decker v. Boice, 83 id. 215, 221; Heilbrun v. Hammond, 13 Hun, 471; Boies v. Gardner, 53 id. 236; Boies v. Benham, 127 N. Y. 620; Collier v. Miller, 137 id. 332.

[6] Hetzel v. Barber, 69 N. Y. 1; Page v. Waring, 76 id. 463; Ward v. Isbill, 73 Hun, 550. See as to lien of purchase-money mortgage, Dusenbury v. Hurlbut, 59 N. Y. 541; Jaycox v. Hovencamp, 17 App. Div. 146; Boies v. Benham, 127 N. Y. 620; Ellis v. Horrman, 90 id. 466, and as to deeds under recorded power of attorney, Gratz v. Land & Imp. Co., 82 Fed. Rep. 381.

[7] *Infra*, p. 553.

[8] Wood v. Chapin, 13 N. Y. 509; Page v. Waring, 76 id. 463.

[9] Weaver v. Edwards, 39 Hun, 233, 235.

Vendor's Lien. A vendor's lien for unpaid purchase money may prevail over a *bona fide* mortgagee.[1]

Assignees of Mortgages. The assignee of a recorded mortgage upon real estate conveyed by the mortgagor to the mortgagee, after an assignment of the mortgage, has a valid lien as against a purchaser of the land from the mortgagee who took without notice of the assignment, notwithstanding the conveyance to the mortgagee as well as the conveyance from the mortgagee to the purchaser, were recorded before the assignment was placed on record.[2] Both an assignment and a satisfaction of mortgage are conveyances within the meaning of sections 240 and 241 of this act.[3] But an assignee of a mortgage takes it subject to all the equities, not only of the mortgagor, but of third persons. The only effect of recording an assignment of mortgage is to protect the assignee from a subsequent sale or satisfaction of the same mortgage.[4] An assignee of a mortgage, though he took *in bona fide* and for value, gets no preference over a prior unrecorded deed or mortgage, when his assignor could not claim it by reason of actual notice of such unrecorded conveyance.[5] *Otherwise*, if his assignor had no notice, though the assignee had.[6] But where a junior mortgagee, with notice of a prior unrecorded mortgage, assigns his mortgage to a *bona fide* purchaser for value, who has no notice, such assignee is entitled to preference under the Recording Act, if he records his assignment before the first mortgage is recorded.[7]

[1] Seymour v. McKinstry, 106 N. Y. 230.

[2] Curtis v. Moore, 152 N. Y. 159; Purdy v. Huntington. 42 id. 324.

[3] *Supra*, pp. 544, 549; Vanderkempf v. Shelton, 11 Paige, 28; Briggs v. Thompson, 86 Hun, 607; The Bank for Savings v. Frank, 45 N. Y. Super. Ct. 404; Belden v. Meeker, 47 N. Y. 307; Westbrook v. Gleason, 79 id. 23; Bacon v. Van Schoonhoven, 87 id. 446; Decker v. Boice, 83 id. 215.

[4] Rapps v. Gottlieb, 142 N. Y. 164; Larned v. Donovan, 84 Hun, 533; Trustees of Union College v. Wheeler, 61 N. Y. 88; Crane v. Turner, 67 id. 437; Greene v. Warnick, 64 id. 220; Viele v. Judson, 82 id. 32; Hill v. Hoole, 116 id. 299, 302; Frear v. Sweet, 118 id. 454, 462; Belden v. Meeker, 47 id. 307; Bacon v. Van Schoonhoven, 87 id. 446; Stevenson Brewing Co. v. Iba, 155 id. 224.

[5] Decker v. Boice, 83 N. Y. 215; Clark v. Mackin, 95 id. 346; Frear v. Sweet, 118 id. 454; Campbell v. Vedder, 1 Abb. Ct. App. Dec. 295; De Lancey v. Stearns, 66 N. Y. 157; Fort v. Burch, 5 Den. 187; Harris v. Norton, 16 Barb. 264; Paul v. Paul, 23 N. Y. St. Repr. 370; Crane v. Turner, 67 N. Y. 437.

[6] Webster v. Van Steenbergh, 46 Barb. 211; Jackson v. Given, 8 Johns. 137; Jackson v. Van Valkenberg, 8 Cow. 260; Varick v. Briggs, 6 Paige, 323; Page v. Waring, 76 N. Y. 463.

[7] Westbrook v. Gleason, 79 N. Y. 23; 89 id. 641; Decker v. Boice, 83 id. 215; Clark v. Mackin, 95 id. 346.

Mortgages Executed at the Same Time. While priority of record ordinarily controls the title under assignments of mortgage, yet it does not apply to mortgages executed at the same time. One of a series of mortgages, executed at the same time, the mortgagees agreeing that none of them should have priority over the other, can obtain no preference over the others by reason of its prior record, even if in the hands of a *bona fide* assignee for value, and without notice of the agreement.[1]

Improper Satisfaction of Mortgages. For the relative rights arising under unlawful satisfactions of mortgages, see the cases cited under section 270 of this act.

What Conveyances are within this Section. Both a referee's and a sheriff's deed are "conveyances" within the meaning of the Recording Act.[2] A satisfaction piece is a conveyance within the act.[3] So a mortgage to protect future advances to the extent of advances;[4] a release of a mortgage;[5] a covenant to convey;[6] a covenant to hold property subject to an easement;[7] a contract for entry on land and the cutting of timber,[8] but not a license to enter and gather fruit.[9] A power to assign a mortgage has been held not to be a conveyance.[10] An unsealed deed, though defective as a conveyance, may be recorded and operative as notice.[11] A quitclaim deed is also a conveyance within the Recording Act.[12]

Meaning of "Conveyance" in this Section. The meaning of the term "conveyance" in the above section of this act is dependent on other sections of the same act: No estate or interest in lands other than leases for a term not exceeding one year,

[1] Decker v. Boice, 83 N. Y. 215; Smyth v. Knickerbocker Life Ins. Co., 84 id. 589; Green v. Warnick, 64 id. 220; Rhodes v. Canfield, 8 Paige, 545.

[2] Hetzel v. Barber, 69 N. Y. 1; Slattery v. Schwannecke, 44 Hun, 75; 118 N. Y. 543, and see cases cited, *supra*, p. 548, and under § 240, The Real Prop. Law.

[3] Bacon v. Van Schoonhoven, 87 N. Y. 446; Clark v. Mackin, 95 id. 346.

[4] Ackerman v. Hunsicker, 85 N. Y. 43; Robinson v. Williams, 22 id. 380; Ketcham v. Wood, 22 Hun, 64; Ten Eyck v. Witbeck, 135 N. Y. 40.

[5] Frear v. Sweet, 118 N. Y. 454; Baker v. Thomas, 39 N. Y. St. Repr. 816; Van Keurin v. Corkins, 66 N. Y. 77.

[6] Hunt v. Johnson, 19 N. Y. 279.

[7] Bradley v. Walker, 138 N. Y. 291. *Cf.* Ward v. Met. Ry. Co., 152 id. 39.

[8] Vorebeck v. Roe, 50 Barb. 302.

[9] Taylor v. Millard, 118 N. Y. 244.

[10] Williams v. Birbeck, Hoff. Ch. 359. *Cf.* § 240, The Real Prop. Law, and Gratz v. Land & River Imp. Co., 82 Fed. Rep. 381.

[11] Grandin v. Hernandez, 29 Hun, 399; Todd v. Eighmie, 4 App. Div. 9, and see cases cited *infra*, under this section. *Cf.* Irving v. Campbell, 56 N. Y. Super. Ct. 224.

[12] Wilhelm v. Wilken, 75 Hun, 552.

nor any trust or power, can be created, granted, assigned, surrendered, or declared,[1] unless by act or operation of law, or by a deed or conveyance in writing,[2] subscribed by the grantor, or his agents, duly authorized, in writing,[3] or by a will.[4] A seal was, formerly, also necessary to pass an estate of freehold.[5] After 1892, a scroll, or the letters L. S., became a sufficient sealing.[6] The Real Property Law seems to have intended to dispense with a seal on a conveyance of a freehold.[7] The consideration need not be expressed in a deed,[8] although it may be necessary to support such deed.[9]

Priority of Record, Refers to Conveyances of Same Estate. It is only when two conveyances purport to convey the same property, that the subsequent grantee obtains a priority over the former one by reason of a priority of record of his deed.[10]

Effect of Actual Notice. Priority of record is of no avail in favor of one who has actual notice at the time he took title of an unregistered mortgage.[11] Whatever is sufficient to put the purchaser upon inquiry is, in general, equivalent to actual notice.[12] Thus actual open and visible possession is sufficient to make it a purchaser's duty to inquire as to the title of possessor;[13] but

[1] Now §§ 207, 208, The Real Prop. Law, formerly 2 R. S. 134, § 6.

[2] Id. *supra;* Leonard v. Clough, 133 N. Y. 292, 297; § 273, The Real Prop. Law.

[3] § 208, The Real Prop. Law, *supra.*

[4] 2 R. S. 135, § 7; Strough v. Wilder, 119 N. Y. 530, 535.

[5] 2 R. S. 738, § 137; Morss v. Salisbury, 48 N. Y. 636; Todd v. Union Dime, etc., Bank, 118 id. 337; 128 id. 636. *Cf.* Grandin v. Hernandez, 29 Hun, 399; Todd v. Eighmie, 4 App. Div. 9.

[6] Chap. 677, § 13, Laws of 1892.

[7] §§ 207, 208, *supra*, and notes of Commissioners of Statutory Revision. But the common law is not expressly abrogated.

[8] Cunningham v. Freeborn, 11 Wend. 240, 248. *Cf.* Meriam v. Harsen, 2 Barb. Ch. 232, 267.

[9] Moser v. Moore, 23 App. Div. 91; Schott v. Burton, 13 Barb. 173; Corwin v. Corwin, 6 N. Y. 342; Wood v. Chapin, 13 id. 509, 517; Ten Eyck v. Witbeck, 135 id. 40; Jackson v. Cadwell, 1 Cow. 622; and see Morris v. Ward, 36 N. Y. 587; Gray v. Barton, 55 id. 68; Adee v. Hallett, 3 App. Div. 308; Anderson v. Blood, 86 Hun, 244.

[10] Treadwell v. Inslee, 120 N. Y. 458.

[11] Butler v. Viele, 44 Barb. 166; Dingley v. Bon, 130 N. Y. 607; Constant v. University of Rochester, 133 id. 640.

[12] Williamson v. Brown, 15 N. Y. 354; Baker v. Bliss, 39 id. 70; Acer v. Wescott, 46 id. 384; Reed v. Gannon, 90 id. 345; Page v. Waring, 76 id. 463; Dingley v. Bon, 130 id. 607; Curtis v. Moore, 152 id. 159, 163; Lyon v. Morgan, 143 id. 505, 509; Cambridge Valley Bank v. Delano, 48 id. 326.

[13] Phelan v. Brady, 119 N. Y. 587; Holland v. Brown, 140 id. 344; Ward v. Met. Ry. Co., 152 id. 39; Raynor

not when possession is of unimproved land.[1] Such possession to be notice must not be consistent with the apparent title of record.[2] Proof of actual notice as against a prior recorded deed must be extremely clear.[3] Notice to an attorney may, or may not, be notice to the principal according to the nature and duration of the agency.[4] A purchaser is chargeable with notice of every fact affecting title, discoverable from the examination of a deed in the chain of title.[5] The legal title to an estate prevails as against a latent equity.[6] But an assignee of a bond and mortgage takes subject not only to latent equities of the obligor but of third persons represented by the mortgagor.[7]

A Purchaser for a Valuable Consideration. A purchaser for a valuable consideration, under this act, is one who surrenders, or parts with value,[8] without notice of an unrecorded conveyance, and who first records his own conveyance.[9] "Valuable consideration" in the statute means the same as in the law of negotiable paper.[10] A nominal consideration is not enough.[11] No one who has not given a new consideration at the time, or relinquished some-

v. Timerson, 54 id. 639; Tuttle v. Jackson, 6 Wend. 213; Wright v. Douglass, 10 Barb. 97; Troup v. Hurlbut, Id. 354; Williams v. Birbeck, Hoff. Ch. 359; Bank of Orleans v. Flagg, 3 Barb. Ch. 316. *Cf.* Laverty v. Moore, 33 N. Y. 658.

[1] Brown v. Volkening, 64 N. Y. 76; Holland v. Brown, 140 id. 344. *Cf.* Mutl. Life Ins. Co. v. Dake, 1 Abb. N. C. 381, 391.

[2] Brown v. Volkening, 64 N. Y. 82; Pope v. Allen, 90 id. 298; Minton v. N. Y. El. R. R. Co., 130 id. 332.

[3] Riley v. Hoyt, 29 Hun, 114.

[4] Constant v. University of Rochester, 111 N. Y. 604; 133 id. 640; Slattery v. Schwannecke, 118 id. 543; Ingalls v. Morgan, 10 id. 178.

[5] Cambridge Bank v. Delano, 48 N. Y. 326; Acer v. Wescott, 46 id. 384; McPherson v. Rollins, 107 id. 316, 322.

[6] Lyons v. Morgan. 143 N. Y. 505, 509; Rexford v. Bexford, 7 Lans. 6. *Cf.* Heilbrun v. Hammond, 13 Hun, 474.

[7] *Supra*, p. 551; The Trustees of Union College v. Wheeler, 61 N. Y. 88.

[8] Cary v. White, 52 N. Y. 138; De Lancey v. Stearns, 66 id. 157; Westbrook v. Gleason, 89 id. 641; Woodburn v. Chamberlin, 17 Barb. 446; Bank for Savings v. Frank, 45 N. Y. Super. Ct. (J. & S.) 404, 410; Constant v. Am. Bap. Assn., 53 id. 170; Weaver v. Edwards, 39 Hun, 233. *Cf.* Webster v. Van Steenbergh, 46 Barb. 211; Schutt v. Large, 6 id. 373; Merritt v. North R. R. Co., 12 id. 605; Paul v. Paul, 23 N. Y. St. Repr. 370; Macauley v. Smith, 28 Abb. N. C. 276.

[9] Westbrook v. Gleason, 79 N. Y. 23; Clark v. Mackin, 95 id. 346, 351; Purdy v. Huntington, 42 id. 334; Van Keuren v. Corkins, 66 id. 77; Heilbrun v. Hammond, 13 Hun, 474, 480.

[10] Pickett v. Barron, 29 Barb. 505; Merritt v. North R. R. Co., 12 id. 605; Harris v. Norton, 16 id. 264.

[11] Ten Eyck v. Witbeck, 135 N. Y. 40; S. C., 29 Abb. N. C. 314.

thing, can, therefore, be considered a purchaser for value within the act.[1] But where a deed expresses a valuable consideration, and acknowledges the payment thereof by the grantee, it affords *prima facie* evidence that he was a purchaser in good faith within the Recording Act, and no proof of actual payment is necessary,[2] and the burden of proof to the contrary rests on a senior purchaser whose deed is unrecorded.[3]

Index. The indexing is no part of the record. The conveyance takes effect from the date of filing.[4] But recording an instrument in the wrong book is not effectual as constructive notice.[5]

Acknowledgments. What constitutes due acknowledgment or proof entitling a conveyance to be recorded under this section is treated of under subsequent sections of this article.[6]

[1] Pickett v. Barron, 29 Barb. 505; De Lancey v. Stearns, 66 N. Y. 157; Union Dime Sav. Inst. v. Duryea, 67 id. 84, 87; Young v. Guy, 87 id. 457, and see cases under § 240, The Real Prop. Law. *Cf.* Webster v. Van Steenbergh, 46 Barb. 211; Paul v. Paul, 23 N. Y. St. Repr. 370.

[2] Ward v. Isbill, 73 Hun, 552.

[3] Gratz v. Land & River Imp. Co., 82 Fed. Rep. 381.

[4] Mut. Life Ins. Co. v. Dake, 87 N. Y. 257; Bedford v. Tupper, 30 Hun, 174; *supra*, p. 528.

[5] Abraham v. Mayer, 7 Misc. Rep. 250.

[6] §§ 242–253.

§ 242. **By whom conveyance must be acknowledged or proved.**— Except as otherwise provided by this article, such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

Formerly 1 Revised Statutes, 756, section 4:

§ 4. To entitle any conveyance hereafter made, to be recorded by any county clerk, it shall be acknowledged by the party or parties executing the same, or shall be proved by a subscribing witness thereto, before, etc., etc. * * *[1]

Early Statutes. The earlier statutes of this State on the subject of acknowledgments of deeds are collated in an appendix to volume 3, 1st edition, of the Revised Statutes. The colonial laws on the same subject are given in the "History of the Law of Real Property in New York."[2]

Recording Officers Prohibited. A recording officer was prohibited by the Revised Statutes from recording any conveyance unless the same was acknowledged.[3] The Penal Code now makes it a misdemeanor to record a conveyance which does not contain a certificate of its proof or acknowledgment.[4]

Acknowledgments. The acknowledgment must be made by the person executing the conveyance,[5] or else the deed must be proved by a subscribing witness other than the grantor.[5] An acknowledgment is not a judicial act, and the officer taking it is not debarred from acting by the fact that he is related to the person making the acknowledgment.[7] The history of proving deeds is referred to in many cases.[8]

Deed by Attorney. When a deed is executed by an attorney he is the party executing it, and may make the acknowledgment.[9]

[1] The balance of 1 R. S. 756, § 4, is set out *verbatim* under §§ 248, 249, The Real Prop. Law, and need not be repeated here. 1 R. S. 756, § 4, is repealed by chap. 547, Laws of 1896.

[2] Baker, Voorhis & Co., A. D. 1895. See index "Acknowledgments."

[3] 1 R. S. 762, § 34.

[4] Penal Code, § 164.

[5] Lovett v. The Steam, etc., Association, 6 Paige, 54, 60; Irving v. Campbell, 121 N. Y. 353; McKay v. Lasher, Id. 477.

[5] Id. *supra*.

[7] Lynch v. Livingston, 6 N. Y. 422; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474, 483. And he must not be a party. Armstrong v. Combs, 15 App. Div. 246.

[8] Van Cortlandt v. Tozer, 17 Wend. 338; affd., 20 id. 423; Lynch v. Livingston, 8 Barb. 463.

[9] Lovett v. Steam Saw Association, 6 Paige, 54; Johnson v. Bush, 3 Barb. Ch. 207.

Deed of Public Officer. An official instrument by a referee or judge proves itself without acknowledgment. In Chamberlain v. Taylor, a deed was executed by a county judge of the county in which the land was sold, under his hand and seal, pursuant to chapter 298, Laws of 1850, but it was followed by no certificate of acknowledgment. It was held that though the deed was followed by no certificate of acknowledgment it was entitled to be recorded.[1]

Subscribing Witness. When the conveyance is proved by a subscribing witness his residence must be stated in the certificate.[2]

Acknowledgment by Corporation. The requirements of an acknowledgment by a corporation are now for the first time set forth in this act.[3] As no form of an acknowledgment is contained in this or any other law of the State when such acknowledgment is that of a natural person, the form prescribed for a corporate acknowledgment is not without interest in all cases.

[1] King v. Post, 12 N. Y. St. Repr. 575; Chamberlain v. Taylor, 36 Hun, 24, 38.

[2] § 253, The Real Prop. Law.

[3] *Infra*, § 258, The Real Prop. Law.

§ 243. **Recording of conveyances heretofore acknowledged or proved.**—A conveyance of real property, within the state, heretofore executed, and heretofore acknowledged or proved, and certified, so as to be entitled to be read in evidence, or recorded, under the laws in force at the time when so acknowledged or proved, but which has not been recorded is entitled to be read in evidence, and recorded in the same manner, and with the like effect, as if this chapter had not been passed. If heretofore executed, but not proved or acknowledged, it may be proved or acknowledged in the same manner as conveyances hereafter executed and with like effect.

Formerly 1 Revised Statutes, 760, sections 22, 23:

§ 22. Every conveyance of any real estate within this state, heretofore executed, and heretofore acknowledged or proved and certified, in such manner as to be entitled to be read in evidence, or recorded, under the laws now in force, but which has not been so recorded, shall be entitled to be read in evidence, in all courts, and to be recorded in the proper office, in the same manner, and with the like effect, as if this Chapter had not been passed.[1]

§ 23. Every such conveyance, not already proved or acknowledged, may be proved or acknowledged, in the same manner as conveyances hereafter executed, and when so proved, acknowledged or recorded, shall have the like effect.[2]

Note on Section 243, Supra. Similar provisions were contained in an earlier law of 1813.[3]

Conveyances, how made Evidence. The Code of Civil Procedure also regulates the manner in which deeds become evidential or prove themselves. "A conveyance acknowledged or proved, and certified in the manner prescribed by law to entitle it to be recorded in the county where it is offered, is evidence without further proof thereof." So a record of a conveyance, or a transcript thereof duly certified, is evidence. But a certificate of acknowledgment, or a transcript thereof, is not conclusive, and the effect thereof may be contested and rebutted. If the conveyance is proved by an interested or incompetent witness it cannot be received in evidence until otherwise proved.[4]

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] 1 R. L. 369.
[4] §§ 935, 936; McKay v. Lasher, 121 N. Y. 477; Mut. Life Ins. Co. v. Corey, 135 id. 326.

§ 244. **Recording executory contracts and powers of attorney.**— An executory contract for the sale or purchase of real property, or an instrument containing a power to convey real property, as the agent or attorney for the owner of the property, acknowledged or proved, and certified, in the manner to entitle a conveyance to be recorded, may be recorded by the recording officer of any county in which any of the real property to which it relates is situated.

Formerly 1 Revised Statutes, 762, section 39:

§ 39. The preceding section shall not be construed to extend to a letter of attorney, or other instrument containing a power to convey lands as agent or attorney for the owner of such lands; but every such letter or instrument, and every executory contract for the sale or purchase of lands, when proved or acknowledged, in the manner prescribed in this Chapter, 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 proved or acknowledged, and the record, thereof when recorded, or the transcript of such record, may be read in evidence, in the same manner, and with the like effect, as a conveyance recorded in such county.[1]

Executory Contract of Sale. The record of an executory contract of sale of land is ineffectual, except to preserve evidence; it is not constructive notice to purchasers, and an action cannot be maintained to cancel it as a cloud on the title,[2] except by virtue of a statute.[3]

Mechanics' Liens. Chapter 49 of the General Laws, in relation to liens, requires executory contracts, in reference to certain fixtures, to be recorded, in order to be valid against mortgagees of the realty.[4]

Power of Attorney. A duly certified transcript of a recorded power of attorney is competent as evidence.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] Boyd v. Schlesinger, 59 N. Y. 301; Washburn v. Burnham, 63 id. 132. *Cf.* Beman v. Douglas, 1 App. Div. 169; Drew v. Duncan, 11 How. Pr. 279.

[3] Chap. 530, Laws of 1880, now § 276, The Real Prop. Law, which see.

[4] Chap. 418, Laws of 1897; Hirsch v. Graves Elevator Co., 24 Misc. Rep. 472.

[5] Lerehe v. Brasher, 104 N. Y. 157.

§ 245. **Recording of letters patent.**— Letters patent, issued under the great seal of the state, granting real property, may be recorded in the county where such property is situated, in the same manner and with like effect, as a conveyance duly acknowledged or proved and certified so as to entitle it to be recorded.

Formerly chapter 110, Laws of 1845, section 1:

§ 1. All letters patent issued under the great seal of this state, granting land to any person or persons, in addition to the record thereof made in the office of the secretary of state, may be recorded in the county where the lands granted are situated, in the same manner and with the like effect as any deed regularly acknowledged or proved before an officer authorized by law to take the proof and acknowledgment of deeds, whenever the patentee or owner of such lands shall request the same to be so recorded.[1]

"Letters Patent." While New York was a province[2] or colony of England, grants of Crown land were always made by *letters patent*, or open letters, "*literae patentes*, so called," says Blackstone, "because they were not sealed up, but exposed to open view with the great seal pendant at the bottom."[3] Letters patent were assurances by matter of record, and as such were public records. Blackstone describes with great particularity the mode in which the King's letters patent were granted.[4] On the independence of New York, the ungranted Crown lands vested in the State, and continued to be granted by letters patent under the great seal.[5] They were usually issued pursuant to an act of the Legislature directed to the commissioners of the land office.

Construction of Letters Patent. Blackstone laid it down that a grant by the King was to be construed most beneficially for the King.[6] But, certainly, patents must be open to two intents before such a rule of construction can be applied,[7] and when the grant is for a valuable consideration the patents may be construed most favorably for the patentee.[8] More just rules of construction are now applied, than at common law, to the construction of letters patent.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] New York was a province of the Crown, not a "colony." The officials, attorney-generals, etc., all styled it "province." See Bradf. N. Y. Laws of 1694.

[3] 2 Black. Comm. 346. The letters patent to the Duke of York, in 1664, for the entire territory, now in this State, are at Albany. See Hist. Law of Real Prop. in N. Y. pp. 10, 16, 46, 184.

[4] 2 Black. Comm. 347, 348; N. Y. Cent. R. R. Co. v. Brockway Brick Co., 10 App. Div. 387, 389.

[5] N. Y. Cent. R. R. Co. v. Brockway Brick Co., 10 App. Div. 387.

[6] 2 Black. Comm. 347.

[7] See discussion in Forsythe's Cas. & Ops. 175, 176.

[8] Sir John Moline's Case, 10 Rep. 65.

[9] People v. N. Y. & Staten Island Ferry Co., 68 N. Y. 71; Langdon v. Mayor, 93 id. 129, 147.

§ 246. **Recording copies of instruments which are in secretary of state's office.**— A copy of an instrument affecting real property, within the state, recorded or filed in the office of the secretary of state, certified in the manner required to entitle the same to be read in evidence, may be recorded with such certificate, in the office of any recording officer of the state.

Formerly chapter 295, Laws of 1839, section 5:

§ 5. A copy of any deed, conveyance or other instrument in writing relating to, or in any manner affecting the title to any real estate which is or may be recorded or filed in the office of the secretary of state, upon being certified by the said secretary in the manner required by law, to entitle the same to be read in evidence, may be recorded in the office of the clerk of any county in this state or in the office of the register of deeds in the city of New York with the secretary's certificate; and such record and a duly certified copy thereof, may be read in evidence in the same manner and with the like effect, as the record of a conveyance of real estate situate in such county originally recorded in the said clerk's office or in the office of the said register.[1]

Holland Land Company. The residue of the act of 1839 refers to the Holland Land Company.[2]

When Deeds May be Read in Evidence. The Code of Civil Procedure now regulates the admission of deeds in evidence. Sections 933 and 935 thereof are as follows:

"§ 933. A copy of a paper filed, kept, entered, or recorded, pursuant to law, in a public office of the State, the officer having charge of which has, pursuant to law an official seal * * * is evidence, as if the original was produced. But, to entitle it to be used in evidence, it must be certified * * * by the officer having the custody of the original.[3] * * *

"§ 935. A conveyance, acknowledged or proved, and certified in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded within the State, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance."

[1] Repealed, chap. 547, Laws of 1896.

[2] *Cf.* § 259, The Real Prop. Law.

[3] See this section set out in full under next section of this act, p. 562, *infra*.

§ 247. **Certified copies may be recorded.**—A copy of a record, or of any recorded instrument, certified or authenticated so as to be entitled to be read in evidence, may be again recorded in any office where the original would be entitled to be recorded. Such record has the same effect as if the original were so recorded. A copy of a conveyance or mortgage affecting separate parcels of real property situated in different counties, or of the record of such conveyance or mortgage in one of such counties, certified or authenticated so as to be entitled to be read in evidence, may be recorded in any county in which any such parcel is situated, with the same effect as if the original instrument authenticated as required by section two hundred and fifty-nine of this chapter were so recorded.

Formerly chapter 210, Laws of 1843, section 5,[1] as amended chapter 539, Laws of 1887.

§ 5. The copy of any record, of any recorded deed or instrument, attested and authenticated in such manner as would by law entitle it to be read in evidence, may be again recorded in any office wherein the original would be entitled to be recorded, and such record shall have the same effect as if the original were so recorded.

Certification Entitling Paper to be Read in Evidence. As stated under the next preceding section of this act, the Code of Civil Procedure regulates admission of deeds of conveyance in evidence. Section 933 thereof is as follows:

"§ 933. A copy of a paper filed, kept, entered, or recorded, pursuant to law, in a public office of the State, the officer having charge of which has, pursuant to law an official seal; or with the clerk of a court of the State, or with the clerk or secretary of either house of the Legislature, or of any other public body or public board, created by authority of a law of the State, and having, pursuant to law, a seal; or a transcript from a record, kept, pursuant to law, in such a public office, or by such a clerk or secretary, is evidence, as if the original was produced. But, to entitle it to be used in evidence, it must be certified by the clerk of the court, under his hand and the seal of the court, or by the officer having the custody of the original, or his deputy, or clerk, appointed pursuant to law, under his official seal, and the hand of the person certifying; or by the presiding officer, secretary, or clerk of the public body or board, appointed pursuant to law, under his hand, and, except where it is certified by the clerk or secretary of either house of the Legislature, under the official seal of the body or board."

[1] Repealed, chap. 547, Laws of 1896.

§ 248. **Acknowledgments and proofs within the state.**—The acknowledgment or proof of a conveyance of real property within the state may be made at any place within the state, before a justice of the supreme court; or within the district wherein such officer is authorized to perform official duties, before a judge, clerk, deputy clerk, or special deputy clerk of a court, a notary public, or the mayor or recorder of a city, a justice of the peace, surrogate, special surrogate, special county judge, or commissioner of deeds.

Formerly 1 Revised Statutes, 756, section 4, subdivision 1:[1]

1. If acknowledged or proved within this state; the chancellor, justices of the supreme court, circuit judges, supreme court commissioners, judges of county courts, mayors and recorders of cities, or commissioners of deeds; but no county judge, or commissioner of deeds for a county or city, shall take any such proof or acknowledgment, out of the city or county, for which he was appointed.[2]

Statutes Concerning Notaries Public. The statutes regarding notaries public are numerous, but need not be referred to here at length.[3] In one sense they amend the Revised Statutes, or are auxiliaries to the foregoing section of the same. In 1859 notaries were empowered to administer oaths and "to take the proof and acknowledgment of deeds, mortgages and any other papers for use or record in this State," in the same manner as commissioners of deeds.[4] Subsequently notaries were empowered to act in certain adjoining counties by acts[5] now consolidated in "The Executive Law."[6] A like provision was embodied in the New York City Consolidation Act of 1882.[7] Before such acts a notary could not take acknowledgments out of the county of his original jurisdiction.[8] Numerous special acts of the Legis-

[1] See for the balance of this section anterior to subd. 1, p. 556, *supra*. It provides, in substance, that instruments shall be acknowledged before, etc., etc.

[2] Repealed, chap. 547, Laws of 1896.

[3] 1 R. S. 98; Id. 102, § 14; 2 id. 283, § 44.

[4] Laws of 1859, chap. 360; Laws of 1863, chap. 508; People v. Hascall, 18 How. Pr. 118.

[5] Laws of 1873, chap. 807; Laws of 1875, chaps. 105, 458; Laws of 1880, chap. 254; Laws of 1883, chap. 140; Laws of 1888, chap. 542; Laws of 1884, chap. 270; Laws of 1885, chap. 61. *Cf.* Laws of 1872, chap. 703.

[6] Laws of 1892, chap. 683, § 82, as amended, Laws 1893, chap. 248.

[7] Laws of 1882, chap. 410, §§ 1712, 1713.

[8] Utica, etc., R. R. Co. v. Stewart, 33 How. Pr. 312.

lature confirm the acts of notaries[1] and those of justices of the peace.[2]

Officers Entitled to Take Acknowledgments. The authority of officers, not being magistrates or judges of courts of record, to take acknowledgments is *ex virtute officii*, and wholly statutory. The "Executive Law" now consolidates the statutes regarding notaries public, their appointment, powers, duties and fees.[3]

Officer Cannot Act Out of Locus of Jurisdiction. A local officer, authorized to take acknowledgments or prove deeds, cannot act out of the place specified for his jurisdiction.[4] But an officer is presumed to act within the limits of his jurisdiction.[5] Where an officer of one county is authorized to act in another, a *jurat* need not set forth the notary's compliance with the law.[6] An acknowledgment is not a judicial act, and the officer taking it is not disqualified by ties of consanguinity.[7] But otherwise if he is a party to the conveyance.[8]

[1] Laws of 1860, chap. 443; Laws of 1861, chap. 246; Laws of 1863, chap. 508; Laws of 1881, chaps. 44, 553; Laws of 1882, chap. 16; Laws of 1883, chaps. 29, 230; Laws of 1884, chap. 304; Laws of 1885, chap. 63; Laws of 1886, chap. 448.

[2] Laws of 1886, chaps. 210, 461; Laws of 1893, chap. 277.

[3] Chap. 683, Laws of 1892, chap. 9 of General Laws, as amended by chap. 248, Laws of 1893.

[4] Jackson v. Humphreys, 1 Johns. 498.

[5] Carpenter v. Dexter, 8 Wall. 513; People v. Snyder, 41 N. Y. 397.

[6] Estate of King, 2 Civ. Proc. Rep. 71.

[7] Lynch v. Livingston, 6 N. Y. 422; Remington Paper Co. v. O'Dougherty, 81 id. 474, 483.

[8] Armstrong v. Combs, 15 App. Div. 246.

§ 249. **Acknowledgments and proofs in other states.**— The acknowledgment or proof of a conveyance of real property, within the state, may be made without the state, but within the United States, before either of the following officers acting within his jurisdiction, or of the court to which he belongs:

1. A judge of the supreme court, of the circuit court of appeals, of the circuit court, or of the district court of the United States.

2. A judge of the supreme, superior, or circuit court of a state.

3. A mayor of a city.

4. A commissioner appointed for the purpose by the governor of the state.

5. Any officer of a state, authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.

Formerly 1 Revised Statutes, 756, section 4:

§ 4,[1] subd. 2. * * * If acknowledged or proved out of this state, and within the United States; the chief justice and associate justices of the supreme court of the United States, district judges of the United States, the judges or justices of the supreme, superior or circuit court, of any state or territory, within the United States, and the chief judge, or any associate judge, of the circuit court of the United States, in the district of Columbia; but no proof or acknowledgment, taken by any such officer, shall entitle a conveyance to be recorded, unless taken within some place or territory, to which the jurisdiction of the court to which he belongs, shall extend.[2]

Earlier Laws. The foregoing provision of the Revised Statutes was, in 1829, transferred from the Revised Laws of 1813.[3] Mayors of cities,[4] certain officers of other States of the Union,[5] and commissioners of the State of New York, were subsequently empowered

[1] The first part of this section is set out under § 242, The Real Prop. Law, p. 556, *supra*. It provides that to entitle any conveyance hereafter made to be recorded, it shall be acknowledged or proved before any one of the following officers. Then follows subdivision 1, also set out, *supra*, under § 248, The Real Prop. Law, p. 563. The entire text of 1 R. S. 756, § 4, appears on pp. 556, 563, 565 of this work.

[2] Repealed, chap. 547, Laws of 1896.

[3] Chap. 44, Laws of 1788; 1 R. L. 269.

[4] Chap. 222, Laws of 1829; chap. 109, Laws of 1845; chap. 80, Laws of 1883.

[5] Chap. 195, § 1, Laws of 1848; chap. 208, Laws of 1892; chap. 123, Laws of 1893.

to take acknowledgments and proof of deeds.[1] So certain persons in Canada.[2]

Certificate of Secretary of State. For purposes of a record the certificate of a commissioner of deeds for the State of New York must be accompanied by a certificate of the Secretary of State of New York, attesting the commissioner's office and the genuineness of his signature;[3] and such is the present law.[4] The commissioner's seal of office must be attached to his certificate, which must specify the day on which it was taken, and also the city or town.[5]

Dominion of Canada. An act of 1875 repealed the authority[6] to appoint commissioners of deeds in the Dominion of Canada.[7] But the "Executive Law" authorizes the Governor to appoint ten such commissioners in a city of any foreign country.

Authentication; Knowledge. Under the former law, as at present,[8] when the acknowledgment was taken in Canada, or without the State, but within the Union, it was provided that the officer must know or have satisfactory evidence that the person acknowledging the deed was the person described in and who executed the same.[9] And in order to entitle a deed so acknowledged to be recorded, it must have been duly authenticated.[10]

[1] Chap. 290, Laws of 1840; chap. 270, Laws of 1850; as amd. chap. 788, Laws of 1857; chap. 222, Laws of 1859; chap. 58, § 1, Laws of 1876, and chap. 683, § 87, Laws of 1892.

[2] Chap. 222, Laws of 1829; chap. 208, Laws of 1870; chap. 123, Laws of 1893, now § 250, The Real Prop. Law.

[3] Laws of 1850, chap. 270, as amended; Laws of 1857, chap. 788; Laws of 1859, chap. 222; Laws of 1876, chap. 58, § 1; Laws of 1880, chap. 115.

[4] *Infra*, § 260, The Real Prop. Law.

[5] Laws of 1850, chap. 270; Laws of 1876, chap. 58; Laws of 1880, chap. 115; § 257, The Real Prop. Law.

[6] Laws of 1857, chap. 788; Laws of 1859, chap. 222.

[7] Laws of 1875, chap. 136; chap. 683, Laws of 1892. *Cf.* § 250, *infra*.

[8] § 252, The Real Prop. Law.

[9] 1 R. S. 758, § 9; Laws of 1892, chap. 208; Laws of 1895, chap. 148; Laws of 1870, chap. 208. *Cf.* § 252, The Real Prop. Law.

[10] Laws of 1848, chap. 195; Laws of 1853, chap. 303; Laws of 1856, chap. 61; Laws of 1867, chap. 557; Laws of 1895, chap. 123; Re Wilcox's Estate, 21 N. Y. Supp. 780. *Cf.* § 260, The Real Prop. Law.

§ 250. **Acknowledgments and proofs in foreign countries.**—The acknowledgment and proof of a conveyance of real property within the state, may be made without the United States before either of the following officers:

1. An ambassador, a minister plenipotentiary, minister extraordinary, minister resident, or charge des affairs of the United States, residing and accredited within the country.

2. A consul-general, vice-consul general, deputy consul-general, vice-consul or deputy-consul, a consular or vice-consular agent, or a consul or commercial or vice-commercial agent of the United States residing within the country.

3. A commissioner appointed for the purpose by the governor, and acting within his own jurisdiction.

4. A person specially authorized for that purpose by a commission, under the seal of the supreme court, issued to a reputable person, residing in or going to the country where the acknowledgment or proof is so to be taken.

5. If within the dominion of Canada, it may also be made before any judge of a court of record; or before any officer of such dominion authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.

6. If within the United Kingdom of Great Britain and Ireland or the dominions thereunto belonging, it may also be made before the mayor, provost or other chief magistrate of a city or town therein.

Formerly 1 Revised Statutes, 757, sections 5, 6 and 7:

§ 5. If the party or parties executing such conveyance, shall be, or reside, in any state or kingdom in Europe, or in North, or South America, the same may be acknowledged or proved before any minister plenipotentiary, or any minister extraordinary, or any *charge des affaires* of the United States, resident and accredited within such state or kingdom. If such parties be or reside in France, such conveyance may be acknowledged or proved before the consul of the United States, appointed to reside at Paris; and if such parties be or reside in Russia, such conveyance may be acknowledged or proved before the consul of the United States appointed to reside at St. Petersburgh.[1]

§ 6. If the party to such conveyance be, or reside, within the United Kingdom of Great Britain and Ireland, or the dominions thereunto belonging, the same may be acknowledged or proved before the mayor of the city of London, the mayor or chief magistrate of the city of Dublin, or the provost or chief magistrate of the city of Edinburgh, or before the mayor or chief

[1] *Cf.* Laws of 1816, p. 118.

magistrate of Liverpool, or before the consul of the United States appointed to reside at London.[1]

§ 7. Such proof or acknowledgment, duly certified under the hand, and seal of office, of such consuls, or of the said mayors or chief magistrates respectively, or of such minister or *charge des affaires*, shall have the like force and validity, as if the same were taken, before a justice of the supreme court of this state.[2]

Acknowledgments and Proofs in Foreign Countries. In 1771 provision was made for the acknowledgment of deeds in the possessions of Great Britain out of the colony.[3] A like provision was incorporated in the laws of the State in 1801,[4] and re-enacted in the revision of 1813,[5] and finally amplified in the Revised Statutes.[6] The later acts extended to places other than those under British dominion. An act of 1829 provided for execution in any foreign country.[7] From time to time the scope of these enactments was enlarged.[8]

Commissioners of Deeds. The "Executive Law" authorizes the governor to appoint commissioners of deeds to act in foreign countries.[9]

[1] *Cf.* 1 K. & R. 370, § 3; 1 R. L. of 1813, 370, § 3; Laws of 1817, p. 58.

[2] 1 R. S. 757, §§ 5, 6, 7, as amd.; repealed, chap. 547, Laws of 1896.

[3] Van Schaack, 612, 765.

[4] 1 K. & R. 479.

[5] 1 R. S. 370, § 3.

[6] *Supra.*

[7] Chap. 222, Laws of 1829.

[8] Laws of 1847, chap. 170; Laws of 1854, chap. 206 (repealed, Laws of 1880, chap. 245); Laws of 1858, chap. 308 (repealed, Laws of 1875, chap. 136); Laws of 1862, chap. 283 (repealed, Laws of 1875, chap. 136); Laws of 1862, chap. 471 (repealed, Laws of 1877, chap. 417); Laws of 1863, chap. 246 (hereby repealed); Laws of 1865, chap. 421 (hereby repealed); Laws of 1870, chap. 208 (hereby repealed); Laws of 1875, chap. 136 (repealed, Laws of 1892, chap. 683); Laws of 1883, chap. 80 (hereby repealed); Laws of 1883, chap. 233 (repealed, Laws of 1892, chap. 683); Laws of 1888, chap. 246 (hereby repealed); Laws of 1892, chap. 683 (Executive Law); Laws of 1893, chap. 123 (hereby repealed); Laws of 1893, chap. 248 (Executive Law); Laws of 1895, chap. 793.

[9] Chap. 683, Laws of 1892, being chap. 9 of the General Laws, as amended by chap. 248, Laws of 1893.

§ 251. **Acknowledgments and proofs by married women.**— The acknowledgment or proof of a conveyance of real property, within the state, or of any other writtten instrument, may be made by a married woman the same as if unmarried.

Formerly 1 Revised Statutes, 758, sections 10, 11:

§ 10. The acknowledgment of a married woman residing within this state, to a conveyance purporting to be executed by her, shall not be taken, unless in addition to the requisites contained in the preceding section, she acknowledge, on a private examination, apart from her husband, that she executed such conveyance, freely, and without any fear or compulsion of her husband; nor shall any estate of any such married woman, pass, by any conveyance not so acknowledged.[1]

§ 11. 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.[2]

History of Separate Acknowledgments by Married Women. The historical remarks made under section 183 of this act,[3] touching deeds to bar dower, are applicable generally to any conveyance by a married woman. As early as 1683 by an act of the New York Assembly, it was provided that estates of *feme covert* could be conveyed only by deed, acknowledged in some court of record, "she being secretly examined if she doth it freely."[4] This act was of brief duration, being disallowed by the Lord Proprietor, the Duke of York.[5] But thereafter, by early custom of New York, a *feme covert* could, in conjunction with the husband, convey by deed without separate acknowledgment.[6] At common law a *feme covert* could convey only by levying a fine or suffering a common recovery,[7] and these judicial acts always required her separate

[1] Amended, as stated below, and as amended repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] *Supra*, pp. 436, 437.

[4] N. Y. Colonial Laws (ed. of 1894), p. 111; Constantine v. Van Winkle, 10 N. Y. 422; 6 Hill, 177; Jackson ex dem. Woodruff v. Gilchrist, 15 Johns. 89, 113; Humbert v. Trinity Church, 24 Wend. 587, 625; Albany Fire Ins. Co. v. Bay, 4 N. Y. 1, 23.

[5] Albany Fire Ins. Co. v. Bay, 4 N. Y. 1, 24; Doc. relating to Colonial Hist. of N. Y. III, 357, 370.

[6] Albany Fire Ins. Co. v. Bay, 4 N. Y. at p. 31; Van Winkle v. Constantine, 10 id. 422; Bool v. Mix, 17 Wend. 128.

[7] 2 Black. Comm. 351; Constantine v. Van Winkle, 6 Hill, 177; Jackson ex dem. v. Hollaway, 7 Johns. 81, 86; Whitbeck v. Cook, 15 Johns. 545; 2 J. & V., N. Y. Laws, 84; Bradley v. Walker, 138 N. Y. 291, 297.

acknowledgment and the consent of the husband.[1] The origin of the distinct custom in New York has been much disputed. In London and in Winchester, England, a similar custom certainly existed.[2] Indeed, in most, if not all the British plantations, a similar custom prevailed.[3] Chancellor Jones, of New York, stated that, in New York, a deed attested by a separate acknowledgment of the wife, before a judge of a court of record, was regarded as the equivalent of a fine;[4] and such was probably the mode adopted by the better conveyancers even prior to 1771, whenever the more tedious methods of fines or recoveries were not employed.[5] In 1771 the custom of New York was formally recognized by the Legislature, and prior conveyances in conformity with it were declared valid.[6] But this act also provided that thereafter "no conveyance of a *feme covert* should pass by deed without a previous acknowledgment made by her apart from her husband."[7] From time to time such statute was thereafter re-enacted in New York.[8] Finally the abolition of fines and recoveries[9] caused deeds separately acknowledged to become the only mode by which a *feme covert* might convey lands in New York. The statute applied to contracts to convey as well as to conveyances,[10] but not to the execution of powers of appointment under a trust.[11]

Requisites of Certificates. The assent of the *feme covert* might be implied,[12] and if the statute was substantially complied with, it was sufficient;[13] but her acknowledgment could not be established by parol by an examination of the officer after his term of office expired.[14] The statute did not apply to *femes covert* residing without the State.[15] Where a separate acknowledgment is required by

[1] Shep. Touch. 7; Albany Fire Ins. Co. v. Bay, 4 N. Y. 13, 31.

[2] Park. Dower, 195; 1 Cruise, Fines, 53, 54, 97; *supra*, p. 436, § 183, The Real Prop. Law.

[3] 2 Black. Comm. 361; Stokes, British Colonies, 443.

[4] Collections N. Y. Hist. Soc. for 1821, p. 347.

[5] 2 J. & V. 84.

[6] Van Schaack, N. Y. Laws, 611, 765; N. Y. Col. Laws (ed. of 1894), V, 202, 534.

[7] Van Schaack, 611, 765; N. Y. Col. Laws (ed. of 1894), V, 202, 534.

[8] 2 J. & V. 266; 1 K. & R. 478, § 2; 1 R. L. 369; 1 R. S. 758, § 10, *supra*.

[9] 2 R. S. 343, § 24.

[10] Knowles v. McCamley, 10 Paige, 342; Bradley v. Walker, 138 N. Y. 291, 298.

[11] Richardson v. Pulver, 63 Barb. 67; § 122, The Real Prop. Law.

[12] Rexford v. Rexford, 7 Lans. 6.

[13] Sheldon v. Stryker, 42 Barb. 284; Dennis v. Tarpenny, 20 id. 371; Canandarqua Acad. v. McKechnie, 19 Hun, 62; Meriam v. Harsen, 2 Barb. Ch. 232, affg. 4 Edw. 71.

[14] Elwood v. Klock, 13 Barb. 50.

[15] Andrews v. Shaffer, 12 How. Pr. 441; 1 R. S. 758, § 11; 1 R. L. of 1813, p. 369, § 2; Laws of 1801, chap. 155.

law, the certificate must be in accordance, or it is a nullity.[1] Where a married woman was judicially separated from her husband, the necessity of certifying to a separate acknowledgment was not indispensable in some cases.[2]

The Statute of 1879. The statute of 1879 dispensed with the necessity of a separate acknowledgment on the part of *feme covert*,[3] and in 1880 proof of her deeds was regulated.[4] Even prior to that time, it was held that a separate acknowledgment was not necessary in respect of separate estates, since the Married Women's Acts,[5] at least in the conveyance of property acquired after the passage of those acts and by those married subsequently thereto.

The statute of 1879, as amended in 1880, was as follows:

SECTION 1. The acknowledgment by married women or the proof of the execution by married women of deeds and other written instruments may be made, taken and certified in the same manner as if they were sole; and all acts and parts of acts which require from them any other or different acknowledgments, proofs or certificates thereof are hereby repealed.

§ 2. This act shall take effect immediately.[6]

[1] See note to 14 Abb. N. C. 463; Genter v. Morrison, 31 Barb. 155.

[2] Delafield v. Brady, 108 N. Y. 524, affg. 38 Hun, 404.

[3] Laws of 1879, chap. 249.

[4] Laws of 1880, chap. 300.

[5] Yale v. Dederer, 18 N. Y. 265, 271; Wiles v. Peck, 26 id. 42; Andrews v. Shaffer, 12 How. Pr. 441; Blood v. Humphrey, 17 Barb. 660; Allen v. Reynolds, 36 N. Y. Super. Ct. 297; Richardson v. Pulver, 63 Barb. 67; and see cases cited, *supra*, under § 183, The Real Prop. Law.

[6] Repealed, chap. 547, Laws of 1896.

§ 252. **Requisites of acknowledgments.**— An acknowledgment must not be taken by any officer unless he knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument.

Formerly 1 Revised Statutes, 758, section 9:

§ 9. No acknowledgment of any conveyance having been executed, shall be taken by any officer, 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.[1]

Knowledge of Officer taking Acknowledgment. This section relates, not to the form or contents of the certificate of acknowledgment,[2] but to the knowledge to be possessed by the officer taking such acknowledgment. This knowledge may be the officer's own, or that of some one else. When the officer does not know the person making the acknowledgment then he must be satisfied of it by evidence of some kind.[3] But the evidence so taken is to satisfy the officer's conscience,[4] and he does not act judicially.[5] Where persons acknowledging the instrument are introduced to him by a mutual acquaintance it is sufficient.[6] The statute does not undertake to regulate the officer's discretion, but unless he has the requisite knowledge his act is a nullity.[8] The contents of the officer's certificate are regulated primarily by subsequent sections of this act.[9]

Subscribing Witnesses. The following section[10] of this act regulates the instance where the conveyance is proved by a subscribing witness and not acknowledged by a party.

[1] Repealed, chap. 547, Laws of 1896.

[2] Regulated by §§ 255, 257, The Real Prop. Law.

[3] Wood v. Bach, 54 Barb. 134.

[4] Wood v. Bach, 54 Barb. 134; Rexford v. Rexford, 7 Lans. 6.

[5] Lynch v. Livingston, 8 Barb. 463; S. C., 6 N. Y. 422; *supra*, p. 564. *Sed cf.* Armstrong v. Combs, 15 App. Div. 246.

[6] Wood v. Bach, 54 Barb. 134; Rexford v. Rexford, 7 Lans. 6; Dibble v. Rogers, 13 Wend. 536. *Sed cf.* Bidwell v. v. Sullivan, 17 App. Div. 629, 630.

[7] Dibble v. Rogers, 13 Wend. 536.

[8] Watson v. Campbell, 28 Barb. 421; Rexford v. Rexford, 7 Lans. 6.

[9] §§ 255, 256, The Real Prop. Law.

[10] § 253.

§ 253. **Proof by subscribing witness.**— Where the execution of a conveyance is proved by a subscribing witness, such witness must state his own place of residence, and that he knew the person described in and who executed the conveyance. The proof must not be taken unless the officer is personally acquainted with such witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to the conveyance.

Formerly 1 Revised Statutes, 758, section 12:

§ 12. 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.[1]

Origin of this Enactment. This section of the Revised Statutes was in turn adopted from "An act concerning deeds," passed April 12, 1813,[2] and the latter, from an act of 1801.[3]

Proof by Subscribing Witness. In proving the execution of a deed for the purposes of evidence in an action, a witness to the execution of such deed must state that he was present at the execution. It seems it is not sufficient that he testify that the parties acknowledged the execution thereof, and that he subscribed his name as witness.[4] But this section is not intended to regulate the proof of deeds in actions, but to satisfy the conscience of the officer who makes the certificate to enable it to be recorded as a conveyance. It is, however, essential that the officer know or have evidence that the subscribing witness is the person making proof.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 R. L. 1813.

[3] Chap. 155, Laws of 1801.

[4] Norman v. Wells, 17 Wend. 136. *Sed cf.* Hollenback v. Fleming, 6 Hill, 303, 305; Early v. St. Pat. Church Society, 81 Hun, 369; Code Civ. Proc. § 936.

[5] See the cases cited *supra*, under § 252, The Real Prop. Law, and § 255, *infra*.

§ 254. **Compelling witnesses to testify.**— On the application of a grantee in a conveyance, his heir or personal representative, or of a person claiming under either of them, verified by the oath of the applicant, stating that a witness to the conveyance, residing in the county where the application is made, refuses to appear and testify concerning its execution, and that such conveyance can not be proved without his testimony, any officer authorized to take, within the state, acknowledgment or proof of conveyance of real property may issue a subpœna, requiring such witness to attend and testify before him concerning the execution of the conveyance. A person who, on being duly served with such a subpœna, without reasonable cause refuses or neglects to attend or refuses to answer under oath concerning the execution of such conveyance, forfeits to the person injured one hundred dollars; and may also be committed to prison by the officer who issued the subpœna, there to remain without bail, and without the liberties of the jail, until he answers under oath as required by this section.

Formerly 1 Revised Statutes, 758, sections 13, 14:

§ 13. Upon the application of any grantee, in any conveyance, his heirs or personal representatives, or of any person claiming under them, verified by the oath of the applicant, that any witness to the conveyance, residing in the county where such application is made, refuses to appear and testify, touching the execution thereof, and that such conveyance cannot be proved without his evidence, any officer authorised to take the acknowledgment or proof of conveyances, except a commissioner of deeds, may issue a subpœna requiring such witness to appear and testify before such officer, touching the execution of such conveyance.[1]

§ 14. Every person, who being served with such subpœna, shall, without reasonable cause, refuse or neglect to appear, or appearing, shall refuse to answer upon oath, touching the matters aforesaid, shall forfeit to the party injured, one hundred dollars; and may also be committed to prison by the officer who issued such subpœna, there to remain without bail, and without the liberties of the jail, until he shall submit to answer upon oath as aforesaid.[2]

Section 254, Supra. The provisions of the Revised Statutes were taken from an act for giving relief in cases of insolvency.[3] Section 254 of this act contains the provision of the Revised Statutes, unchanged in substance, except that the provision excepting commissioners of deeds from the officers who may issue subpœnas has been omitted.[4]

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] 1 R. L. 463, § 7; Revisers' note to 1 R. S. 758, §§ 13, 14.
[4] Note of Commissioners of Statutory Revision to this section.

§ 255. **Certificate of acknowledgment or proof.**—An officer taking the acknowledgment or proof of a conveyance must indorse thereupon or attach thereto, a certificate, signed by himself, stating all the matters required to be done, known or proved on the taking of such acknowlment or proof; together with the name and substance of the testimony of each witness examined before him, and if a subscribing witness, his place of residence.

Formerly 1 Revised Statutes, 759, section 15:

§ 15. Every officer who shall take the acknowledgment or proof, of any conveyance, shall endorse 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.[1]

Purpose of a Certificate. The primary purpose of a certificate of acknowledgment under this section is to entitle a conveyance to be recorded.[2] It is not to entitle it to be read in evidence,[3] and it is not to give validity to the instrument of conveyance.[4]

Form of a Certificate. The form of the certificate not having been prescribed by law is left in some measure to the officers.[5] There need be only a substantial compliance with the statute.[6]

Form and Position of Certificate. The form and position of the certificate must, however, be such as to entitle the conveyance to be recorded under this article of The Real Property Law.[7]

Contents of the Certificate. The certificate must comply with either section 252 or section 253 of this act.

Where the acknowledgment is by a party to the conveyance, the certificate must show knowledge of the party by the officer.[8] The usual words, "*to me known*," or "*known to me* to be, etc.,"

[1] Repealed, chap. 547, Laws of 1896.

[2] § 241, The Real Prop. Law; Tuttle v. The People, 36 N. Y. 431, 435.

[3] Code Civ. Proc. § 935, regulates evidence; *vide supra*, p. 561.

[4] See Smith v. Tim, 14 Abb. N. C. 447; reversed, 101 N. Y. 472; Treadwell v. Sackett, 50 Barb. 444.

[5] Ritter v. Worth, 58 N. Y. 627; West Point Iron Co. v. Reymert, 45 id. 703; Smith v. Boyd, 101 id. 472, revg. 10 Daly, 149; Canandarqua Academy v. McKechnie, 19 Hun, 62; 90 N. Y. 618; Jackson ex dem., etc., v. Gumaer, 2 Cow. 552; Sheldon v. Stryker, 42 Barb. 284.

[6] Meriam v. Harsen, 2 Barb. Ch. 232; Carpenter v. Dexter, 8 Wall. 513; Sheldon v. Stryker, 42 Barb. 284; Irving v. Campbell, 121 N. Y. 353, 360.

[7] Irving v. Campbell, 121 N. Y. 353; *vide*, *infra*, p. 577.

[8] Miller v. Link, 2 Sup. Ct. Rep. 86; Fryer v. Rockefeller, 63 N. Y. 268;

are not, however, indispensable.[1] It was formerly sufficient to certify that the officer knew the grantor to be the one who executed the deed.[2] But the certificate must now contain words of acknowledgment.[3] This statute may be more stringently construed, and it is now desirable that the certificate shall show that the party is known to the officer to be the same person described in and who executed the conveyance.[4] But as no set form is prescribed by any statute, a certificate may be defective in form and yet a sufficient compliance with the statute, for some purposes.[5]

Officer's Means of Knowledge. The officer may obtain the knowledge of the witness by an ordinary introduction;[6] and as such introduction is to satisfy his own conscience,[7] he need not state this evidence of knowledge in the certificate.[8]

Knowledge. It is sufficient if knowledge of the party in some way appear in the certificate.[9]

Certificate, where Acknowledgment is by Subscribing Witness. Where the conveyance is proved by a subscribing witness[10] it is said the certificate should show that such witness was present at the execution;[11] that he signed at the time of execution;[12] the residence of the witness;[13] that he knew the person described in and who executed the conveyance.[14] The certificate must also show either that the officer was personally acquainted with the subscrib-

Sethlin v. Golding, 15 N. Y. St. Repr. 814.

[1] Hutton v. Weber, 17 N. Y. Supp. 463; affd., 137 N. Y. 615.

[2] Jackson v. Osborn, 2 Wend. 555; Thurman v. Cameron, 24 id. 87; Jackson v. Gumaer, 2 Cow. 552. *Cf.* Hunt v. Johnson, 19 N. Y. 279.

[3] People v. Harrison, 8 Barb. 560.

[4] Fryer v. Rockefeller, 63 N.Y. 268; People v. Harrison, 8 Barb. 560; Irving v. Campbell, 121 N. Y. 353, 361; Miller v. Link, 2 Sup. Ct. 86. *Cf.* Smith v. Boyd, 101 N. Y. 472.

[5] Smith v. Boyd, 101 N. Y. 472, and see note on certificates of acknowledgments, 14 Abb. N. C. 452, 455, 456.

[6] See cases cited, *supra*, § 252, The Real Prop. Law.

[7] See cases cited under § 252, The Real Prop. Law; Rexford v. Rexford, 7 Lans. 6. *Sed cf.* Bidwell v. Sullivan, 17 App. Div. 620, 630.

[8] Ritter v. Worth, 58 N. Y. 627. *Cf.* Bidwell v. Sullivan, 17 App. Div. at p. 630.

[9] Hutton v. Weber, 17 N. Y. Supp. 462; affd., 137 N. Y. 615; Smith v. Boyd, 101 id. 472.

[10] Who is such, see Earley v. St. Patrick's Church Society, 81 Hun, 369.

[11] Norman v. Wells, 17 Wend. 136. *Sed cf.* Hollenbeck v. Fleming, 6 Hill, 303.

[12] Earley v. St. Patrick's Church Society, 81 Hun, 369.

[13] Irving v. Campbell, 121 N.Y. 353; *vide*, *infra*, p 577.

[14] See the language of § 255, *supra*; Irving v. Campbell, 121 N. Y. at p. 359.

ing witness,[1] or else the substance of the testimony of the witnesses who proved the identity of the subscribing witness,[2] and the names of such witnesses.[3] How far it may be necessary for the officer to know the witnesses who prove the identity of the subscribing witness, is another question.[4]

Certificate where Acknowledgment Taken out of the State. A certificate of an acknowledgment, taken out of the State, should comply with this section[5] as well as with the next section of this act.[6]

Certificate Must Comply with Law then in Force. The certificate of acknowledgment need only comply with the statute in force when it is taken.[7] But unless it does so comply in substance and truth it is a nullity, at least, for purposes of evidence,[8] as the facts stated in such certificates may be rebutted.[9]

Acknowledgment not a Judicial Act. As the act of taking an acknowledgment is not a judicial one, the officer's consanguinity to the party is no bar.[10] But an officer who is a party to the conveyance is debarred by that fact from taking the acknowledgment.[11]

Officer's Subscription. When the official character of the officer taking the acknowledgment appears in the body of the certificate, it is not necessary that it be appended to the subscription of his signature.[12]

Re-acknowledgment. A deed with a defective certificate may be made good by re-acknowledgment,[13] or by statute.[14]

Place of Certificate. The certificate had formerly to be indorsed on the conveyance.[15] But it is now quite sufficient if in some way attached or subjoined to the conveyance.[16] It must be, however,

[1] Sheldon v. Stryker, 42 Barb. 284; Bidwell v. Sullivan, 17 App. Div. 629.

[2] Ritter v. Worth, 58 N. Y. 627.

[3] Not their residence. *Cf.* Dibble v. Rogers, 13 Wend. 537.

[4] *Cf.* Jackson v. Harrow, 11 Johns. 434; Jackson v. Vickory, 1 Wend. 406.

[5] People ex rel. Alton v. Register, 6 Abb. Pr. 180.

[6] § 256, The Real Prop. Law.

[7] Richardson v. Pulver, 63 Barb. 67; Trustees Canandarqua Academy v. McKechnie, 90 N. Y. 618, 627.

[8] Watson v. Campbell, 28 Barb. 421; Rexford v. Rexford, 7 Lans. 6; Irving v. Campbell, 121 N. Y. 353. *Cf.* Heilbrun v. Hammond, 13 Hun, 474.

[9] Code Civ. Proc. § 936.

[10] Lynch v. Livingston, 8 Barb. 463; S. C., 6 N. Y. 422; Remington Paper Co. v. O'Dougherty, 81 id. 474, 483; Canandarqua Academy v. McKechnie, 19 Hun, 62.

[11] Armstrong v. Combs, 15 App. Div. 246.

[12] 14 Abb. N. C. 460, and cases there cited.

[13] Doe ex dem. De Peyster et al. v. Howland, 8 Cow. 277; Osterhout v. Shoemaker, 3 Hill, 513.

[14] Watson v. Mercer, 8 Pet. 88. *Cf.* 14th Amend. U. S. Const. as to rights of third parties affected.

[15] 1 R. S. 759, § 15.

[16] Thurman v. Cameron, 24 Wend. 87.

apparent that the certificate relates to the conveyance and, therefore, it should not be on a separated paper.[1]

Operation of Certificate. How far a distinction is to be drawn between a certificate made for the purposes of recording a conveyance and a certificate made for the purpose of reading a deed in evidence, should always be considered. The certificate for the latter purpose is only *prima facie* evidence of acknowledgment or execution, and these facts may be rebutted on the trial.[2] But when a deed valid *inter partes*[3] is once recorded, on the strength of even a false certificate, why should it not then be operative for some purpose, as notice to subsequent purchasers, as it is in fact recorded?[4] It would be good as against a subsequent purchaser having actual notice of such deed.[5] But the weight of authority seems to be the other way, that the record is a nullity.[6]

[1] Irving v. Campbell, 121 N. Y. 353, 360; Thurman v. Cameron, Id. *supra*.

[2] Code Civ. Proc. § 936, formerly 1 R. S. 759, § 17; repealed, chap. 417, Laws of 1877.

[3] Voorhes v. Presbyterian Church, 17 Barb. 103; Wood v. Chapin, 13 N. Y. 509; Strough v. Wilder, 119 id. 530, 535.

[4] *Cf.* Heilbrun v. Hammond, 13 Hun, 574.

[5] See cases cited, *supra*, under § 241, The Real Prop. Law.

[6] Irving v. Campbell, 121 N. Y. 353; S. C., 54 N. Y. Super. Ct. 224.

§ 256. When certificate to state time and place.— Where the acknowledgment or proof is taken by a commissioner appointed by the governor, for a city or county within the United States, and without the state, the certificate must also state the day on which, and the town and county or the city in which the same was taken.

Formerly chapter 270, section 5, Laws of 1850, as amended by chapter 58, Laws of 1876, section 3, and chapter 115, Laws of 1880:

§ 5. No commissioner appointed under or by virtue of this act shall be authorized to take the proof or acknowledgment of any deed or instrument, or to administer any oath or affirmation at any place other than within the city and county within which he shall reside at the time of his appointment, and every certificate of any such commissioner to any proof or acknowledgment taken before him, or to any oath or affirmation administered by him, shall specify the day on which and the town and county or the city within which the same was taken or administered; and without such specification the said certificate shall be wholly invalid, inoperative and void.[1]

Note on this Section. See the laws regulating the appointment of commissioners, cited under section 249, The Real Property Law.[2] A certificate should also respond to all other legal requirements, besides those stated in this section of this act.[3]

Certificate must State Time and Place. While the form of certificates of acknowledgment is not prescribed by law[4] (except in the case of corporations)[5] it is obvious from this section that where the certificate is that of a commissioner for another State of the Union, it should state the day, and the town or city and county where it is taken, or it may be fatally defective, and thus destroy the conveyance for the purposes of tender under a contract to convey.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, p. 565.

[3] § 255, The Real Prop. Law; People ex rel. Alton v. Register, 6 Abb. Pr. 180.

[4] *Supra*, p. 575.

[5] § 258, The Real Prop. Law.

[6] Irving v. Campbell, 121 N. Y. 353.

§ 257. **When certificate must be under seal.**—Where a certificate of acknowledgment or proof is made by a commissioner appointed by the governor, or by the mayor or other chief magistrate of a city or town without the United States, or by a minister, charge des affairs, consul-general, vice-consul-general, deputy-consul-general, vice-consul or deputy consul, consular or vice-consular agent, or consul or commercial or vice-commercial agent, of the United States, it must be under his seal of office, or the seal of the consulate to which he is attached. All acknowledgments or proofs of deeds, mortgages or other instruments relating to real property, the certificates of which were made in the form required by the laws of this state, by a consul-general, vice-consul-general, deputy-consul-general, vice-consul, deputy-consul, consular agent, vice-consular agent, consul or commercial agent or vice-commercial agent of the United States prior to the first day of April, eighteen hundred and ninety-six, are confirmed.

Formerly 1 Revised Statutes, 757, section 7:

§ 7. Such proof or acknowledgment, duly certified under the hand, and seal of office, of such consuls, or of the said mayors or chief magistrates respectively, or of such minister or *charge des affaires*, shall have the like force and validity, as if the same were taken, before a justice of the supreme court of this state.[1]

Note on this Section. The provisions of the Revised Statutes, set out above, were amplified by section 1, chapter 246, Laws of 1863,[2] and chapter 136, Laws of 1875:

Section 1, chapter 246, Laws of 1863, is as follows:

§ 1. The acknowledgment or proof of any deed or other written instrument, required to be proven or acknowledged in order to entitle the same to be recorded or read in evidence in this State, by any person being in any foreign country, may be made before any vice-consul or commercial agent of the United States government, resident in any foreign port or country, and when certified by him, under his seal of office or under the seal of the consulate to which he is attached, to have been made before him by the party executing the same, and that the said party is known or proven to him to be the same person who is described in and who executed the same, shall be as valid and effectual as if taken before one of the justices of the Supreme Court of the State.

[1] Repealed, chap. 547, Laws of 1896. [2] Repealed, chap. 547, Laws of 1896.

§ 258. **Acknowledgment by corporation and form of certificate.**— The acknowledgment of a conveyance or other instrument by a corporation, must be made by some officer thereof authorized to execute the same by the board of directors of said corporation. The certificate of acknowledgment must be in substantially the following form, the blanks being properly filled.

State of New York,
County of..... .....,
} *ss.:*

On the ..... day of ..... in the year ....., before me personally came ..... to me known, who, being by me duly sworn, did depose and say that he resided in.....; that he is the (president or other officer) of the (name of corporation), the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

(Signature and office of officer taking acknowledgment.)

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal.

Note on this Section. This section of The Real Property Law is new.[1] Prior to this act no particular form of proof or acknowledgment of a mortgage or deed, made by a corporation, was prescribed, and proof or acknowledgment by its secretary was held sufficient.[2] Other cases are to the same effect.[3] In Trustees of the Canandarqua Academy v. McKechnie,[4] the attestation clause of a mortgage stated that the corporation had caused it to be signed by "G.," its president and sealed with the corporate seal. It was so signed and sealed. The only certificate of acknowledgment was to the effect that a subscribing witness "knew 'G.,' the person described in and who executed the said deed." This was held sufficient.

[1] Note to this section by Commissioners of Statutory Revision, Appendix I, *infra*.

[2] Pruyne v. Adams Furniture & Mfg. Co., 92 Hun, 214.

[3] Lovett v. The Steam Saw Mill Assn., 6 Paige, 54, 60; The Trustees of the Canandarqua Academy v. McKechnie, 90 N. Y. 618; Howe Machine Co. v. Avery, 16 Hun, 555; Johnson v. Bush, 3 Barb. Ch. 207.

[4] Id. *supra*.

§ 259. **When county clerk's authentication necessary.**—A certificate of acknowledgment or proof, made within the state, by a commissioner of deeds, justice of the peace, or, except as otherwise provided by law, by a notary public, does not entitle the conveyance to be read in evidence or recorded, except within the county in which the officer resides at the time of making such certificate, unless authenticated by a certificate of the clerk of the same county. But this section does not apply to a conveyance executed by an agent for the Holland Land company, or of the Pulteney estate, lawfully authorized to convey real property.

Formerly 1 Revised Statutes, 759, sections 18, 19:

§ 18. Where any conveyance shall be proved or acknowledged, before any judge of the county courts, not of the degree of counsellor at law, in the supreme court, or before any commissioner of deeds appointed for any county or city, it shall not be entitled to be read in evidence, or to be recorded, in any other county than that in which such judge or commissioner shall reside, unless in addition to the preceding requisites, there shall be subjoined to the certificate of proof or acknowledgment, signed by such judge or commissioner, a certificate under the hand and official seal of the clerk of the county, in which such judge or commissioner resides, specifying that such judge or commissioner was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that the said clerk is well acquainted with the handwriting of such judge or commissioner, and verily believes, that the signature to the said certificate of proof or acknowlment, is genuine.[1]

§ 19. The last section shall not apply to any conveyance executed by any agent for the Holland Land company, or by any agent of the Pulteney estate, lawfully authorized to convey real estate.[2]

County Clerk's Certificates. Since 1847 the certificates of county judges have not been required to be authenticated by the county clerk.[3] The act of 1833[4] did not change the provisions of the Revised Statutes, requiring certificates of the county clerk, in order to entitle conveyances proved or acknowledged before commissioners of deeds or county judges, not of the degree of counselor, to be recorded.[5]

Holland Land Company. The records of the Holland Land Company, papers, maps, etc., are on a statutory basis,[6] and that

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Laws of 1847, chap. 470; People v. Hurlburtt, 44 Barb. 126.

[4] Laws of 1833, chap. 271, § 9.

[5] Wood v. Weiant, 1 N. Y. 77.

[6] Laws of 1839, chap. 295; Bissing v. Smith, 85 Hun, 564.

company and the Pulteney estate may be said to have a particular status in this regard, not of general interest throughout the State.[1] The fundamental acts concerning the Holland Land Company are those passed in 1796, an act for relief of William Willinck and others, aliens;[2] in 1819, an act declaring the terms and conditions of a grant of land from the Holland Land Company for the use of the people of this State,[3] and in 1839, an act relative to title, papers, etc., of the Holland Land Company.[4]

Pulteney Estate. The chief acts touching the "Pulteney estate" were enacted in 1807, viz.: An act for the confirmation of title to lands held under conveyance by Robert Troup, as agent of the Pulteney estate;[5] in 1807, an act for the relief of Sir James Pulteney and wife;[6] in 1814, an act for the relief of settlers on the Pulteney estate;[7] in 1821, "an act concerning the Pulteney estate;"[8] in 1827, "an act relative to deeds for lands in the Pulteney estate."[9]

[1] Howard v. Moot, 64 N. Y. 262; Duke of Cumberland v. Graves, 9 Barb. 595; S. C., 7 N. Y. 305; People v. Snyder, 51 Barb, 589; S. C., 41 N. Y. 397.

[2] 3 Greenl. 341, 387, 400.

[3] Laws of 1819, p. 301.

[4] Chap. 295, Laws of 1839.

[5] 5 Webster, 210,

[6] 5 Webster, 210.

[7] Laws of 1814, p. 16.

[8] Laws of 1821, p. 13.

[9] Laws of 1827, p. 6.

§ 260. **When other authentication necessary.**— In the following cases a certificate of acknowledgment or proof is not entitled to be read in evidence or recorded unless authenticated by the following officers, respectively:

1. Where the original certificate of acknowledgment or proof is made by a commissioner appointed by the governor, by the secretary of state.[1]

2. Where made by a judge of a court of record in Canada, by the clerk of the court.

3. Where made by the officer of a state of the United States, or of the dominion of Canada authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein, by the secretary of state of the state, or the clerk, register, recorder or prothonotary of the county in which the officer making the original certificate resided, when the certificate was made, or by the clerk of any court of that county, having by law a seal.[2]

Formerly chapter 195, section 2, Laws of 1848, as amended by chapter 729, Laws of 1894;[3] chapter 270, section 4, Laws of 1850; chapter 208, section 1, Laws of 1870; chapter 136, section 2, Laws of 1875.

Note on Section 260, Supra. The acts enabling the appointments of commissioners by the governor are designated under section 249 of this act.[4]

Contents of Certificates of Authentication. The contents of a certificate of authentication are prescribed by the next section of this act.[5]

[1] *Cf.* chap. 107, Laws of 1895.

[2] *Cf.* chap. 99, Laws of 1891; chap. 729, Laws of 1894.

[3] Note of Commissioners of Statutory Revision to this section.

[4] *Supra*, p. 565.

[5] *Infra*, p. 585.

§ 261. **Contents of certificate of authentication.**—An officer authenticating a certificate of acknowledgment or proof must subjoin or attach to the original certificate a certificate under his hand, and if he has, pursuant to law, an official seal, under such seal. Except when the original certificate is made by a judge of a court of record in Canada, such certificate of authentication must specify that, at the time of taking the acknowledgment or proof, the officer taking it was duly authorized to take the same; that the authenticating officer is acquainted with the former's handwriting, or has compared the signature to the original certificate with that deposited in his office by such officer; and that he verily believes the signature to the original certificate is genuine;[1] and if the original certificate is required to be under seal, he must also certify that he has compared the impression of the seal affixed thereto with the impression of the seal of the officer who took the acknowledgment or proof deposited in his office, and that he verily believes the impression of the seal upon the original certificate is genuine.[1] A clerk's certificate authenticating a certificate of acknowledgment or proof, taken before a judge of a court of record in Canada, must specify that there is such a court; that the judge before whom the acknowledgment of proof was taken, was, when it was taken, a judge thereof; that such court has a seal; that the officer authenticating is clerk thereof; that he is well acquainted with the handwriting of such judge, and verily belives his signature is genuine.

Formerly chapter 270, section 4, Laws of 1850; chapter 136, section 2, Laws of 1875; chapter 195, section 2, Laws of 1848, as amended by chapter 557, Laws of 1867; chapter 208, section 1, Laws of 1870.[2]

Note on this Section. The law touching certificates of authentication was formerly embodied in several acts.[3]

Defects in Authentication. Some defects in a certificate of authentication may be helped out by intendment.[4]

[1] The word *genuine* is printed *gununine* in the Session Laws of 1896, vol. 1, p. 613.

[2] Note of Commissioners of Statutory Revision to this section.

[3] Laws of 1848, chap. 195, § 2, as amd. by Laws of 1867, chap. 557 (As to certificate to acknowledgment taken out of the state but in the Union); Laws of 1858, chap. 308 (N. Y. commissioners); Laws of 1863, chap. 246; Laws of 1865, chap. 421 (Consuls); Laws of 1870, chap. 208 (In Canada).

[4] Thorn v. Mayer, 12 Misc. Rep. 487.

Effect of Omission of Certificate. Where a certificate of authentication is requisite, its omission renders a deed ineffectual as a conveyance of a marketable title.[1] Nothing is better settled than that a purchaser is entitled to a deed or conveyance which will constitute a good record title in his favor. If a deed is not so acknowledged or authenticated as to entitle it to be recorded (if authentication be required), then it is not such a conveyance as satisfies a covenant or contract to convey, and the title may be rejected by the purchaser.[2] Thus it becomes of the first importance that a conveyance shall be well and sufficiently acknowledged, and if authentication of a certificate of acknowledgment or proof be required that it shall also be well and sufficiently authenticated.

[1] Williamson v. Banning, 86 Hun 203.

[2] Irving v. Campbell, 121 N. Y. 353; Jay v. Wilson, 91 Hun, 391.

§ 262. **Recording of conveyances acknowledged or proved without the state, where parties and certifying officer are dead.**— Where the execution of a conveyance of real property within this state is acknowledged or proved according to the laws of any other state of the United States, and a certificate of the acknowledgment or proof signed by the officer taking it is annexed to or indorsed upon the instrument, if such officer and the grantor or mortgagor be dead and the death of all of them be proved by affidavit, sworn to in such state before an officer authorized by its laws to administer an oath therein, the conveyance, with the affidavit or affidavits annexed thereto, on being authenticated as required by this section, may be read in evidence and recorded in the same manner, and with like effect, as if the conveyance was acknowledged or proved and certified as required by the laws of this state. To entitle such conveyance and affidavits to be read in evidence, or recorded, a certificate of the clerk, recorder, register or prothonotary of the county in which the deceased officer resided, authenticating his signature, and also certifying that the conveyance is acknowledged or proved in all respects, as required by the laws of such state, must be annexed to the original certificate; and a like certificate of such clerk, recorder, register or prothonotary, authenticating the signature of the officer, before whom the affidavits proving the deaths were taken, must be annexed to such affidavits. The affidavits on being recorded, are presumptive evidence of the matters of fact, required to be stated therein.

Formerly chapter 259, Laws of 1858, as follows:

AN ACT in relation to the proof or acknowledgment of deeds and other conveyances by persons residing out of this state.

Passed April 15, 1858.

SECTION 1. Any deed or conveyance or other written instrument, affecting real estate within this state, proved or acknowledged in any other state or territory of the United States, according to the laws of such state or territory, where the grantor or grantors of such deed or conveyance and the officer before whom the same shall be proved or acknowledged shall be dead; and when such proof or acknowledgment shall be certified as herein provided, may be recorded in any county of the state, and may be read in evidence in any court of this state, in the same manner and with the like effect as though the same had been proved or acknowledged as required by the laws of this state, provided that the death of the grantor or grantors, and of the officer before whom the same shall be proved or acknowledged, shall be proved by the affidavit of one or more persons, sworn to before some

officer authorized by law to administer oaths in such state or territory, and certified as herein provided.

§ 2. To enlitle[1] such deed or conveyance, or other written instrument, to be read in evidence or recorded in this state, there shall be annexed to the certificate of proof or acknowledgment, signed by such officer, a certificate under the name and official seal of the clerk or register of the county in which such officer resided, specifying that such officer was, at the time of taking such proof or acknowledgment duly authorized to take the same, and that such clerk or register is well acquainted with the handwriting of such officer, and verily believes that the signature to said certificate of proof or acknowledgment is genuine, and that such deed or conveyance or written instrument, is proved or acknowledged in all respects, as required by the laws of such state or territory. There shall also be a like certificate of such clerk or register, attached to the jurat or affidavit, proving the death of the grantor or grantors, and of the officer before whom the deed or written instrument was proved or acknowledged, certifying that such officer was, at the time of taking such affidavit or affidavits, duly authorized to take the same, and that such clerk or register is well acquainted with the handwriting of such officer, and verily believes that the signature to such jurat or affidavit is genuine. Such affidavit or affidavits shall be recorded with such deed or other written instrument, and be presumptive evidence of the facts therein stated.

§ 3. This act shall take effect immediately.[2]

[1] So in original Session Laws of 1858.

[2] Repealed, chap. 547, Laws of 1896.

§ 263. **Proof where witnesses are dead.**— Where the witnesses to a conveyance, authorized to be recorded, are dead, its execution may be proved before any officer authorized to take within the state the acknowledgment and proof of conveyances, other than a commissioner of deeds, a notary public, or a justice of the peace. The proof of the execution must be made by satisfactory evidence of the death of all the witnesses thereto, and of the handwriting of such witnesses, or any one of them, and of the grantor, which evidence, with the name and residence of each witness examined, must be set forth by the officer taking the same, in his certificate of proof. A conveyance so proved, and certified, may be recorded in the proper office, if the original conveyance be at the same time deposited in the same office, there to remain for the inspection of all persons desiring to examine the same. If the conveyance affects real property in two or more counties, a certified copy of the conveyance, with the proof and certificates, may be recorded in each of such counties. Such recording and deposit are constructive notice of the execution of such conveyance to all purchasers of the same real property, or any part thereof, from the same vendor, his heirs or assigns, subsequent to such recording, but do not entitle the conveyance or the record thereof, or a transcript of the record to be read in evidence.

Formerly 1 Revised Statutes, 761, sections 30, 31, 32, 33:

§ 30. Where the witnesses to any conveyance, authorised by this Chapter to be recorded, shall be dead, then the same may be proved before any officer authorised to take the proof and acknowledgment of deeds, other than commissioners of deeds, and county judges not of the degree of counsel in the supreme court.[1]

§ 31. The proof of the execution of any conveyance in such case, shall be made by satisfactory evidence of the death of all the witnesses thereto, and of the handwriting of such witnesses, or any one of them, and of the grantor; all which evidence, with the names and places of residence of the witnesses examined before him, shall be set forth by the officer taking the same, in his certificate of such proof.[2]

§ 32. Any conveyance proved and certified, pursuant to the two last sections, may be recorded in the proper office, if the original deed be at the same time deposited in the same office, there to remain, for the inspection of all persons desiring to examine the same.[3]

§ 33. The recording and deposit of any conveyance, proved and certified according to the provisions of the three last sections, shall be constructive

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] Repealed, chap. 547, Laws of 1896.

notice of the execution of such conveyance, to all purchasers subsequent to such recording; but such proof, recording, or deposit, shall not entitle such conveyance, or the record thereof, or the transcript of such record, to be read in evidence.[1]

Note on Section 263. The foregoing section of this act relates to proof for the purpose of the recording of conveyances, and not to their effect as evidence in judicial proceedings.[2] This section is predicated of an unusual set of circumstances, and in view of that fact unusual care is directed to be observed in proving such deeds. The proof is not to be made before a commissioner of deeds, a notary public or a justice of the peace. It follows that such proof can be made, if within the State, only before the other officers mentioned in section 248 of this act.[3] It is apparent that if deceased witnesses to a deed were in their lifetime hostile to persons in adverse possession, a deed proved under this section might be well proved for the purpose of being recorded, and yet inadequately proved for the purpose of establishing a conclusive title under it.[4]

[1] Repealed, chap. 547, Laws of 1896.

[2] *Cf.* Brown v. Kimball, 25 Wend. 259; Borst v. Empie, 5 N. Y. 33.

[3] *Supra*, p. 563.

[4] *Cf.* Code Civ. Proc. § 936.

§ 264. Recording books.— Different sets of books must be provided by the recording officer of each county, for the recording of deeds and mortgages; in one of which sets, he must record all conveyances and other instruments absolute in their terms delivered to him, pursuant to law, to be so recorded, which are not intended as mortgages, or securities in the nature of mortgages, and in the other set, such mortgages and securities delivered to him.

Formerly 1 Revised Statutes, 756, section 2:

§ 2. Different sets of books shall be provided, by the clerks of the several counties, for the recording of deeds and mortgages; in one of which sets, all conveyances absolute in their terms, and not intended as mortgages, or as securities, in the nature of mortgages, shall be recorded; and in the other set, such mortgages and securities shall be recorded.[1]

Effect of Record in Wrong Book. If a deed of conveyance is recorded in the *liber* of mortgages it is not operative as notice.[2]

Mortgages. A deed absolute on its face, but accompanied by an unrecorded separate instrument of defeasance, or by some conditional bye-agreement operating as a defeasance, must be recorded as a mortgage to be effective as notice.[3] But not every condition is a defeasance for the purposes of this section.[4]

Indexes and Indexing. The index of *libers* of conveyances or mortgages is, however, no part of the record under this act, or its prototype,[5] and a failure to index a recorded conveyance or a mistake in indexing, does not destroy its effect as notice.[6] The purchaser duly delivering an instrument for record is not responsible for the errors of the clerk.[7] For cognate cases see those cited under section 269 of this act.

[1] Repealed, chap. 547, Laws of 1896.

[2] § 269, The Real Prop. Law; Gillig v. Maas, 28 N. Y. 191; Stoddard v. Rotton, 5 Bosw. 378; The Bank for Savings v. Frank, 45 N. Y. Super. Ct. 404. And see cases cited under § 269, The Real Prop. Law.

[3] § 269, The Real Prop. Law; Decker v. Leonard, 6 Lans. 264; Howells v. Hettrick, 13 App. Div. 366.

[4] Macaulay v. Porter, 71 N. Y. 173; Randall v. Sanders, 87 id. 578; Kraemer v. Adelsberger, 122 id. 467, 476; Holmes v. Grant, 8 Paige, 243, 260.

[5] Mutual Life Ins. Co. v. Dake, 1 Abb. N. C. 381; affd., 87 N. Y. 257.

[6] Mutual Life Ins. Co. v. Dake, 87 N. Y. 257; Bedford v. Tupper, 30 Hun, 174.

[7] Simonson v. Falihee, 25 Hun, 570; Peck v. Mallams, 10 N. Y. 509, 519. *Cf.* Muehlberger v. Schilling, 3 N. Y. Supp. 705; S. C., 19 N. Y. St. Repr. 1.

§ 265. **Indexes.**— Each recording officer must provide, at the expense of his county, proper books for making general indexes of instruments recorded in his office, and must form indexes therein, so as to afford correct and easy reference to the books of record in his office. There must be one set of indexes for mortgages or securities in the nature of mortgages, and another set for conveyances and other instruments not intended as such mortgages or securities. Each set must contain two lists in alphabetical order, one consisting of the names of the grantors or mortgagors, followed by the names of their grantees or mortgagees, and the other list consisting of the names of the grantees or mortgagees, followed by the names of their grantors or mortgagors, with proper blanks in each class of names, for subsequent entries, which entries must be made as instruments are delivered for record. This section, so far as relates to the preparation of new indexes, shall not apply to a county where the recording officer now has general numerical indexes. A recording officer who records a conveyance of real property, sold by virtue of an execution, or by a sheriff, referee or other person, pursuant to a judgment, the granting clause whereof states whose right, title or interest was sold, must insert in the proper index, under the head "grantors," the name of the officer executing the conveyance, and of each person whose right, title or interest is so stated to have been sold.[1]

Formerly chapter 199, section 1, Laws of 1843:

§ 1. The clerks of the several counties in this state, and the register of the city and county of New York, in those counties in which general indices of deeds and mortgages have not been made and preserved, according to the act passed April 18, 1826, shall provide proper books for making such general indices, and shall form indices therein in such manner as to afford correct and easy reference to the several books of record in their offices respectively. There shall be one book for deeds and another for mortgages. In each book there shall be made double entries, or two lists of names in alphabetical order. In one shall be set the names of the grantors or mortgagors, followed by the names of their grantees or mortgagees; and in the other, the names of the grantees or mortgagees, followed by the names of the grantors or mortgagors, leaving proper blanks between each class of names for subsequent entries; and in those counties in which indices were made under the said act of April 18, 1826 and have been preserved, the several clerks shall complete the same by bringing them down to the present time, and in either case, the said clerk shall keep the said indices complete by adding to the lists as deeds and mortgages shall be sent in to be recorded.[2]

[1] The last paragraph is new. See note of Commissioners of Statutory Revision to this section.

[2] Repealed, chap. 547, Laws of 1896.

Note on Section 265, Supra. It was stated under the preceding section that a failure to index a recorded conveyance, or a mistake in indexing same, does not destroy its effect as notice to subsequent purchasers.[1]

Indexes in New York and Brooklyn. The laws concerning indexes in the city of New York were embodied in the Consolidation Act.[2] The existing law regulating the block system for the borough of Manhattan dates from 1897.[3] It provides for indexes.[4] The law regulating indexes and "block system" in the city and borough of Brooklyn dates from 1894.[5]

Indexes and Indexing. As the index of *libers* of conveyances or mortgages is no part of the record under this act, and those from which it is derived, a failure to index a conveyance, duly left for record, does not destroy the effect of the instrument, so entitled to be recorded, as notice.[6]

[1] *Supra*, p. 591.

[2] Laws of 1882, chap. 410, § 1752; Laws of 1888, chap. 321.

[3] Laws of 1887, chap. 718; Laws of 1889, chap. 349, and see next note.

[4] Laws of 1887, chap. 718; Laws of 1889, chap. 349, §§ 8, 9, 15, 17; amended, Laws of 1890, chap. 166; Laws of 1892, chap. 412, §§ 14, 15, 16, 17; Laws of 1893, chap. 536; *et vide infra*, p. 605.

[5] Laws of 1894, chap. 365; amended, Laws of 1895, chaps. 71, 739, and by Laws of 1896, chap. 754; Matter of Kenna, 98 Hun, 178.

[6] Droge v. Cree, 14 N. Y. Supp. 300; Howells v. Hettrick, 13 App. Div. 366; *et supra*, p. 591; *et infra*, p. 605.

§ 266. **Order of recording.**—Every instrument, entitled to be recorded, must be recorded by the recording officer in the order and as of the time of its delivery to him therefor, and is considered recorded from the time of such delivery.

Formerly 1 Revised Statutes, 760, section 24:

§ 24. Every conveyance entitled by law to be recorded, shall be recorded in the order, and as of the time, when the same shall be delivered to the clerk for that purpose, and shall be considered as recorded, from the time of such delivery.[1]

Note on this Section. Similar statutes to 1 Revised Statutes, 760 section 2, were made at an early date in this State.[2]

What Constitutes a Recording under the Statute. A leaving of a conveyance with the clerk or register (at least with instructions to record it and payment of fees) completes the record,[3] and a failure on the part of the officer ought not to prejudice a party who has complied with the statute.[4]

Mandamus. When the right is clear a clerk or other recording officer can be compelled by mandamus to record an instrument duly entitled to be recorded.[5]

[1] Repealed, chap. 547, Laws of 1896.

[2] Chap. 155, Laws of 1801; 1 K. & R. 478, § 5; 1 R. L. 369, § 5; chap 45, Laws of 1822; Jackson ex dem., etc., v. Van Valkenburgh, 8 Cow. 260.

[3] Simonson v. Falihee, 25 Hun, 570; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257, 264.

[4] Droge v. Cree, 14 N. Y. Supp. 300.

[5] People ex rel. Bennett v. Miller, 39 Hun, 463; People ex rel. Lewkowitz v. Fitzgerald, 29 Abb. N. C. 471.

§ 267. **Certificate to be recorded.**— The certificate of the acknowledgment or proof of the execution of an instrument, and the certificate authenticating the signature or seal of the officer so certifying, or both, if required, must be recorded together with the instrument so acknowledged or proved; otherwise neither the record of the instrument nor a transcript thereof can be read in evidence.

Formerly 1 Revised Statutes, 759, section 20:

§ 20. The certificate of the proof or acknowledgment of every conveyance, and the certificate of the genuineness of the signature of any judge or commissioner, in the cases where such last mentioned certificate is required, shall be recorded, together with the conveyance, so proved or acknowledged; and unless the said certificates be so recorded, neither the record of such conveyance, nor the transcript thereof, shall be read, or received in evidence.[1]

Observation on Section 267, Supra. This section furnishes not only a mandate to the recording officer to record the certificates on conveyances, but it also prescribes the penalty for a failure to record certificates on such conveyances, viz., that it disentitles the record to be read in evidence. How far the omission to record a certificate may destroy the effect of a deed, otherwise duly recorded and indexed, as constructive notice to subsequent purchasers, presents quite a different question, and one that ought not to be speedily dismissed as adjudicated.[2]

[1] *Cf.* Laws of 1818, p. 44, § 5; 1 R. S. 759, § 20; repealed by chap. 547, Laws of 1896.

[2] Dingley v. Bon, 130 N. Y. 607; *sed vide supra*, pp. 549, 577, 578, 579, 586; Armstrong v. Combs, 15 App. Div. 246.

§ 268. **Time of recording.**— The recording officer must make an entry in the record, immediately after the copy of every instrument recorded by him, stating the hour, day, month and year, when it was recorded, and must indorse upon every such instrument a certificate, stating the time as aforesaid, when, and the book and page where, the same was recorded.

Formerly 1 Revised Statutes, 760, section 25:

§ 25. The recording officer shall make an entry in the record, immediately after the copy of every conveyance recorded, specifying the time of the day, month and year, when the said conveyance was recorded, and shall indorse upon every conveyance recorded by him, a certificate, stating the time as aforesaid, when, and the book and page where, the same was recorded.[1]

Comment. This legislation is supplemental to that which affords priority of rights to those who obtain priority of record. That priority of record confers priority is, however, subject to many exceptions before denoted under the various sections of this article.

Instruments Simultaneously Executed. Instruments executed at the same time, intended to be equal liens, obtain no preference over one another by reason of priority of record.[2]

Purchase-money Mortgages. So a purchase-money mortgage may prevail over a conveyance first recorded.[3]

[1] *Cf.* 1 R. L. 370, § 5; 1 R. S. 760, § 25, is repealed by chap. 547, Laws of 1896.

[2] *Supra*, p. 552; Greene v. Warnick, 64 N. Y. 220.

[3] *Supra*, p. 551; Lane v. Nickerson, 17 Hun, 148.

§ 269. **Certain deeds deemed mortgages.**—A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time.

Formerly 1 Revised Statutes, 756, section 3:

§ 3. 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.[1]

Note on this Enactment. The substance of this section dates from the year 1774.[2] A similar provision was enacted in 1801—"An act concerning Mortgages"[3]—and re-enacted in 1813.[4] From thence it passed to the Revised Statutes,[5] and finally into the 269th section of this act.

Record must follow Statute. As registration or recording is notice only by virtue of some statute, the statute must be strictly followed to be effective.[6]

Effect of Deed, Absolute on its Face, Inter Partes and as to Third Persons. If an absolute conveyance is intended as security, it is a mortgage, nevertheless.[7] And this fact may, in some instances, be proved by oral evidence,[8] notwithstanding it is recorded as a deed. But where a deed, absolute on its face, is accompanied by a separate defeasance or by some conditional bye-agreement,

[1] Repealed, chap. 547, Laws of 1896.

[2] Chap. 39, Laws of 1774.

[3] Chap. 156, Laws of 1801; 1 K. & R. 480, § 3. See Clute v. Robison, 2 Johns. 595, on this act.

[4] 1 R. L. 372, § 3; Laws of 1822, p. 262, § 3. See White v. Moore, 1 Paige, 551, 553; Brown v. Dean, 3 Wend. 208, on this act.

[5] 1 R. S. 756, § 3.

[6] James v. Morey, 2 Cow. 246, revg. James v. Johnson, 6 Johns. Ch. 417.

[7] Clark v. Henry, 2 Cow. 324; Dey v. Dunham, 2 Johns. Ch. 182, 189; Kraemer v. Adelsberger, 122 N. Y. 467; Weed v. Stevenson, Clarke Ch. 166.

[8] Cook v. Eaton, 16 Barb. 439.

showing that the deed was intended as security, both must be recorded as a mortgage to protect the holders of such security against the claim of subsequent *bona fide* purchasers from the mortgagor.[1] But not every such conditional agreement is a defeasance, which brings a deed within this section, and requires both to be recorded as a mortgage.[2]

The Record of an Agreement. The prior record of an agreement operating as an estoppel will not always prevail over a subsequent mortgage from the same person who made the agreement.[3]

Record of Assignment of Mortgage. An assignment of a mortgage need not be recorded as against a subsequent purchaser of the premises, but only as against a subsequent purchaser of the mortgage itself.[4]

[1] Grimstone v. Carter, 3 Paige, 421; Stoddard v. Rotton, 5 Bosw. 378; The Bank for Savings v. Frank, 45 N. Y. Super. Ct. 404; Warner v. Winslow, 1 Sandf. Ch. 430; Weed v. Stevenson, Clarke Ch. 166; Purdy v. Huntington, 42 N. Y. 334, 343; Westfall v. Westfall, 16 Hun, 541; Howells v. Hettrick, 13 App. Div. 366; Abraham v. Mayer, 7 Misc. Rep. 250, and see cases cited *supra* under § 264, The Real Prop. Law.

[2] Macaulay v. Porter, 71 N. Y. 173; Randall v. Sanders, 87 id. 578; Kraemer v. Adelsberger, 122 id. 467, 476; Holmes v. Grant, 8 Paige, 243, 260; Brown v. Dewey, 1 Sandf. Ch. 56.

[3] Oliphant v. Burns, 146 N. Y. 218.

[4] *Supra*, p. 551; Curtis v. Moore, 152 N. Y. 159, *et infra*, p. 600.

§ 270. **Recording discharge of mortgage.**— A mortgage, registered or recorded, must be discharged upon the record thereof, by the recording officer, when there is presented to him a certificate signed by the mortgagee, his personal representative or assignee, and acknowledged or proved, and certified, in like manner as to entitle a conveyance to be recorded, specifying that the mortgage has been paid, or otherwise satisfied and discharged. The certificate of discharge, and the certificates of its acknowledgment or proof, must be recorded; and a reference must be made to the book and page containing such record, in the minute of the discharge of such mortgage, made by the officer upon the record thereof.

Formerly 1 Revised Statutes, 761, sections 28, 29:

§ 28. 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.[1]

§ 29. 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, in the minute of the discharge of such mortgage, made by the officer upon the record thereof.[2]

Note on Section 270, Supra. The old statute (1 R. S. 373[3]) was varied by the Revised Statutes so as to require the filing of the "satisfaction."[4]

Executors and Trustees. A surviving executor is entitled to discharge a mortgage.[5] But a trustee cannot discharge a mortgage in contravention of a trust expressed therein.[6] If improperly discharged an action lies to set aside the satisfaction.[7]

The Clerk. A clerk's erroneous minute or memorandum of satisfaction of mortgage on the margin of the page of the liber where the mortgage is recorded, does not affect the validity of the satisfaction itself, even as to *bona fide* purchasers who rely thereon.[8]

[1] Repealed, chap. 547, Laws of 1896.
[2] Repealed, chap. 547, Laws of 1896.
[3] § 4.
[4] Note of Revisers to 1 R. S. 761, §§ 28, 29.
[5] The People v. Keyser, 28 N. Y. 226.
[6] McPherson v. Rollins, 107 N. Y. 316; Kirsch v. Tozier, 143 id. 390; Waterman v. Webster, 33 Hun, 611.
[7] Weaver v. Edwards, 39 Hun, 233.
[8] Viele v. Judson, 82 N. Y. 32.

A clerk may be compelled to satisfy a mortgage by mandamus, but only where the right is clear.[1]

Foreign Executor. An executor whose letters testamentary were issued in another State is a "personal representative" within the meaning of this section of this act, and he may execute a satisfaction of mortgage as therein provided, for the purpose of discharging upon the record a mortgage made to his testator.[2]

Recorded Assignment of Mortgage; Notice to Whom. The record of an assignment of mortgage is notice of the rights of the assignee thereof as against subsequent acts of the mortgagee. It is not constructive notice to subsequent purchasers and incumbrancers of the land. Being on record, the assignment is notice that the mortgagee can no longer assign or discharge the mortgage.[3]

[1] People ex rel. Bennett v. Miller, 39 Hun, 463.

[2] People ex rel. Lewkowitz v. Fitzgerald, 29 Abb. N. C. 471.

[3] *Supra*, p. 551; Curtis v. Moore, 152 N. Y. 159; Viele v. Judson, 82 id. 32; Bacon v. Van Schoonhoven, 87 id. 446; Frear v. Sweet, 118 id. 454, 464. *Cf.* Larned v. Donovan, 31 Abb. N. C. 308. See § 271, The Real Prop. Law, for exception to the rule "that recording constitutes notice."

§ 271. **Effect of recording assignment of mortgage.**— The recording of an assignment of a mortgage is not in itself, a notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate a payment made by either of them to the mortgagee.

Formerly 1 Revised Statutes, 763, section 41:

§ 41. The recording of an assignment of a mortgage, shall not be deemed, in itself, notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee.[1]

Former Law. It was, before the Revised Statutes, the law that payment by mortgagor to mortgagee, after assignment by the latter, but before actual notice to the mortgagor, must be allowed to the latter.[2]

The Revised Statutes. The foregoing section of the Revised Statutes, therefore, conformed to the pre-existing law, and relieved mortgagors from the ordinary effect of Recording Acts by declaring that such record should not be constructive notice to them.[3]

Section Refers only to Certain Persons. This section has no reference to any other persons besides mortgagors, their heirs and personal representatives. It does not apply to purchasers of equities of redemption.[4] The mortgagor is not bound by subsequent assignments of the mortgage, without actual notice thereof, and payments by him to the holder of the mortgage, if made without actual notice, are protected even after a recorded assignment of such mortgage.[5]

Assignments of Mortgages, etc. For cases touching the record, and relative priorities, of mortgages, assignments of mortgages, etc., under this article, see under section 241 of this act.[6]

[1] Repealed, chap. 547, Laws of 1896.

[2] James v. Morey, 2 Cow. 246, 288.

[3] Revisers' note to 1 R. S. 763, § 41; Brewster v. Carnes, 103 N. Y. 556.

[4] Brewster v. Carnes, 103 N. Y. 556; Larned v. Donovan, 31 Abb. N. C. 308, 313; 84 Hun, 533; 155 N. Y. 341.

[5] Pettus v. McGowan; 37 Hun, 409; O'Callaghan v. Barrett, 21 N. Y. Supp. 368; Ely v. Schofield, 35 Barb. 330; Kelly v. Bruce, 17 Wkly. Dig. 39; Van Keuren v. Corkins, 66 N. Y. 77.

[6] *Supra*, p. 551.

§ 272. **Recording of conveyances made by treasurer of Connecticut.**— A conveyance of real property, executed at any time since the tenth day of March, eighteen hundred and twenty-five, by the treasurer of the state of Connecticut, acknowledged by him before the secretary of state of such state, and the acknowledgment of which is certified by such secretary of state under the seal of such state, in the manner required for the acknowledgment and certification of a conveyance within this state, may be recorded in the proper office within this state, without further proof thereof.

Formerly 1 Revised Statutes, 760, section 21:

§ 21. All conveyances of real estate, executed since the tenth day of March, one thousand eight hundred and twenty-five, or hereafter to be executed, by the treasurer of the state of Connecticut, which shall be acknowledged by him before the secretary of state of the state of Connecticut, and the acknowledgment of which, shall be certified by the said secretary, under the seal of the said state, in the manner herein prescribed, may be recorded in the proper offices within this state, without further proof thereof; and every such conveyance, or the record thereof, or the transcript of such record, duly certified, may be read in evidence, as if such conveyance had been acknowledged before a justice of the supreme court.[1]

Note. The Legislature of this State, by an act passed March 12, 1813,[2] rendered valid all conveyances of real estate within this State, made to the State of Connecticut, for the security and benefit of the school fund thereof, and authorized the same to be conveyed by the State of Connecticut. In 1825 the act of 1813 was amended by the Legislature of New York, and section 2 of such act provided "that all deeds or other conveyances of real estate to be executed by the treasurer of said State of Connecticut, and which shall be acknowledged before and certified by the secretary of said State, under the seal thereof, may be recorded in the proper office of this State."[3]

[1] See chap. 29, Laws of 1825, at p. 35, for the original enactment. 1 R. S. 760, § 21, is now repealed. Laws of 1896, chap. 547.

[2] Laws of 1830, p. 80.

[3] Chap. 29, Laws of 1825.

§ 273. **Revocation to be recorded.**— A power of attorney or other instrument, recorded pursuant to this article, is not deemed revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power was recorded.

Formerly 1 Revised Statutes, 763, section 40:

§ 40. No letter or other instrument so recorded, shall be deemed to be revoked by any act of the party to 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.[1]

Power of Attorney, when Revoked. A power of attorney is revoked as to third persons only from the time they have notice of the revocation. To revoke a power of attorney duly recorded, it is necessary as to third persons to record the revocation.[2] In another State, it has been held, under a similar statute, that a recorded power of attorney to convey lands remains in force as to purchasers in good faith, without notice, from the attorney, though the grantor himself, in the meantime, conveys the same lands by a deed which remains unrecorded.[3]

[1] Repealed, chap. 547, Laws of 1896.
[2] Williams v. Birbeck, Hoff. Ch. 359.
[3] Gratz v. Land & Imp. Co., 82 Fed. Rep. 381.

§ 274. **Penalty for using long forms of covenants.**— The recording officer of any county may charge for the recording of an instrument containing any of the covenants mentioned in sections two hundred and eighteen and two hundred and nineteen of this chapter, at large, instead of the short forms thereof, in said sections contained, the sum of five dollars in addition to the fees chargeable by law for such recording.

Formerly chapter 475, Laws of 1890, section 7:

§ 7. The register or county clerk of the county of New York and the county of Kings shall be entitled to charge for the recording of any instrument containing the above-mentioned covenants, or any of them at large, instead of the short forms thereof, in this act contained, the sum of five dollars in addition to the fee chargeable by law for such recording.[1]

Note on this Section. For the short forms of covenants and the construction thereof, see article VII of this act.[2] This section is a survival of chapter 475, Laws of 1890, entitled, "An act to provide for short forms of deeds and mortgages." The original act was designed to encourage shorter forms of conveyances than those so long employed in this State. To attain this object certain sentences when employed in grants of freehold interests in real estate were by statute declared to mean the same as the longer set of words, theretofore commonly employed in conveyances of freeholds in New York.[3] The substance of the act in question has been now re-enacted in The Real Property Law and the act of 1890 repealed.[3]

Construction of Section 274 Supra. Section 274 prescribes the penalty for using longer forms than those prescribed in sections 218 and 219 of this act. As in the case of all penal laws, this section cannot be extended by implication to sections 235, 236 and 237[4] of this act, prescribing construction of certain short forms of covenants in mortgages on leases. But without the penalty the shorter forms of mortgages on leases are now likely to be employed. The reform instituted by the acts in question was to relieve the public record offices from the necessity of transcribing prolix conveyances, thereby encumbering the public records, and in the course of centuries necessitating large and costly depositories. That such reform is only begun is obvious. That it might be much extended with advantage is also apparent. This section and sections 218, 219 relate only to grants of freehold interests.

[1] Repealed, chap. 547, Laws of 1896.

[2] §§ 218, 219, 220, 221, 222, 223, The Real Prop. Law.

[3] §§ 218, 219, The Real Prop. Law, pp. 503, 505, *supra*.

[4] Added by chap. 338, Laws of 1898, to The Real Prop. Law.

§ 275. **Certain acts not affected.**— Nothing contained in this article repeals or affects any act providing for recording and indexing instruments affecting real property in the city of New York, according to city blocks or other limited areas.

Note. This section is new.[1] The acts not to be affected by this article are generally referred to under section 265 of this act.[2]

Block System. In 1887 "An act to provide for the recording and indexing of conveyances and instruments relating to land in the city of New York, according to limited areas,"[3] was passed. This act made provision for the "block system" and for the registration and execution of conveyances according to that system. In 1888 the operation of such act was extended.[4] In 1889 an act was passed regulating the recording and indexing of instruments affecting land in the city of New York according to the "block system."[5] These acts have been subsequently amended[6] or supplemented.[7]

[1] Note of Commissioners of Statutory Revision to this section.
[2] *Supra*, p. 593.
[3] Chap. 718, Laws of 1887.
[4] Chap. 321, Laws of 1888.
[5] Chap. 349, Laws of 1889.
[6] Chap. 166, Laws of 1890.
[7] Chap. 412, Laws of 1892; chap. 536, Laws of 1893.

§ 276. **Actions to have certain instruments cancelled of record.**— An owner of real property or of any undivided part thereof or interest therein, may maintain an action to have any recorded instrument in writing relating to the same, other than those required by law to be recorded, declared void or invalid, or to have the same cancelled of record as to said real property, or his undivided part thereof or interest therein.

Formerly chapter 530, Laws of 1880, sections 1, 2:

SECTION 1. When any agreement, contract or instrument in writing, relating to real estate, other than those required by law to be recorded, shall have been recorded, or shall be hereafter recorded in the office of the clerk or register of any county in this state, any owner of such real estate, or of any undivided part thereof, or of any interest therein, who claims that agreement, contract or instrument in writing is invalid or void, or that the same cannot be enforced as against him, either in whole or in part, may bring and maintain, in any court of competent jurisdiction, an action for the purpose of having such agreement, contract or instrument in writing declared void, or invalid, or for the purpose of being relieved therefrom and to have the same canceled or discharged of record, as to said real estate or his undivided part thereof or interest therein, either wholly or as to such portion of such agreement, contract or instrument in writing as may be void or invalid, or which cannot be enforced as against him.[1]

§ 2. This act shall take effect immediately.[2]

Former Law. Prior to the foregoing enactment in 1880, the record of a contract of sale of lands was ineffectual, except to preserve evidence. The record thereof was not constructive notice and an action did not lie to cancel it as a cloud on title.[3]

When Action Lies. An action lies independently of statute to cancel a forged deed,[4] or a fraudulent deed.[5] But not a deed void on its face.[6] A party out of possession may sustain such an action, only when authorized by statute, or where special grounds for equitable relief exist, aside from the mere allegation of title.[7]

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] See cases cited *supra*, p. 559, under § 244, The Real Prop. Law.

[4] Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

[5] Lattin v. McCarty, 41 N. Y. 107.

[6] Cox v. Cleft, 2 N. Y. 118; Dederer v. Voorhies, 81 id. 153. *Cf.* Sanders v. Down, 141 id. 422; Swarthout v. Ranier, 143 id. 499; Rapps v. Gottlieb, 142 id. 164.

[7] Moores v. Townshend, 102 N. Y. 387. *Cf.* Trustees v. Bowman, 136 id. 521.

§ 277. **Officers guilty of malfeasance liable for damages.**—An officer authorized to take the acknowledgment or proof of a conveyance or other instrument, or to certify such proof or acknowledgment, or to record the same, who is guilty of malfeasance or fraudulent practice in the execution of any duty prescribed by law in relation thereto, is liable in damages to the person injured.

Formerly 1 Revised Statutes, 762, section 35:

§ 35. Every judge, officer, or other person, within this state, authorised to take the acknowledgment or proof of any conveyance, and every clerk of any county, or his deputy, who shall be guilty of any malfeasance, or fraudulent practice in the execution of the duties prescribed to them by law, in relation to the taking, or certifying, the proof or acknowledgment, or the recording, or certifying, any record of any such conveyance, mortgage, or instrument in writing, or in relation to the cancelling of any mortgage, shall, upon conviction, be adjudged guilty of a misdemeanor, and be subject to punishment by fine and imprisonment, and shall also be liable in damages to the party injured.[1]

Note. The Penal Code now contains other penal provisions, formerly contained in the Revised Statutes.[2]

[1] Repealed, chap. 547, Laws of 1896. [2] §§ 162, 163 and 164, Penal Code.

ARTICLE IX.

The Descent of Real Property.

SECTION 280. Definitions and use of terms; effect of article.
281. General rule of descent.
282. Lineal descendants of equal degree.
283. Lineal descendants of unequal degree.
284. When father inherits.
285. When mother inherits.
286. When collateral relatives inherit; collateral relatives of equal degrees.
287. Brothers and sisters and their descendants.
288. Brothers and sisters of father and mother and their descendants.
289. Illegitimate children.
290. Relatives of the half-blood.
291. Cases not hereinbefore provided for.
292. Posthumous children and relatives.
293. Inheritance, sole or in common.
294. Alienism of ancestor.
295. Advancements.
296. How advancements adjusted.

§ 280. **Definitions and use of terms; effect of article.**—The term "real property" as used in this article, includes every estate, interest and right, legal and equitable in lands, tenements and hereditaments except such as are determined or extinguished by the death of an intestate seized or possessed thereof, or in any manner entitled thereto; leases for years, estates for the life of another person; and real property held in trust, not devised by the beneficiary. "Inheritance" means real property as herein defined, descended according to the provisions of this article; the expressions "where the inheritance shall have come to the intestate on the part of the father" or "mother," as the case may be, 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. When in this article a person is described as living, it means living at the time of the death of the intestate from whom the descent came; when he is described as having died, it means that he died before such intestate. This article does not affect a limitation of an estate by deed or will, or tenancy by the curtesy or dower.

Formerly 1 Revised Statutes, 754, sections 20, 21, 27, and 1 Revised Statutes, 755, sections 28, 29:

§ 20. The estate of a husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of this Chapter, nor shall the same affect any limitation of any estate by deed or will.[1]

§ 21. 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 this Chapter.[2]

§ 27. The term "real estate," as used in this Chapter, shall be construed to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of an intestate, seised or possessed thereof, or in any manner entitled thereto, and except leases for years, and estates for the life of another person; and the term "inheritance," as used in this Chapter, shall be understood to mean real estate, as herein defined, descended according to the provisions of this Chapter.[3]

§ 28. 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.[4]

§ 29. The expressions used in this 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.[5] [6]

Observations on Section 280, Supra. The Commissioners of Statutory Revision announce that they did not intend to change the antecedent law by this section of The Real Property Law.[7] But by the transposition of clauses necessary to combine so many discordant sections in one, it has been feared by some persons that leases for years may now be included in the term "real property," contrary to the former statute and practice.[8] Such an interpretation seems, however, hardly probable.

[1] Repealed by chap. 547, Laws of 1896; The Real Prop. Law, art. 10, *infra*.

[2] Repealed by chap. 547, Laws of 1896; The Real Prop. Law, art. 10, *infra*.

[3] Repealed by chap. 547, Laws of 1896; The Real Prop. Law, art. 10, *infra*.

[4] Repealed by chap. 547, Laws of 1896; The Real Prop. Law, art. 10, *infra*.

[5] Repealed by chap. 547, Laws of 1896; The Real Prop. Law, art. 10, *infra*.

[6] The meaning of this section is illustrated, *infra*, under § 284, The Real Prop. Law.

[7] Note to § 280, The Real Prop. Law, Appendix I, *infra*.

[8] See a technical and professional leading article in The New York *Sun*, Dec. 10, 1896.

Tenants by Curtesy and in Dower. If we consider this strangely composite section of the new law in the order of the re-enacted provisions, we shall first consider the section of the Revised Statutes saving tenancy by the curtesy, and the rights of tenant in dower.[1] Tenancy by the curtesy was an incident of the old socage tenure,[2] and when entails were abolished and lands were made allodial in New York it was expressly saved and still exists.[3] Curtesy is a legal estate for life,[4] dependent on marriage, seisin, issue born alive and death of wife.[5] *Pedis possessio*, or actual entry, or seisin, on wild lands of the wife is not necessary in this State.[6] A wife's dower was also an incident of the socage tenure.[7] Estates in dower were[8] extended to lands made allodial and retained by the Revised Statutes.[9] We have seen that by the common law aliens had neither dower nor curtesy.[10] While such estates are saved by this section of the statute they are not descendible.[11]

Article IX, Supra, no Reference to Deeds or Wills. It was also expressly enacted by the Revised Statutes that the chapter on descents had no application to any limitation of any estate by deed or will.[12] It is confined to successions *ab intestato*. It was not intended to affect the construction of deeds or wills.[13]

1 Revised Statutes, 754, Section 21, Supra. Referring to section 21 of the Revised Statutes above set out, it should be noted that it referred wholly to an estate of *cestui que use*.[14] It was taken from the 4th section of the revised Statute of Uses of 1787.[15]

1 Revised Statutes, 754, Section 27, Supra. Referring to 1 Revised Statutes, 754, section 27, above set forth, it will be observed that

[1] 1 R. S. 754, § 20.

[2] *Supra*, p. 39.

[3] Laws of 1782, chap. 2; 2 J. & V. 67; 1 id. 245, § 4; 1 K. & R. 44; 1 R. L. 52, § 4; Bertles v. Nunan, 92 N. Y. 152, 160; Leach v. Leach, 21 Hun, 381.

[4] Adair v. Lott, 3 Hill, 182.

[5] Graham v. Luddington, 19 Hun, 246; Billings v. Baker, 28 Barb. 343; Jackson v. Jackson, 5 Cow. 74; Adair v. Lott, 3 Hill, 182; Dunscomb v. Dunscomb, 1 Johns. Ch. 508. See as to birth of a child delivered by a Cæsarean operation, Marsellis v. Thalhiman, 2 Paige, 35.

[6] Jackson v. Selleck, 8 Johns. 262; Jackson v. Gilchrist, 15 id. 87, 118. *Sed cf.* Carr v. Anderson, 6 App. Div. 6.

[7] *Supra*, pp. 404, 405.

[8] 2 J. & V. 67, § 6.

[9] 1 R. S. 740; Id. 754, § 20; *supra*, pp. 404, 405.

[10] *Supra*, p. 68.

[11] Jackson ex dem. v. Hendricks, 3 Johns. Cases, 214.

[12] 1 R. S. 754, § 20; *supra*, § 280, The Real Prop. Law.

[13] See Revisers' notes to chap. 2, 1 R. S. 754, § 20.

[14] Revisers' note to 1 R. S. 754, § 21, Appendix II, *infra*.

[15] 2 J. & V. 68; 1 R. L. 74, § 4.

it employs certain terms of the common law, such as lands,[1] tenements[2] and hereditaments,[3] and that without reference to that system of jurisprudence the statute cannot be construed. In general terms it first provides that every estate, interest and right in lands, tenements and hereditaments shall be co-extensive with the term "real estate," and then it proceeds to certain definite exceptions to that general and distributed proposition, to wit: (1) *Estates, rights and interests determined by the death of an intestate seised thereof or entitled thereto.* Such estates, rights and interests as are limited to the life of a person, *ex vi termini*, die with him and do not descend.[4] (2) *Leases for years* pass as at common law to personal representatives.[5] (3) *Estates for the life of another person or pur autre vie*, on the grantee's death were made by statute to pass to personal representatives, and not as at common law to grantee's heir as special occupant.[6] So that this exception of the statute coincides with the statutory change in a rule of law. (4) *Real property held in trust not devised by beneficiary.* The third exception embraces estates of beneficiaries and also coincides with the changes made by the Revised Statutes, for *cestui que trust*[7] then ceased to have an estate,[8] his whole trust estate being vested in trustees and on the death of survivor passing to the Supreme Court.[9]

Seisin, Real Property, Death. Under the present act *seisin* of the ancestor no longer plays such an important part in the law of descent. The maxim "*non jus sed seizina facit stipitem*" has been practically abrogated,[10] as every estate, interest and right, legal and equitable, except such as are extinguished by the death of intestate, is "real estate" and descendible.[11] As a general proposition it may be stated that the term "*real property*," as used in this article on descents, includes all interests in lands not specifically excepted by this section of the statute; whether such interests are in possession, reversion or remainder.[12] The term

[1] See p. 53, *supra*.

[2] See p. 53, *supra*.

[3] See p. 53, *supra*.

[4] *Vide infra*, what estates and interest are not so limited.

[5] *Supra*, p. 117, under § 23, The Real Prop. Law; Code Civ. Proc. § 2712.

[6] *Supra*, p. 119, under § 24, The Real Prop. Law; Smith, Real & Per. Prop. 380.

[7] *Vide supra*, p. 610, under this section.

[8] § 80, The Real Prop. Law.

[9] § 91, The Real Prop. Law.

[10] See notes under next section of The Real Prop. Law, *et supra*, pp. 61, 83, 405.

[11] § 280, The Real Prop. Law; 1 R. S. 754, § 27.

[12] Floyd v. Carow, 88 N. Y. 560, 569; Lakey v. Scott, 15 Week. Dig. 148; Griffeth v. Beecher, 10 Barb. 433.

death, in this section of The Real Property Law, applies only to natural, actual death; it does not apply to civil death such as results from a sentence to imprisonment for life.[1]

Contingent Remainders and Interests. What contingent remainders and interests are descendible, and do not, for the purposes of this statute, terminate with the death of a contingent remainderman, has been before considered.[2] A possibility of reverter is also said to be descendible, but a distinction is made between representation and descent.[3]

Vested Remainders. Vested remainders are estates, and do not terminate with the life of the vested remainderman, but descend unless devised.[4]

Statutory Rules. Rights, titles and interests, which, by statute, pass to executors or administrators, of course do not descend under this article of The Real Property Law.[5]

Fixtures. Fixtures annexed to the freehold descend to the heir.[6] But if annexed for the purposes of trade, they go to the executor or administrator.[7]

Rents. Rents are divided into rent service, rent charge and rent seck.[8] Rent reserved on a grant in fee is a hereditament, descendible and devisable.[9] As socage rents service are saved both by statute and the Constitution, it may be noticed that they are real property and descendible.[10] Rents reserved on terms of years, made after June 7, 1895, are now apportionable.[11] At common law rent could not be apportioned in respect of time, but it is now otherwise.[12] Rent can now be apportioned between heirs

[1] Avery v. Everett, 110 N. Y. 317.

[2] *Supra*, p. 210, under § 49, The Real Prop. Law.

[3] *Supra*, p. 211, under § 49, The Real Prop. Law.

[4] § 49, The Real Prop. Law, *supra*, p. 210; Savage v. Pike, 45 Barb. 464.

[5] § 2712, Code Civ. Proc., formerly 2 R. S. 82, § 6.

[6] 2 R. S. 83, § 7; Ford v. Cobb, 20 N. Y. 344, 347; Potter v. Cromwell, 40 id. 287; McRea v. Cent. Nat. Bank, 66 id. 489,

[7] § 2712, Code Civ. Proc.; Murdock v. Gifford, 18 N. Y. 28.

[8] *Supra*, pp. 89, 104, under § 20, The Real Prop. Law, and under § 21, The Real Prop. Law.

[9] *Supra*, p. 112, under § 21, The Real Prop. Law, and p. 213, *supra*, under § 50, The Real Prop. Law; Van Rensselaer v. Read, 26 N. Y. at p. 564; Cruger v. McLawry, 41 id. 219, 222.

[10] *Supra*, p. 213; Const. of 1894, art. 1, § 11; Smith, Real & Pers. Prop. 13.

[11] § 2720, Code Civ. Proc.; chap. 542, Laws of 1875. The latter act was repealed by The Real Prop. Law, art. 10, *infra*.

[12] See observations, *supra*, p. 452, under § 192, The Real Prop. Law.

and executors and between life tenants and remaindermen, under the present law.[1] Rents reserved to the deceased, which had accrued at the time of his death, if undevised, go to his executors or administrators.[2] But the rents accrued after his death follow the reversion, and go to his heir or devisee as the case may be.[3]

Crops. Grass and fruits, growing or annexed to the freehold, go to the heir[4] or devisee.[5] But when severed from the soil they are personal property, and pass to the administrator.[6] Growing crops, by statute, now go to the administrator.[7]

Pews, Vaults and Graves. Pews are incorporeal hereditaments, and go to heirs or devisees.[8] Private burial grounds continue real estate for all purposes;[9] but the rights of holders of burial lots or vaults are in the same class with pews, incorporeal hereditaments, or usufructuary interests, and descendible.[10]

Mortgaged Lands. In the State of New York a mortgage is not a conveyance of land, but a lien. The mortgagor continues to hold the legal title to the land,[11] and it descends to the mortgagor's heirs, or passes to his devisees, *non obstante* the mortgage.[12] By the English common law the rule was otherwise.[13] So, where mortgagor dies seised of real estate afterwards sold under the mortgage, the surplus moneys are land *quoad* the mortgagor's heirs or devisees are concerned.[14] Otherwise if the mortgagor die after the sale.[15]

Lands Condemned. Land condemned remains land *quoad* the private owner, and descendible until appraisal. If the owner die

[1] § 2720, Code Civ. Proc.

[2] § 2712, Code Civ. Proc.

[3] Payn v. Beal, 4 Den. 405, 410; Dolph v. White, 12 N. Y. 296, 301; Marshall v. Mosely, 20 id. 280, 283.

[4] *Supra*, p. 53, under § 1, The Real Prop. Law; Kain v. Fisher, 6 N. Y. 597; Matter of Chamberlain, 140 id. 390; Warren v Leland, 2 Barb. 613.

[5] Stall v. Wilbur, 77 N. Y, 158. *Cf.* Austin v. Sawyer, 9 Cow. 39.

[6] Cresson v. Stout, 17 Johns. 116; § 2172, Code Civ. Proc.

[7] § 2712, Code Civ. Proc.; Stall v. Wilbur, 77 N. Y. 158.

[8] McNabb v. Pond, 4 Bradf. 7.

[9] Mitchell v. Thorne, 134 N. Y. 536.

[10] Richards v. Northwest Dutch Church, 32 Barb. 42; Freligh v. Platt, 5 Cow. 494.

[11] Waters v. Stewart, 1 Cai. Cas. 47; Jackson ex dem., etc., v. Willard, 4 Johns. 41; Lansing v. Goelet, 9 Cow. 346, 370; Hitchcock v. Harrington, 6 Johns. 290; Runyan v. Mersereau, Jr., 11 id. 534; Trimm v. Marsh, 54 N. Y. 599, 604; Cox v. McBurney, 2 Sandf. 561.

[12] Dunning v. The Ocean Nat. Bank, 61 N. Y. 497.

[13] Tudor, Lead. Cas. Real Prop. 992. note; Miller v. Miller, 22 Misc. Rep. 582.

[14] Dunning v. The Ocean Nat. Bank, 61 N. Y. 497.

[15] Denham v. Cornelli, 67 N. Y. 556.

before appraisal, the award is realty, and descends; if he die after appraisal, the award is personalty, and goes to the administrator of an intestate.[1]

Conversion of Personalty. For the purposes of descent personal estate may be converted into land. This conversion most often takes place by reason of the provisions of a will, *e. g.*, by grant of a power of sale and direction to distribute proceeds.[2] But to constitute such a conversion of personal into real estate or *e converso* the direction, or power of sale, must be express and independent of discretion.[3]

Proceeds of Sale of Infants' Lands. The proceeds of sale of lands belonging to infants or persons *sub tutela* and incompetent, continue land for the purposes of descent, at least until the disability is removed and their election otherwise.[4]

Title by Descent Preferred to Devise. Where the heirs of testator are given by will the same estate or interest they would take by descent their title is by descent and not by devise.[5]

1 Revised Statutes, 755, Section 28. The cases bearing on the substance of former 1 Revised Statutes, 755, sections 28 and 29, are given in the comments on other sections of this act.[6]

Intestate Succession. Degrees of kinship are reckoned in three ways: By going down, by going up and by going sideways, *ex transverso*, *ex latere*, or collaterally, as it is called. The kinship going up is that of ascendants; the kinship coming down is that of descendants; and the kinship reckoned sideways is that of brothers and sisters and their issue, and of uncles and aunts and their issue.[7] When an inheritance goes to the father or the mother of the intestate, it "ascends," not "descends," although "descends" is both in this statute and at common law used as the equivalent of "ascends" or of "intestate succession by an ascendant."[8] By

[1] Ballou v. Ballou, 78 N. Y. 325.

[2] Stagg v. Jackson, 1 N. Y. 206; Horton v. McCoy, 47 id. 21; Hood v. Hood, 85 id. 561. *Cf.* Gourley v. Campbell, 66 id. 169.

[3] White v. Howard, 46 N. Y. 144, 162; Hobson v. Hale, 95 id. 588; Trowbridge v. Metcalf, 5 App. Div. 318, 321; Chamberlain v. Taylor, 105 N. Y. 185; Matter of McComb, 117 id. 378.

[4] Code Civ. Proc. § 2359; Forman v. Marsh, 11 N. Y. 544; Matter of McComb, 117 id. 378, 383; Wells v. Seeley, 47 Hun, 109; Matter of Woodworth, 5 Dem. 156; Valentine v. Wettherill, 31 Barb. 655, 657.

[5] Pyatt v. Waldo, 85 Fed. Rep. 399; Buckley v. Buckley, 11 Barb. 43.

[6] For cases on 1 R. S. 755, § 29, *supra*, see under § 284, *infra*, and Morris v. Ward, 36 N. Y. 587, 593.

[7] *Cf.* Just. Inst. 3, 6, pr.

[8] *E. g.*, §§ 284, 285, The Real Prop. Law.

the law of New York, stated in this chapter, no collateral can inherit if there be either "descendants" or "ascendants" of intestate, and no ascendant can inherit if there be descendants. Thus the three classes are reciprocally opposed or exclusive. The existing law of New York, stated in the succeeding sections of this statute, is very similar to the Roman law, as remodeled by Justinian in the 118th and 127th Novels; and now that "adoption" is grafted on our law, the lawyer can find many more analogies in the civil law[1] than in the common law, although the points of difference between the civil law and the law of New York are sufficiently obvious. Our present system also presents points of resemblance to primitive English or Saxon law,[2] before the establishment of the feudal system; but such similarity is barren of results of value to the student of the existing law in New York, and need only be noticed in passing.

[1] *Vide infra*, "Adoption," under § 281, The Real Prop. Law.

[2] Scrutton, Roman & English Law, *passim*. *Cf.* 2 Black. Comm. 516.

§ 281. **General rule of descent.**— The real property of a person who dies without devising the same shall descend:

1. To his lineal descendants.
2. To his father.
3. To his mother; and
4. To his collateral relatives,

as prescribed in the following sections of this article.

Formerly 1 Revised Statutes, 751, section 1:

SECTION 1. After this chapter shall take effect, the real estate of every 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 in all cases to the rules and regulations hereinafter prescribed.[1]

Title by Descent. Descent or hereditary possession is the title whereby a person, on the death of his ancestor,[2] acquires his estate by right of representation.[3] Title by descent is by operation of law,[4] and all canons of descent are regulated by law and are, therefore, *juris positivi*.[5] Title by descent is favored over title by purchase.[6] The title to real estate in New York by descent is governed wholly by the law of New York — "*lex rei sitæ*."[7]

Early Law of New York. Prior to independence of the Crown, the common law regulated in New York descents *ab intestato*.[8] On the practical cessation of hostilities with England the Legislature immediately turned its attention to the condition of the law, and, in the year 1782, an act was passed regulating descents and converting estates tail into fees simple.[9] This act, *inter alia*, abol-

[1] Repealed by chap. 547, Laws of 1896; The Real Prop. Law, art. 10, *infra*.

[2] The term "ancestor" in this article includes collateral kinsmen. McCarthy v. Marsh, 5 N. Y. 263; Wheeler v. Clutterbuck, 52 id. 67; Conkling v. Brown, 8 Abb. Pr. (N. S.) 350, note; *et vide infra*, under § 290, The Real Prop. Law.

[3] 4 Kent, Comm. 374; 2 Black. Comm. 201.

[4] 2 Black. Comm. 201.

[5] Matter of Mericlo, 63 How. Pr. 62, 65; Miller v. Miller, 18 Hun, 507, 516.

[6] Buckley v. Buckley, 11 Barb. 43; Henriques v. Stirling, 26 App. Div. 30, 35; Pyatt v. Waldo, 85 Fed. Rep. 399.

[7] Lynch v. Clarke, 1 Sandf. Ch. 583, 640; Story, Conf. Laws, § 448; Bollerman v. Blake, 24 Hun, 187, 189. *Cf.* Miller v. Miller, 91 N. Y. 315.

[8] 1 Story on the Const. 77, and note, p. 78.

[9] Laws of 1782, chap. 2.

ished, in effect, primogeniture as a rule of descents[1] within certain degrees, and it made real estates partible inheritances among males and females, or divisible among all issue who were to hold as tenants in common. Failing issue, the estate was partible among collaterals, if not too remote, in like manner, to hold as tenants in common. In cases not provided for, the common law was still to regulate the inheritance or succession.[2] The act of 1782 was defective,[3] and it was repealed, and its substance re-enacted in 1786, in better language and with some changes.[4] The act of 1786 admitted the father of an intestate into the succession, failing lineal descendants, or issue of the body of the intestate; but if the estate was deduced *ex parte materna*, the mother succeeded, failing such issue. Failing both issue of the body and parents, the estate under this act passed to collaterals as tenants in common. Thus, the common-law rule of impartible inheritances which had prevailed under the common law since the feudal settlement,[5] was finally abrogated in New York in almost all cases,[6] and new canons of descent were prescribed. The act of 1786 also changed the rule excluding collaterals of the half blood; it remained in force until the Revised Statutes finally remodeled the act of 1786 in much its present form.[7]

The Common-law Rules of Descent. As prior to the statute of 1782, the common law regulated descent of lands held by the socage tenure in New York,[8] we may briefly consider its leading canons regulating such descent: (I) "Inheritance shall lineally descend to the issue of the person who last died actually seised, *ad infinitum*, but shall never lineally ascend."[9] This rule was of

[1] Terry v. Dayton, 31 Barb. 519, 523. In certain remote cases primogeniture still prevails in this State. The Real Prop. Law, § 291; Hunt v. Kingston, 3 Misc. Rep. 309.

[2] § 291, The Real Prop. Law.

[3] Jackson ex dem., etc., v. Van Zandt, 12 Johns. 169; Medcef Eden's Case, 20 id. 483.

[4] Laws of 1786, chap. 12; 1 J. & V. 245.

[5] 2 Black. Comm. 56. It was, however, some time subsequent to the Conquest before the common law was fully determined in this respect. 2 Hallam, Mid. Ages, 129.

[6] *Vide infra*, under § 290, The Real Prop. Law.

[7] 1 J. & V. 245; 1 Gr. 2c5; 1 K. & R. 44; 1 R. L. 52, 305; 1 R. S. 750. *Cf.* Laws of 1895, chap. 1022.

[8] All the lands in New York were held by this tenure until 1787. Then lands granted by the State were made allodial (2 J. & V. 67). The Revised Statutes made all lands allodial, saving rents, escheats, etc. (1 R. S. 718, § 3). *Supra*, pp. 41, 47, 48.

[9] Watkins, Desc. 88; Cruise, Dig. tit. 29, chap. 3, § 1; 2 Black. Comm. 208; 4 Kent, Comm. 411; Torrey v. Shaw, 3 Edw. Ch. 356, 360.

purely feudal origin,[1] and founded at a time when the succession of the ablest persons to feuds was of paramount importance in the political economy of the State.[2] The importance of the actual seisin of the person last seised was a modification of the rule that descent must be deduced from the first purchaser.[3] The importance of actual seisin in this canon depended in like manner originally on the law of feuds, and is referable to a time when "seisin" meant feudal investiture of the tenant,[4] and not, as now, mere "possession" of an owner.[5] In its primitive meaning, "seisin" was the best test of complete property or ownership, "*jus proprietatis et possessionis.*" (II) The second canon was, "That the male issue should be preferred before the female."[6] This canon is also referable to the feudal law regulating succession to feuds. It is a modified or English form of the "Salic law" which excluded absolutely female succession.[7] (III) The third canon was, "That where there are two or more males, in equal degree, the eldest only shall inherit, but the females altogether."[8] This preference of eldest males is commonly called the right of primogeniture.[9] It prevailed strictly in England, except in localities where some more antique system of law had prevailed by custom. It was the law in New York even after Independence, but prior to the act of 1782.[10] The equal succession of females was also of English origin, and a modification of the feudal system of other countries. (IV) The fourth canon was, "That the lineal descendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done, had he been living."[11] It was this legal conception of an inheritable "feud" that gave rise to the later conception of a "fee

[1] Cruise, Dig. tit. 29, chap. 3, § 15; 4 Kent, Comm. 412; 2 Black. Comm. 211–228.

[2] *Cf.* Wright, Origin of Feudal Tenures, 15.

[3] 2 Black. Comm. 228; Valentine v. Wettherill, 31 Barb. 655, 658.

[4] *Supra*, pp. 61, 83, 405, note 8.

[5] *Supra*, pp. 405, note 8, 611; and under § 30, The Real Prop. Law (note) is denoted the difference between seisin for purposes of descent and a title by purchase; *supra*, p. 143.

[6] Watkins, Desc. 88; Cruise, Dig. tit. 29, chap. 3, § 16; 2 Black. Comm. 212.

[7] 2 Black. Comm. 213.

[8] Watkins, Desc. 89; Cruise, Dig. tit. 29, chap. 3, § 17; 2 Black. Comm. 214.

[9] This purely feudal attribute of tenure survived the abolition of the feudal system (12 Car. II, chap. 24) where it originated. Sandys, History of Gavelkind, 238; Hallam, Mid. Ages, I, 129.

[10] *Supra.*

[11] Watkins, Desc. 89; Cruise, Dig. tit. 29, chap. 3, § 21; 2 Black. Comm. 217.

simple."[1] This taking by representation is called succession *per stirpes*, or according to the roots, since each branch inherits the same share that their root or *stirps* whom they represent would have taken.[2] (V) The fifth canon or rule of descent was, "That on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules."[3] This rule was also evolved from the feudal law, regulating succession to inheritable feuds, it being deemed proper to confine such succession to those of the blood of the first purchaser. But as it worked a hardship to those new feudatories who had no descendants, their collaterals were let into the succession by limiting the feud so as to be held as an ancient feud; *i. e.*, "*ut feudum antiquum.*"[4] (VI) The sixth rule or canon of descent was, "That the collateral heir of the person last seised must be his next collateral kinsman of the whole blood."[5] This exclusion of collaterals of the half blood was also referable to the law regulating succession to feuds. It was the survival of the lords' attempt to limit such succession and promote escheats — escheats being one of the fruits of feudal tenure. (VII) The seventh and last canon or rule of descent was, "That, in collateral inheritances, the male stock shall be preferred to the female; that is, kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near, unless where the lands have, in fact, descended from the female.[6] Thus, the relations on the father's side are admitted *in infinitum* before those on the mother's side are admitted at all, and those of the father's father before those of the father's mother, and so on. All these rules were of feudal origin.[7] If we remember that the person who last died seised is always the *præpositus* at common law, it is not difficult to apply the rules given. The succession to land is then in this order: (*a*) The male stock of the paternal line; (*b*) the

[1] *Supra*, p. 13.

[2] Co.; 1 Inst. 10b.

[3] Watkins, Desc. 89; Cruise, Dig. tit. 29, chap. 23, § 25; 2 Black. Comm. 220; Valentine v. Wettherill, 31 Barb. 655, 658.

[4] 2 Black. Comm. 221; Hyatt v. Pugsley, 33 Barb. 373, 376.

[5] Watkins, Desc. 89; Cruise, Dig. tit. 29, chap. 23, § 45; 2 Black. Comm. 224; Valentine v. Wettherill, 31 Barb. 655, 658.

[6] Watkins, Desc. 89; Cruise, Dig. tit. 29, chap. 3, § 61; 2 Black. Comm. 234.

[7] 4 Kent, Comm. 412. But so was all the common law of land. For a time there was no common law except that relating to land, as personal property was insignificant in value.

female stock of the paternal line; (*c*) the male branches of the female stock of the paternal line; (*d*) the female branches of the female stock of the paternal line; (*e*) the male stock of the maternal line; (*f*) the female branches of the male stock of the maternal line; (*g*) the male branches of the female stock of the maternal line; (*h*) the female branches of the female stock of the maternal line.

Present Statutory Canons of Descent. The act of 1782, as revised in 1786, and subsequently by the Revised Statutes, abrogated the common law in part and originated the canons of descent now prevailing in this State.[1] These canons were only perpetuated by this article of The Real Property Law which professes to make no change in the antecedent law of descent.[2] We may, therefore, consider first the general effect of the act of 1782, as revised in 1786, on the seven canons of the common law above set forth in the text: The first canon, excluding the father, was changed. The second canon, preferring males to females, was abrogated partly, or as far as the statute actually prescribed a course of descents. The third, concerning the rule of primogeniture, was practically, although not entirely, abrogated.[3] The fifth was modified. The sixth, excluding relatives of the half blood, was reversed *sub modo*.[4] The seventh, which had little application in New York, except as a rule of last resort in cases not provided for by the statute of 1786,[5] was also abrogated.

Section 281, The Real Property Law. Section 281 of this act is virtually the same as section 1 of chapter 2 of part II of the Revised Statutes, on Descents.[6] Both sections profess to be incomplete without reference to certain complementary sections of the respective statutes. Indeed, both of the sections in question so expressly state. Thus it is that this article[7] of The Real Property Law embraces interdependent sections, the whole making one complete Statute of Descents.[8] In so far as section 281 of

[1] Valentine v. Wettherill, 31 Barb. 655, 659; Laws of 1782, chap. 2; Laws of 1786, chap. 12; 1 J. & V. 245; 1 Gr. 205; 1 K. & R. 44; 1 R. L. 52, 305; 1 R. S. 750; Laws of 1895, chap. 1022.

[2] Notes of Commissioners of Statutory Revision to article IX, *infra*, Appendix I.

[3] *Cf.* The present rule, § 291, The Real Prop. Law, and cases cited there.

[4] The Revised Statutes changed the rule *in toto*. § 290, The Real Prop. Law.

[5] See Jackson ex dem., etc., v. Green, 7 Wend. 333, 335, 336, where the changes by the act of 1786 are very perspicuously and concisely stated.

[6] 1 R. S. 751, § 1; *supra*, p. 616.

[7] Art. 9.

[8] Miller v. Miller, 18 Hun, 507, 516; 91 N. Y. 315, 317.

this act is concerned, it conserved one principal change, made in 1786, in the common law, viz., the right of the father of the intestate to inherit, failing lineal descendants; and one other change made in 1829 by the Revised Statutes, the recognition of the mother of intestate as entitled to inherit before collaterals.[1] But the principal change made by this section, or by its prototype, the corresponding section of the Revised Statutes, concerns the rule in the act of 1786, which required an heir to deduce title from the person last seised.[2] The act of 1786 perpetuated the common-law rule in this particular,[3] and if the ancestor last seised was dispossessed by force or fraud, or was entitled to the fee under a contingent remainder or executory devise, and died before the estate vested in possession, the right or estate might go, according to the English rule, to the eldest male heir, in exclusion of others equally entitled as heirs by the statute of 1786, where the intestate died seised.[4] Thus actual or constructive seisin of the ancestor must be shown by the heir to succeed under the act of 1786.[5] The Revised Statutes, and this section in turn, changed this rule, and actual or constructive seisin[6] of the ancestor need no longer be shown to entitle the heir to succeed to any estate, legal or equitable, of the ancestor.[7] It is sufficient if the ancestor had title either by purchase or descent.

Widow. In 1895 it was attempted to include a widow of an intestate among those entitled to take real property by descent.[8] But the statute was repealed before it went into effect.[9] So in 1889, a widow was given by statute the use of an interest not to exceed in value $1,000, and in case the intestate left no children, this use ripened into a fee.[10] But this statute was also speedily repealed.[11]

[1] See note to 1 R. S. 751, § 1, Appendix II, *infra*.

[2] *Supra*, p. 618.

[3] Laws of 1786, chap. 12; 1 R. L. of 1813, p. 52.

[4] See Revisers' note to 1 R. S. 751, § 1, Appendix II, *infra*; Jackson ex dem., etc., v. Hendricks, 3 Johns. Cas. 214; Bates v. Schraeder, 13 Johns. 260; Jackson ex dem., etc., v. Hilton, 16 id. 96.

[5] "*Seizina facit stipitem*" was the common-law maxim. 2 Black. Comm. 209.

[6] This term "seisin" has undergone great change in modern law, and now means ownership, *i. e.*, lawful possession, or even right of possession. Matter of Dodge, 105 N. Y. 585, 591. *Cf.* Durando v. Durando, 23 id. 331; Van Rensselaer v. Poucher, 5 Den. 35, *et supra*, pp. 61, 83, 405, note 8.

[7] § 280, The Real Prop. Law; Dodge v. Stevens, 105 N. Y. at p. 590; *supra*, pp. 611, 618.

[8] Laws of 1895, chap. 171.

[9] Laws of 1895, chap. 1022.

[10] Laws of 1889, chap. 406.

[11] Laws of 1890, chap. 173.

Table of Descents. Section 281 of this act furnishes a table of descents, which, beyond lineal descendants, is, as far as it goes, at variance with the common-law rules before mentioned.[1] The table of descents, as modified by succeeding sections, prescribes the following course of descents: (*a*) Lineal descendants, *ad infinitum*; (*b*) ascendants specified; (*c*) collaterals specified; (*d*) collaterals entitled as at common law.[2]

Illegitimate and Adopted Children. It is to be remembered that the class just indicated by (*a*) "lineal descendants," has by the later law of this State been artificially augmented so as to include children formerly illegitimate, but now legitimated *per subsequens matrimonium*,[3] and also children made such by adoption.[4]

Adoption. A new element in the law of descents has been introduced by the authorized adoption of children, under the statute of 1873,[5] amended in 1887, as follows:[6]

§ 10. A child, when adopted, shall take the name of the person adopting, and the two thenceforth shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation, (including)[7] the right of inheritance, and the heirs and next of kin of the child so adopted shall be the same as if the said child was the legitimate child of the person so adopting, except that as respects the passing and limitation over of real and personal property, under and by deeds, conveyances, wills, devises and trusts, dependent upon the person adopting dying without heirs, said child adopted shall not be deemed to sustain the legal relation of child to the person so adopting so as to defeat the rights of remainderman, and in case of the death of the person so adopted the person so adopting as above provided shall, for the purpose of inheritance, sustain the relation of parent to the person so adopted.

Repeal of the Statutes of 1873 and 1887. The statutes just set out above remained in force until October 1, 1896, when they were repealed and their substance re-enacted in "The Domestic Relations Law."[8] The section of the latter law relative to descents to adopted children is as follows:

§ 64. **Effect of adoption.**— Thereafter the parents of the minor are relieved from all parental duties towards, and of all responsibility for, and have no rights over such child, or to his property by descent or succession. The child takes the name of the foster parent. His rights of inheritance and succession from his natural parents remain unaffected by such adoption.

[1] *Supra*, pp. 617, 618.

[2] Hunt v. Kingston, 3 Misc. Rep. 309.

[3] § 289, The Real Prop. Law; Smith v. Lansing, 24 Misc. Rep. 566.

[4] *Vide infra.*

[5] Laws of 1873, chap. 830.

[6] Laws of 1887, chap. 703.

[7] So in original act, including parentheses.

[8] Laws of 1896, chap. 272, being chap. 48 of the General Laws.

The foster parent or parents and the minor sustain toward each other the legal relation of parent and child and have all the rights, and are subject to all the duties of that relation, including the right of inheritance from each other, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting; but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen.

Effect of the Statutes Relative to Adoption. The adoption of children was unknown to the common law, and exists in this State only by virtue of the statutes,[1] set out above. The act of 1873 applied only to adoptions after its passage.[2] But the act of 1887, enabling adopted children to take by descent, applies to adoptions made before 1887, and under the act of 1873.[3] While the adoption of a minor child entitles it to take immediately by descent from the parents by adoption, and possibly also from the immediate children of the blood of such parents, yet the statute seems to stop just there, and the issue of the adopted child have not inheritable blood of the family into which the adopted child has entered by adoption, so as to entitle such issue to take by descent from lineal ascendants or descendants of the adoptive parents; and certainly not from the collaterals of the family by adoption.[4] It will be observed that the adopted child, by provision of the recent law of New York, takes by descent from natural parents as well as from adoptive parents, and this was so in the later Roman law.[5] The reason for the Roman law was that, by emancipation from the adoptive family, the adopted might lose the right to inherit from both families, had not the right of succession in the natural family been expressly preserved.[6] The New York statute

[1] Carroll v. Collins, 6 App. Div. 106, 109; Matter of Thorne, 155 N. Y. 140.

[2] Hill v. Nye, 17 Hun, 457; Matter of Thorne, 155 N. Y. 140. *Cf.* Simmons v. Burrell, 8 Misc. Rep. 404, and see note, 29 Abb. N. C. 49, discussing this subject in an interesting manner.

[3] Dodin v. Dodin, 17 Misc. Rep. 35, citing Ely v. Holton, 15 N. Y. 595.

[4] *Vide* Just. Inst. 1, 11, 5–8, where it is stated that a man may adopt a person as his son, but he cannot adopt him as grandson without consent of the son. Other illustrations are to be found in the Roman law. It would be ridiculous for the law to constitute an heir without the act of intestate. *Cf.* N. Y. Life Ins. Co. v. Viele, 22 App. Div. 80.

[5] Just. Inst. 3, 1, 14.

[6] G. 3, 1, 10–13; Just. Inst. 2, 13, 4; G. 1, 137. Emancipation was a divestitive fact, but the *filius-familias* could not be emancipated against his

does not seem to admit of subsequent exclusion from the adoptive family, and yet it gives the right to inherit from both the natural family and the adoptive family.

Adoptive Father. In imitation of the Roman law,[1] the father, by adoption, takes in intestate succession from the adopted child, and the mother also takes under "The Domestic Relations Law."[2]

Adopted Child Excluded, when. By provision of The Domestic Relations Law an adopted child is not an heir of the adoptive parents, so as to defeat a limitation over in case such parents die without issue or heirs.[3]

will. D. 1, 7, 31; C. 8, 49, 4; Nov. 89, 11.

[1] Just. Inst. 2, 12, pr.; The Real Prop. Law, § 284.

[2] *Supra*, p. 622; § 285, The Real Prop. Law,

[3] The Domestic Relations Law, § 64, *supra*. This part of the section is very inartificially framed, but its meaning seems as stated in the text. *Cf.* N. Y. Life Ins. Co. v. Viele, 22 App. Div. 80.

§ 282. Lineal descendants of equal degree.— If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be.

Formerly 1 Revised Statutes, 751, section 2:

§ 2. If the intestate shall leave several descendants in the direct line of lineal descent, and all of equal degree of consanguinity to such intestate, the inheritance shall descend to such persons in equal parts, however remote from the intestate, the common degree of consanguinity may be.[1]

Rule I of Descents. This section of The Real Property Law makes no change in the corresponding section of the Revised Statutes, just set out above. The Revised Statutes in this particular had not enlarged[2] the scope of the act of 1786, referred to under the preceding section of this act.[3] The rule now expressed in this section is called the "First Rule of Descents"[4] from its position in the act of 1786.[5] It is referred to above, in the text, as the rule changing within certain degrees impartible to partible inheritances and abolishing primogeniture.[6] Yet, at common law, not all inheritances were impartible, for in case there were no male descendants, the female descendants of equal degree took as coparceners,[7] and consequently the act of 1786, in order to amplify the intent of the act by familiar illustration, provided that all lineal descendants of equal degree should take in the same manner "as if they were all daughters of the" intestate. But as parceners held more as joint tenants than as tenants in common, the Revised Statutes saw fit to omit this illustration contained in the act of 1786. In essentials the Revised Statutes only enlarged the scope of "Rule I of Descents," as formulated in 1782[8] in New York, and perpetuated in 1786.[9] While this rule of partible inheritances seems novel, it was only a return to Saxon institutions, for before the "Conquest," the descent of all lands in England was according to the custom of gavelkind, which prescribed equal partition among the male children of an intestate.[10]

[1] Repealed by chap. 547, Laws of 1896, The Real Prop. Law, art. 10, *infra*.

[2] 1 R. S. 753, § 17, now § 293, The Real Prop. Law.

[3] *Supra*, p. 617.

[4] Original edition of 1 Revised Statutes, p. 751, foot note 1.

[5] *Supra*, p. 617.

[6] *Supra*, p. 617.

[7] 2 Black. Comm. 187.

[8] *Supra*, p. 616.

[9] *Supra*, p. 617.

[10] *Leges Gulielmi*, 225; Hallam, Mid. Ages, I, 129. In some cases all children shared alike.

The existing limitations on the rule of partible inheritances are subsequently mentioned.[1]

Children. By this first rule of descents, all lineal descendants,[2] male and female alike, in the same degree of descent from the common ancestor, take equally and *per capita* as tenants in common. Thus, if intestate leave three children, A. and B., males, and C., a female, each child takes one-third of the inheritance.[3]

Grandchildren. So, if intestate leaves all grandchildren, but no children, all the grandchildren (each being in the same degree of descent from the grandparent) take equal shares, or *per capita*, and as tenants in common. Thus, if intestate leave four grandchildren by his son A., deceased, and one grandchild by his son B., deceased,[4] each grandchild takes one-fifth of the inheritance.[5]

Great-grandchildren. If intestate leaves all great-grandchildren and no children or grandchildren, the great-grandchildren do not take the share of their respective immediate ascendant, but all share equally in the inheritance of the common ancestor, being equal in degree of consanguinity from intestate.[6]

Adopted Children. Adopted children now take by descent from parents by adoption.[7]

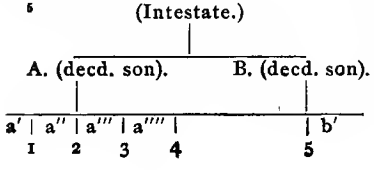
[1] *Infra*, under § 291, The Real Prop. Law.

[2] Legitimate is meant. § 289, The Real Prop. Law.

[3] 1 R. S. 753, § 17; now § 293, The Real Prop. Law.

[4] 4 Kent, Comm. 375; Pond v. Bergh, 10 Paige, 140, 148.

[5]



[6] 4 Kent, Comm. 395; Pond v. Bergh, 10 Paige, 140, 148; Remsen, Intest. Success. 43. *Cf.* Adams v. Smith, 20 Abb. N. C. 60, 62.

[7] *Vide supra*, p. 622, under § 281, The Real Prop. Law; and § 64, The Domestic Relations Law, which is set out in full on pp. 622, 623, *supra*. The Domestic Relations Law is express and clear in that it confers the right of inheritance from adoptive parents on children by adoption.

§ 283. **Lineal descendants of unequal degree.**— If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received.

Formerly 1 Revised Statutes, 751, sections 3 and 4:

§ 3. If any of the children of such intestate be living, and any be dead, the inheritance shall descend to the children who are living, and to the descendants of such children as shall have died; so that each child who shall be living, shall inherit such share as would have descended to him, if all the children of the intestate who shall have died leaving issue, had been living; and so that the descendants of each child who shall be dead, shall inherit the share, which their parent would have received if living.[1]

§ 4. The rule of descent prescribed in the last section, shall apply in every case where the descendants of the intestate, entitled to share in the inheritance, shall be of unequal degrees of consanguinity to the intestate; so that those who are in the nearest degree of consanguinity, shall take the shares which would have descended to them, had all the descendants in the same degree of consanguinity, who shall have died leaving issue, been living; and so that the issue of the descendants who shall have died, shall respectively take the shares, which their parents, if living, would have received.[2]

History of this Section 283. The archetype of this section of The Real Property Law was derived from the second canon of descents in the act of 1782,[3] revised in 1786.[4]

Interpretation of this Section; Rule II of Descents. This section contains the second rule of descents that surviving lineals of the same degree take *per capita*, as between themselves, and that the issue or descendants of such of that degree as are dead take the share of their immediate ancestor *per stirpes inter se*, or, in other words, take *jure representationis*. Thus, if intestate leaves a son and also two children of a deceased daughter, the son will inherit an undivided one-half, and the daughter's two children will take a moiety of the other undivided one-half and these three heirs-at-law will then hold as tenants in common, until sale or partition.[5]

[1] Repealed by chap. 547, Laws of 1896, The Real Prop. Law, art. 10, *infra*.

[2] Repealed by chap. 547, Laws of 1896, The Real Prop. Law, art. 10, *infra*.

[3] Laws of 1782, chap. 2, *supra*, p. 616.

[4] Laws of 1786, chap. 12, *supra*, p. 617.

[5] 4 Kent, Comm. 390; Rems. Intes. Suc. 42; Pond v. Bergh, 10 Paige, 140, 148.

The rule stated in this section is known from its numbering in the acts of 1782 and 1786, as the "Second Canon of Descents."[1]

Adopted Children. Adopted children of a deceased descendant will hardly be let into an intestate succession under this section of The Real Property Law.[2] But the adopted children of an intestate will share,[3] subject to the rule stated in section 290 of this act.

Children Legitimated per Subsequens Matrimonium. Certain illegitimate children, though formerly not regarded as entitled to share in an intestate succession, now are by statute made competent as heirs after the intermarriage of their parents.[4]

[1] 4 Kent, Comm. 390.

[2] *Vide supra*, under § 281, The Real Prop. Law, and § 64, The Dom. Rel. Law.

[3] Laws of 1896, chap. 272; § 64, The Dom. Rel. Law; *supra*, p. 622.

[4] The Real Prop. Law, § 289; The Dom. Rel. Law, § 18; Smith v. Lansing, 24 Misc. Rep. 566. *Vide infra*, under § 289.

§ 284. **When father inherits.**— If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

Formerly 1 Revised Statutes, 751, section 5, as amended by chapter 320, Laws of 1830, section 13:

§ 5. In case the intestate shall die without lawful descendants, and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate, on the part of his mother.[1]

§ 13. In case the intestate shall die without lawful descendants, and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate, on the part of his mother, and such mother be living; but if such mother be dead, the inheritance descending on her part shall go to the father for life and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters, or their descendants living, such inheritance shall descend to the father in fee. (Laws of 1830, chap. 320, § 13.)[2]

History of this Section 284. This section is derived, through the Revised Statutes,[3] from the act of 1786,[4] not being contained in the act of 1782.[5]

Rule III of Descents. Combined with the next succeeding section of this act this section forms the "Third Rule of Descents,"[6] whereby preference is given to parents over collaterals of intestate. It is to be observed that, under this "Third Rule," the old preference for males to females[7] still survives to a limited extent in the law. A like succession of parents to children is said by Kent to have been regarded as impolitic by the Roman law, it being contrary to the law of nature.[8] It cannot be denied that among certain classes of people there are argu-

[1] Amended, § 13, chap. 320, Laws of 1830.

[2] Repealed, chap. 547, Laws of 1896, by repeal of R. S.

[3] *Supra*, p. 629; 1 R. S. 751, § 5, as amended, Laws of 1830, chap. 320.

[4] *Supra*, p. 617.

[5] *Supra*, p. 616.

[6] 4 Kent, Comm. 393; Torrey v. Shaw, 3 Edw. Ch. 356, 360.

[7] *Supra*, p. 618.

[8] 4 Comm. 397, citing Just. Inst. 3, 3.

ments to be adduced against this order of succession, now so well established in this State,[1] for it tends to possible neglect by the father of enriched children, and, in rare cases, even to infanticide. Yet, even in England, this rule was older than the feudal settlement, for in Saxon times the father might inherit from the son.[2] The reason why, by the common or feudal law, a father did not succeed to his son's estate, was purely military,[3] the maxim "*hæreditas nunquam ascendit*" being only the result of a fiction that the father had already enjoyed the estate.[4]

Inheritance ex Parte Materna. If the inheritance came to the intestate on the part of his mother, his father does not succeed, excepting the mother be then dead.[5] The meaning of this expression in the statute, "on the part of his mother," was deemed not clear at first.[6] But it was finally held that an estate came to an intestate "on the part of his mother," when it was derived by the intestate from her, or from any relatives of her blood,[7] by devise,[8] gift[9] or descent.[10] But where an intestate received money from his mother as a gift, and invested it in land, it was held that the land did not come to him "on the part of the mother," and the land descended as if it had been originally purchased (*de novo*) by the intestate himself.[11] So if intestate acquired the estate for a valuable consideration from his mother or her family, then it is an acquisition by original purchase and not an estate derived "*ex parte materna*" within the meaning of this section of The Real Property Law.[12]

If Mother be Dead, Father Takes. If the mother be dead, and intestate has collateral kindred, the inheritance which came to intestate "on the part of intestate's mother," devolves on the father for life; always provided intestate leaves no lineal descend-

[1] Matter of Hohman, 37 Hun, 250; Morris v. Ward, 36 N. Y. 587.

[2] Hallam, Mid. Ages. I, 129.

[3] *Supra*, pp. 617, 618.

[4] Glanvill, lib. 7, chap. 1; 2 Black. Comm. 211, 212.

[5] *Supra*, § 284, The Real Prop. Law.

[6] Torrey v. Shaw, 3 Edw. Ch. 356, 361; Morris v. Ward, 36 N. Y. 587; Adams v. Anderson, 23 Misc. Rep. 705.

[7] The Real Prop. Law, § 280; Morris v. Ward, 36 N. Y. 587.

[8] Wells v. Seeley, 47 Hun, 109; Hyatt v. Pugsley, 33 Barb. 373, 377; The Real Prop. Law, § 280.

[9] Morris v. Ward, 36 N. Y. 587; The Real Prop. Law, § 280. *Cf.* Champlin v. Baldwin, 1 Paige, 562.

[10] Valentine v. Wettherill, 31 Barb. 655; The Real Prop. Law, § 280.

[11] Champlin v. Baldwin, 1 Paige, 562. *Cf.* Adams v. Anderson, 23 Misc. Rep. 705, 709.

[12] Morris v. Ward, 36 N. Y. 587, 594.

ants.[1] The "reversion," in such case, vests in the collaterals of intestate according to rule IV,[2] and if there be none such, then the father takes the inheritance in fee.[3]

Adopted Children. Fathers may inherit from adopted children under recent laws.[4] This section of The Real Property Law may consequently cause embarrassment in cases where the inheritance of the adopted came to him on the part of his natural mother and not his adoptive mother. The legislation in regard to adoption must be very much supplemented to constitute a complete code of reciprocal rights, duties and obligations. It is now singularly incomplete.

Legitimated Children. The father may also inherit from children made legitimate by a subsequent marriage of parents.[5]

Ascendants beyond Father and Mother. Ascendants beyond father and mother are not let into an intestate succession by the present New York law,[6] except possibly in conformity with the common law,[7] and after all collaterals specified in this act[8] are exhausted.

[1] Laws of 1830, chap. 320, § 13, *supra*.

[2] *Infra*, §§ 286, 287, The Real Prop. Law.

[3] The Real Prop. Law, § 284; Fowler v. Ingersoll, 127 N. Y. 472, 476.

[4] § 64, "The Domestic Relations Law;" *vide supra*, pp. 622, 623, under § 281, The Real Prop. Law.

[5] *Vide infra*, under § 289, The Real Prop. Law.

[6] 4 Kent, Comm. 407.

[7] § 291, The Real Prop. Law; 2 Peere Williams, 613.

[8] §§ 287, 288, The Real Prop. Law.

§ 285. **When mother inherits.**—If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for 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. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.

Formerly 1 Revised Statutes, 752, section 6:

§ 6. If the intestate shall die without descendants and leaving no father, or leaving a father not entitled to take the inheritance under the last preceding section, and leaving a mother, and a brother or sister, or the descendant of a brother or sister, then the inheritance shall descend to the mother during her 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. If the intestate in such case, shall leave no brother or sister, nor any descendants of any brother or sister, the inheritance shall descend to the mother in fee.

Some Account of Section 285, Supra. This section, with that preceding, forms a part of "Rule III of Descents." The admission of the mother into the line of succession from an intestate who leaves no lineal descendants is an innovation of the Revised Statutes.[1] It did not, like the rule of paternal succession, originate with the act of 1786.[2]

When Mother Takes a Fee. The instances where the mother takes a fee under this section include the case where the inheritance came to her intestate son from an ancestor, and such intestate leaves a brother or sister of the half blood, not of the blood of such ancestor, and excluded under section 290 of this act.[3]

When Mother Takes a Life Estate. Under this section, if an intestate leaves only brothers and sisters, a father not entitled to take, and a mother, the mother takes a life estate only.[4]

[1] Note of Revisers, 1 R. S. 752, § 13; *infra*, Appendix II.

[2] Chap. 12, Laws of 1786, *supra*, p. 617.

[3] Wheeler v. Clutterbuck, 52 N. Y. 67; Conkling v. Brown, 8 Abb. Pr. (N. S.) 345; S. C., 57 Barb. 265.

[4] *Supra*, § 285; Tilton v. Vail, 17 Civ. Proc. 194, 199; Miller v. Macomb, 26 Wend. 229.

Inheritance from Adopted Child. By recent legislation a mother by adoption may inherit from her adopted child.[1] But the legislation on this subject is so incomplete as to make this section of The Real Property Law difficult to apply in cases of intestate succession by adoptive mothers.[2] If the inheritance came to intestate from his natural parents one set of arguments applies: If the estate was the result of his own frugality another set of arguments may be made to govern the succession. But where the estate came to intestate from the adoptive family it ought certainly to revert to the members of that family. But the legislation in New York offers imperfect solution of these cases.

Inheritance from Legitimated Offspring. The mother may also inherit under this section from those of her offspring who were legitimated by her subsequent marriage with their father.[3]

Inheritance from Illegitimate Children. The mother may also inherit from her illegitimate offspring, not legitimated; but this is pursuant to section 289 of this act.[4]

[1] § 64, The Domestic Relations Law, *supra*, p. 622.

[2] *Supra*, p. 622.

[3] *Vide infra*, under § 289, The Real Prop. Law.

[4] *Vide infra*, § 289, The Real Prop. Law.

§ 286. **When collateral relatives inherit; collateral relatives of equal degrees.**—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 him the common degree of consanguinity may be.

Formerly 1 Revised Statutes, 752, section 7:

§ 7. 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]

Account of the Legislation Embodied in Section 286. By the common law, collateral relations inherited on failure of lineal descendants of an intestate; the eldest male being preferred under the rule of primogeniture.[2] By the New York act of 1782,[3] as amended in 1786,[4] an inheritance of intestate, failing lineal descendants and father, went to his brothers and sisters in equal parts, and to the children of deceased brothers and sisters; the latter taking the share of their respective parents, *jure representationis* or *per stirpes*.[5] If there were no surviving brothers and sisters of intestate, still their children in every case took the inheritance *per stirpes* and not *per capita*, although such children all stood in equal degree from the intestate.[6] This rule the Revised Statutes changed,[7] so as to make it conform to the corresponding rule applicable to lineal descendants of the same degree.[8] The act of 1786 did not provide for collateral succession, beyond brothers' and sisters' children.[9] The Revised Statutes extended the succession to the remotest descendants of such brothers and sisters.[10]

[1] Repealed by chap. 547, Laws of 1896, The Real Prop. Law, art. 10, *infra*.

[2] *Supra*, p. 619, under § 281, The Real Prop. Law.

[3] Chap. 2, Laws of 1782, *supra*, p. 616.

[4] Chap. 12, Laws of 1786, *supra*, p. 617.

[5] Pond v. Bergh, 10 Paige, 140, 148.

[6] Jackson ex dem., etc., v. Thurman, 6 Johns. 322.

[7] 1 R. S. 752, §§ 7, 8 and 9.

[8] § 282, The Real Prop. Law.

[9] Hannan v. Osborn, 4 Paige, 336; Pond v. Bergh, 10 id. 140, 148.

[10] Id., *supra*.

Changes made by the Revised Statutes. The modifications in the act of 1786, introduced by the Revised Statutes, not only permitted collaterals beyond brothers' and sisters' children to take, but provided that they should take *per capita* and not *per stirpes*, whenever there was no surviving collateral kinsman of nearer degree to intestate.[1] Thus, by the Revised Statutes, when intestate left surviving him only two sons of a deceased brother and one son of a deceased sister, and no other heirs, the three nephews took equal shares of the inheritance, as all stood in equal degree from intestate. This rule prevailed to the remotest degree of collaterals, and this act makes no change in this canon. By the amendment to the act of 1786, mentioned above,[2] brothers and sisters of the half blood share, unless the inheritance came to intestate from an ancestor not of their blood.[3]

Rule IV of Descents. This rule then concerns the succession of certain collateral kindred. In its entirety it is only partly expressed in this section of this act — the other and more important branch of it being reserved for the next two sections of The Real Property Law.[4] Rule IV of Descents as combined in these sections is, that where collaterals all stand in equal degree, however remote from intestate, they shall share the inheritance equally and not *jure representationis*.[5] But when such collaterals stand in unequal degree of consanguinity to intestate, the succession among them is then *jure representationis per stirpes*.[6] Collateral succession under the Revised Statutes presents a very great similarity to succession under the Roman law as remodeled by Justinian.[7]

Collateral Succession. The extent of collateral succession[8] is now always a matter of State regulation, *juris positivi;* the common law being displaced here, in practice, to a great extent.[9] The collaterals who are entitled to take by intestate succession, under the law of New York, are (1) brothers and sisters and their descendants,[10] (2) uncles and aunts and their descendants, to the remotest degree.[11] In all such cases, "Rule IV of Descents"[12] applies

[1] See note of Revisers to chap. II, R. S.; Appendix No. II, *infra.*

[2] *Supra*, p. 617.

[3] § 290, The Real Prop. Law.

[4] §§ 287, 288, 293, *infra.*

[5] Hyatt v. Pugsley, 33 Barb. 373, 377; S. C., 23 id. 285, 301; Kelly v. Kelly, 5 Lans. 443, 446; § 293, The Real Prop. Law.

[6] 4 Kent, Comm. 400; § 287, The Real Prop. Law; Pond v. Bergh, 10 Paige, 140, 148.

[7] Nov. 118, 127.

[8] *Supra*, p. 614.

[9] § 291, The Real Prop. Law.

[10] § 287, The Real Prop. Law.

[11] § 288, The Real Prop. Law.

[12] *Supra*, p. 635.

to the succession to the inheritnce and they take as tenants in common.[1]

When Collaterals are "Descendants." While collaterals are not "descendants" within the meaning of our Statute of Wills,[2] they certainly are within the meaning of many phrases of this Article on Descents.[3]

[1] § 293, The Real Prop. Law.

[2] Van Beuren v. Dash, 30 N. Y. 393; Howard v. Barnes, 65 How. Pr. 122.

[3] *Cf.* Conkling v. Brown, 8 Abb. Pr. (N. S.) 350, note; §§ 287, 288, 290, The Real Prop. Law; McCarthy v. Marsh, 5 N. Y. 263; Wheeler v. Clutterbuck, 52 id. 67.

§ 287. 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, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

Formerly 1 Revised Statutes, 752, sections 8, 9:

§ 8. If all the brothers and sisters of the intestate be living, the inheritance shall descend to such brothers and sisters; 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 brothers and sisters as shall have died; so that each brother or sister who shall be living, shall inherit such share as would have descended to him or her, if all the brothers and sisters of the intestate, who shall have died leaving issue, had been living; and so that such descendants shall inherit the share, which their parent would have received, if living.

§ 9. 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 intestate, to the remotest degree, whenever such descendants are of unequal degrees.[1]

Rule IV of Descents. Section 287 of this act states somewhat more explicitly and in detail the rule specified under the preceding section of the statute.[2] The word "collectively" in this section was inserted in the commissioners' draft by the Legislature,[3] in order to make it more clear, when the division of an inheritance was intended to be *per stirpes* and when *per capita*. It is now most clear that if intestate leaves brothers and sisters surviving, they inherit equal shares, and that to the remotest degree the descendants of deceased brothers and sisters take by representation collectively the share their *stirps* would have taken if living.[4] But if there be no brothers and sisters surviving, but only their chil-

[1] Repealed, chap. 547, Laws of 1896.

[2] § 286, *supra*.

[3] Note of Commissioners of Statutory Revision, Appendix I, *infra*.

[4] Hannan v. Osborn, 4 Paige, 336, 340, 341; § 291, The Real Prop. Law.

dren, then such children take *per capita*, all standing in equal degree of collateral succession from the intestate.[1] If there be some nephews and nieces surviving and some dead leaving children, then such children (being of the degree of great-nephews and great-nieces of intestate) will succeed only to the share of their deceased parent, as the succession in that case is to heirs in unequal degree of propinquity, and consequently *per stirpes* under Rule IV, regulating collateral descent.[2]

Half-Blood. The rule is also explicit that where the intestate is the first purchaser of the inheritance for value (*i. e.*, has acquired it for value, and not by gift or devise by, from or through some relative),[3] then his collaterals of the half blood are entitled to share with those of the whole blood of intestate;[4] provided, of course, he leaves no descendants or parents.

Alien Ancestor. The descent between brothers and sisters is immediate, and even before 1830, it made no difference in their right of succession *inter se* that their common father was an alien.[5] But if some brothers and sisters are citizens and some aliens, the citizens take to the exclusion of the aliens.[6]

[1] Hyatt v. Pugsley, 33 Barb. 373, 377; Pond v. Bergh, 10 Paige, 140, 148; Kelly v. Kelly, 5 Lans. 443, 446.

[2] Pond v. Bergh, 10 Paige, 140, 148; 4 Kent, Comm. 400.

[3] *Infra*, § 290, The Real Prop. Law.

[4] Brown v. Burlingham, 5 Sandf. 418; Valentine v. Wetherill, 31 Barb. 655, 659; Schult v. Moll, 132 N. Y. 122, 125.

[5] *Supra*, p. 68, under § 5; *et infra*, § 294, The Real Prop. Law.

[6] Leary v. Leary, 50 How. Pr. 122; *et supra*, pp. 67, 68.

§ 288. **Brothers and sisters of father and mother and their descendants.**— If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of his father, shall descend:

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living:

2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

3. If all such brothers and sisters shall have died, to their descendants.

4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants. But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

Formerly 1 Revised Statutes, 752, section 10, and 1 Revised Statutes, 753, sections 11, 12 and 13:

§ 10. 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 the father of the intestate 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:

4. 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.[1]

[1] Repealed, chap. 547, Laws of 1896.

§ 11. 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.[1]

§ 12. In all cases not provided for by the preceding sections, where the inheritance shall have come to the intestate on the part of his mother, the same, instead of descending to the brothers and sisters of the intestate's father, and their descendants, as prescribed in the preceding tenth section, shall descend to the brothers and sisters of the intestate's mother, and to their descendants, as directed in the last preceding section; and if there be no such brothers and sisters, or descendants of them, then such inheritance shall descend to the brothers and sisters and their descendants, of the intestate's father, as before prescribed.[1]

§ 13. 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.[1]

Comment on this Section 288. Neither the act of 1782[2] nor that of 1786[3] made any provision for collateral succession beyond the children of brothers and sisters of an intestate.[4] Farther than that degree, collateral succession was then regulated by the common law, the male stock being preferred.[5] The Revised Statutes, by the addition of the section above set out, in our text, introduced the rule of partible inheritances and a succession by intestate's parents' brothers and sisters and their descendants to the remotest degree. "Rule IV of Descents," above given,[6] was also made applicable to such successions. Thus the principle of the acts of 1782 and 1786 was extended to fathers' and mothers' brothers and sisters and their descendants, or so as to include uncles and aunts and their descendants,[7] and the English or common-law rule, which preferred the male stock and the eldest male of that stock, was abrogated one step farther.

Relatives of the Half Blood. In a succession by uncles and aunts and their descendants the rule that those of the half blood are let

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, p. 616.

[3] *Supra*, p. 617.

[4] Hannan v. Osborn, 4 Paige, 336; Pond v. Bergh, 10 id. 140, 148; 1 R. L. 52.

[5] Chap. 2, Laws of 1782; chap. 12, Laws of 1786. Note of Revisers to chap. 2, part 2, R. S.; Appendix No. II, *infra*.

[6] *Supra*, p. 635.

[7] 4 Kent, Comm. 408, 411; Hunt v. Kingston, 3 Misc. Rep. 309.

into the succession prevails subject to the proviso in section 290 of this act.[1]

Uncles and Aunts and their Descendants. Under this section if the estate of an intestate comes to him on the part of his father,[2] and there be no lineal descendants, no parents, no brothers and sisters or their descendants, then the estate goes to the father's brothers and sisters,[3] or to their descendants *ad infinitum* as provided in Rule IV of Descents.[4] If, on the other hand, the estate has come to intestate on the part of the mother,[5] the estate, in the absence of nearer *consanguinei*, or blood relations, will go to her brothers and sisters and their descendants, and be divided according to Rule IV of Descents.[6] But if the estate comes to intestate on the part of neither father nor mother, then the brothers and sisters of both parents, agnates[7] and cognates,[8] or their descendants, share the inheritance in accordance with the principles stated in Rule IV of Descents.[9]

Alien Uncles and Aunts. Aliens are, however, excluded in intestate successions by collaterals[10] unless special acts permit such succession.[11]

[1] § 290, The Real Prop. Law; Beebee v. Griffing, 14 N. Y. 235.

[2] *Supra*, p. 630, as to construction of, "on the part of the mother."

[3] Wells v. Seeley, 47 Hun, 109, 116; 4 Kent, Comm. 408.

[4] *Supra*, p. 635.

[5] *Supra*, p. 630, as to construction of, "on the part of the mother."

[6] *Supra*, p. 635.

[7] *Agnates*, relations by the father.

[8] *Cognates*, relations by the mother.

[9] Brown v. Burlingham, 5 Sandf. 418; Hunt v. Kingston, 3 Misc. Rep. 309, 312; Adams v. Anderson, 23 id. 705.

[10] Leary v. Leary, 50 How. Pr. 122; *et supra*, p. 638.

[11] *Supra*, pp. 67, 68.

§ 289. **Illegitimate children.**— If an intestate who shall have been illegimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit.

Formerly 1 Revised Statutes, 753, section 14; 1 Revised Statutes, 754, section 19, and chapter 547, Laws of 1855, section 1:

§ 14. 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.[1]

§ 19. Children and relatives who are illegitimate, shall not be entitled to inherit, under any of the provisions of this Chapter.[2]

§ 1. Illegitimate children, in default of lawful issue, may inherit real and personal property from their mother as if legitimate; but nothing in this act shall affect any right or title in or to any real or personal property already vested in the lawful heirs of any person heretofore deceased.[3]

Comment on Section 289. By the common law a bastard or illegitimate child was one conceived or born out of lawful matrimony.[4] By the common law, a subsequent marriage of the parents of an illegitimate child did not legitimate such issue.[5] Marriages within the forbidden degree are, in New York, absolutely void, and the children of such marriages illegitimate.[6] But where a marriage is only avoided by decree of the court, the prior issue are not illegitimate.[7] Before the Revised Statutes, when the common law prevailed, a bastard could not inherit. He was "*filius nullius*," or "*filius populi*" or even "*filius terrâ*."[8]

Legitimation per Subsequens Matrimonium. In many of the modern Latin States the principle of the Roman law,[9] "that a

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] Repealed, chap. 547, Laws of 1896.

[4] 1 Black. Comm. 454; 2 Kent, Comm. 211, 212.

[5] 1 Black. Comm. 454; 2 Kent, Comm. 208; Miller v. Miller, 18 Hun, 507; S. C. revd., 91 N. Y. 315. *Cf.* Bollerman v. Blake, 24 Hun, 187.

[6] 2 R. S. 139, § 5; chap. 601, Laws of 1893, now § 2, "The Domestic Relations Law."

[7] Code Civ. Proc. §§ 1759, 1760; 2 R. S. 139, § 4, now § 4, The Domestic Relations Law.

[8] 1 Black. Comm. 454; 2 id. 247; Co. Litt. 8a; 2 Kent, Comm. 212, and cases cited *infra*, this section.

[9] C. 5, 27, 10; Nov. 89, 8; 78, 3; 12, 4; Miller v. Miller, 18 Hun, 507, 520; S. C., 91 N. Y. 315.

subsequent marriage of parents legitimates their prior offspring," prevails. It is also the law of Scotland, and it is, as such, recognized on Scotch appeals to the House of Lords, where the rule "*legitimatio per subsequens matrimonium*" is frequently applied to intestate succession by Scotchmen.[1] This principle is also recognized by the courts of New York in a proper case, where the law of the domicile of origin is applied.[2] So rational is the principle of the Roman law, touching legitimation of children by subsequent marriage of their parents, that it was in 1895 converted into a law of this State by statute,[3] and it is now perpetuated by "The Domestic Relations Law."[4] These acts both saved vested rights either of administration or in estates of persons, under prior limitations to such parents, with remainders over for defaults of issue, etc.[5] Children thus made legitimate by statute do not take under this section of this act,[6] but they take as legitimate lineal descendants under the Table of Descents, embodied in section 281 of this act. How far a statutory legitimation by a subsequent marriage of the parents entitles such issue to take real estate, situated in another State, by comity, is the subject of an interesting monograph, which it may be useful to refer to.[7] In Pennsylvania and other States, it has been held that such legitimation, under the laws of a foreign State, produces no such result in Pennsylvania or such other States.[8]

Status of Legitimacy. Children are always presumed to be legitimate until the contrary is shown.[9] A recognition by the family, general reputation, matrimonial cohabitation of parents, are sufficient to establish legitimacy in this State, especially after a great lapse of time.[10] In this State, *consensus, non concubitus, facit matrimonium*,[11]

[1] See note 11, 2 Wend. Black. 248.

[2] Miller v. Miller, 91 N. Y. 315; S. C., 18 Hun, 507, 520, revd. *Cf.* Bollerman v. Blake, 24 id. 187; 23 Alb. L. J. 165.

[3] Chap. 531, Laws of 1895.

[4] Chap. 272, Laws of 1896, being chap. 48 of "The General Laws," § 18.

[5] Ferris v. The Pub. Admr., 3 Bradf. 249. *Cf.* Smith v. Lansing, 24 Misc. Rep. 566.

[6] § 289, The Real Prop. Law.

[7] 23 Alb. L. J. 165.

[8] Smith v. Dorr's Admr., 34 Penn. St. 126; Barnum v. Barnum, 42 Md. 250; Lingin v. Lingin, 45 Ala. 410; Stoltz v. Doehring, 112 Ill. 603. *Cf.* Scott v. Key, 11 La. 232; Miller v. Miller, 91 N. Y. 315.

[9] Cross v. Cross, 3 Paige, 139; Montgomery v. Montgomery, 3 Barb. Ch. 132.

[10] Gall v. Gall, 114 N. Y. 109, 118; Hynes v. McDermott, 91 id. 451, 459.

[11] Fenton v. Reed, 4 Johns. 52; Gall v. Gall, 114 N. Y. 109.

and the maxim "*omnia præsumuntur pro matrimonio*," is very liberally applied to legitimate children.[1]

Mother the Heir, when. But when the *status* of illegitimacy is once fixed upon a male child, his mother, if living, is, under this section, his universal heir, unless he leaves lawful issue surviving.[2] Neither the illegitimate children of an illegitimate male nor his collaterals, however, inherit from him, under this section, but his mother, or her stock, excludes them in the succession.[3] But the mother of an illegitimate female does not inherit to the exclusion of the illegitimate offspring of such female. This section of The Real Property Law covers that case.

[1] Caujolle v. Ferrié, 23 N. Y. 90, 95; Hynes v. McDermott, 91 id. 451; Montgomery v. Montgomery, 3 Barb. Ch. 1 32.

[2] § 289, *supra;* Matter of Mericlo, 63 How. Pr. 62; St. John v. Northrup, 23 Barb. 25, 32.

[3] Matter of Mericlo, 63 How. Pr. 62; Miller v. Miller, 18 Hun, 507, 516; St. John v. Northrup, 23 Barb. 25, 32; Kiah v. Grenier, 56 N. Y. 220, 224.

§ 290. **Relatives of the half-blood.**— Relatives of the half-blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Formerly 1 Revised Statutes, 753, section 15:

§ 15. 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 ancestors, shall be excluded from such inheritance.[1]

Rule V of Descents. The rule that collaterals of the half blood are now admitted into the existing "Table of Descents,"[2] although subject to the provision that such collaterals of the half blood are excluded when the inheritance came to intestate by descent, devise or gift from an immediate ancestor, forms Rule V of the existing canons of descent, it being an innovation on the common law of descents.[3] Rule V of Descents is fully and clearly expressed in this section of The Real Property Law, and needs no paraphrase.

Account of Section 290, The Real Property Law. The English common law did not admit those of the half blood into collateral successions.[4] But even at common law there were some reasonable exceptions to this rule; *e. g.*, where the intestate had not been actually seised of a hereditament, in order to make himself the stock or *terminus*, then the brother of the half blood succeeded before the sister of the whole blood.[5] This was because it was necessary to go back to the seisin of the common father of the intestate and the half blood, and the brother of the half blood was the common father's heir. Blackstone lucidly explains the origin of the feudal, or common-law rule, which excluded the half blood from collateral successions; it being founded on a presumption that the half blood could not be of the blood of the first feudatory.[6] It is obvious that this rule might only apply beneficently

[1] Repealed, chap. 547, Laws of 1896

[2] § 281, The Real Prop. Law.

[3] § *Supra*, pp. 617, 618, 619.

[4] *Supra*, p. 619; 2 Black. Comm. 228–231.

[5] Watkins, Descents, 42.

[6] 2 Black. Comm. 228; Valentine v. Wettherill, 31 Barb. 655, 658.

to inheritances of very old family or ancestral estates, and that it had no reasonable application in successions to those estates acquired solely by the industry of the persons last seised. The Legislature of New York, in 1786, wisely changed the common law in this respect, so as to admit brothers and sisters of the half blood into collateral successions, in every case where the inheritance came from a common ancestor of such whole and half blood; but excluding them in every other case.[1] The Revised Statutes carried the same principle much farther.[2] But whether it was intended to apply to successions beyond those of uncles and aunts and their descendants is doubtful.[3] This act goes not beyond the Revised Statutes in this respect.[4]

Relatives of the Half Blood. Thus, under the existing Statutes of Descents, half blood brothers and sisters of intestate and their descendants *ad infinitum*[5] and the half blood brothers and sisters of intestate's father and mother and their descendants *ad infinitum*,[6] are admitted (according to the foregoing rules[7]) into intestate collateral successions (in default of those of nearer degree), unless the inheritance came to intestate from an immediate ancestor who was not of the blood of such half blood collaterals of intestate.[8] Beyond collaterals of the degrees indicated, the common-law rules regulating descents prevail.[9]

Ancestor. The term "ancestor," as employed in this section, embraces collateral as well as lineal predecessors in blood and title.[10] But it means the *immediate* ancestor, from whom intestate received the estate, and not some remote ancestor who may have first acquired the estate by purchase.[11] When the estate was derived by intestate by purchase and for value, and not by descent,

[1] Laws of 1786, chap. 12; 1 R. L. of 1813, p. 53.

[2] 1 R. S. 753, § 15.

[3] Note of Revisers to 1 R. S. 753, §§ 15, 16.

[4] §§ 290, 291, The Real Prop. Law.

[5] § 287, The Real Prop. Law.

[6] § 288, The Real Prop. Law; Beebee v. Griffing, 14 N. Y. 235; Hunt v. Kingston, 3 Misc. Rep. 309; 4 Kent, Comm. 408, 411.

[7] §§ 281, 286, 287, 288, The Real Prop. Law; *supra*, pp. 616, 634, 637, 639.

[8] Wheeler v. Clutterbuck, 52 N. Y. 67; Valentine v. Wettherill, 31 Barb. 655, 658; Brown v. Burlingham, 5 Sandf. 418.

[9] § 291, The Real Prop. Law.

[10] Wheeler v. Clutterbuck, 52 N. Y. 67; McCarthy v. Marsh, 5 id. 263; Conkling v. Brown, 8 Abb. Pr. (N. S.) 345, 350, note; Valentine v. Wettherill, 31 Barb. 655, 659.

[11] Wheeler v. Clutterbuck, 52 N. Y. 67, 71; Valentine v. Wettherill, 31 Barb. 655, 658; Emanuel v. Ellis, 48 N. Y. Super. Ct. (16 J. & S. 430); Hyatt v. Pugsley, 33 Barb. 373; Conkling v. Brown, 8 Abb. Pr. (N. S.) 345.

devise or gift from an ancestor, the exclusion specified in this section has no application, and intestate's collaterals of the half blood share with those of the whole blood.[1] An estate derived by an intestate "C." from his brother "A." is an estate derived by "C." from an "ancestor,"[2] within the meaning of this section, and although "A." in his turn had inherited the estate from their father, "B.," the half brothers and sisters of "A." and "C.," not of the blood of "B.," are entitled to share in the inheritance, for "C." derived the estate from his brother "A.," and not from his father "B.," and the half brothers and sisters of "C." were half brothers and sisters of "A.," and, therefore, of the blood of "A."[3]

Uncles and Aunts of Intestate. The principle concerning the rights of those of the half blood to take in collateral successions applies to uncles and aunts of intestate, and to their descendants to the remotest degree.[4]

[1] Valentine v. Wettherill, 31 Barb. 655, 660; Brown v. Burlingham, 5 Sandf. 418.

[2] McCarthy v. Marsh, 5 N. Y. 263; McGregor v. Comstock, 3 id. 408.

[3] Wheeler v. Clutterbuck, 52 N. Y. 67; Valentine v. Wettherill, 31 Barb. 655.

[4] Beebee v. Griffing, 14 N. Y. 235.

§ 291. **Cases not hereinbefore provided for.**— In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

Formerly 1 Revised Statutes, 753, section 16:

§ 16. In all cases not provided for by the preceding rules, the inheritance shall descend according to the course of the common law.[1]

Comments on this Section. The common law, in so far as it is adopted by the State Constitution, still controls descent in this State in every case not specially provided for by the foregoing five rules of descent,[2] or by the section regarding illegitimate succession, which may be regarded as an exception rather than a rule of descent.[3] The common law which is thus made the "*ultima ratio*" of cases not specifically provided for, is not the Statute of Distributions of English law, founded, as Blackstone thought, on the 118th and 127th Novels of Justinian,[4] but the pure Anglo-feudal law of succession, or that which is now termed the common law of land. Chancellor Kent wondered that the revisers did not adopt the principle of the Statute of Distributions instead of this archaic law.[5] But the revisers simply revised the earlier State Statutes of Descent, which had uniformly contained a like provision, consonant with the genius of all statutory reforms of the common law.[6] The rules of descent above mentioned,[7] prescribed by this statute, provide for (1) lineal descent *ad infinitum*; (2) for the succession of ascendants, only as far as the mother and father of intestate; (3) for collateral succession of brothers and sisters and their descendants *ad infinitum*; (4) for collateral succession of uncles and aunts, both agnates and cognates, and their descendants *ad infinitum*.[8] Beyond that point this statute makes no specific provision whatever, and by provision of this section the common law then prevails. Thus, the rules of the common law, given above,[9] apply to intestate succession after the descendants of uncles and aunts are exhausted. But independently of this section the common law would have prevailed in any event,

[1] Repealed, chap. 547, Laws of 1896.

[2] *Supra*, pp. 625, 627, 629, 635, 645.

[3] The Real Prop. Law, § 289.

[4] 2 Black. Comm. 517. *Cf.* Scrutton, "Rom. Law & Law of Eng." p. 147, where this is denied.

[5] 4 Comm. 411.

[6] Laws of 1782, chap. 2; Laws of 1786, chap. 12; 1 K. & R. 44; 1 R. L. of 1813, pp. 52, 305.

[7] *Supra*, pp. 625, 627, 629, 635, 645.

[8] The Real Prop. Law, § 281.

[9] *Supra*, pp. 617, 618, 619.

had it not been expressly abrogated. So that this section of this act is simply declaratory.

Common-law Rules Still in Force. After the lineals, ascendants and collaterals, expressly indicated in this article as entitled to succeed in intestate successions,[1] are exhausted, then the canons of the common law above given [2] apply. Grandparents are excluded [3] and the granduncles of the father's side become the stock of descent under the common-law rule that males are preferred, and so the male stock of the eldest grand uncle will take to the exclusion of others in equal degree from the intestate.[4]

[1] §§ 281, 284, 285, 286, 287, 288, The Real Prop. Law.

[2] *Supra*, pp. 617, 618, 619.

[3] 4 Kent, Comm. 407.

[4] Hunt v. Kingston, 3 Misc. Rep. 309. *Cf.* Brown v. Burlingham, 5 Sandf. 418, and § 293, The Real Prop. Law.

§ 292. **Posthumous children and relatives.**— A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

Formerly 1 Revised Statutes, 754, section 18:

§ 18. Descendants and relatives of the intestate, begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate, and had survived him.[1]

Common-law Rule. At common law a posthumous child could take by descent,[2] although it was extremely doubtful how far he could take under the Statute of Wills, or by a limitation by way of contingent remainder.[3] But as the freehold could not be in abeyance by strict rule of the common law,[4] an infant *en ventre sa mére*, succeeded only at its actual birth, the title meanwhile devolving on the "heir presumptive." At its birth the child could enter on the prior occupant.[5]

The Statute. It must be apparent that this section goes farther than the common law as stated by Watkins,[6] for it expressly permits an abeyance of the seisin, for the child is now *in esse* only from the time of its birth for the purposes of descent.[7]

If a Child en Ventre sa Mére is not Born Alive. If a child *en ventre sa mére* be born dead or in such an early state of pregnancy as to be incapable of living, it is to be considered as if it had never been born or conceived, in so far as others claiming through such child are concerned.[8]

Tenant by Curtesy. Where a child is delivered by the Cæsarean operation and immediately dies, it is not "issue born alive" so as to entitle the father to curtesy.[9]

[1] Repealed, chap. 547, Laws of 1896.

[2] Watkins, Descents, 131; Challis, 111, 126; 1 Black. Comm. 130; Marsellis v. Thalhimer, 2 Paige, 35.

[3] *Supra*, p. 205, under § 46, The Real Prop. Law; Steadfast ex dem., etc., v. Nicoll, 3 Johns. Cas. 18, 22; Mason v. Jones, 2 Barb. 229, 251, 252; Challis, 111, and cases cited; Watkins, Descents, chap. 4. *Cf.* McGillis v. McGillis, 154 N. Y. 532.

[4] *Supra*, pp. 22, 23, 209.

[5] Watkins, Descents 131. *Cf.* Challis, 111, 126.

[6] Watkins, Descents, 131.

[7] Mason v. Jones, 2 Barb. at p. 252.

[8] Marsellis v. Thalhimer, 2 Paige, 35.

[9] Marsellis v. Thalhimer, 2 Paige, 35.

Children Born after the Execution of a Will. Children born after the execution of a parent's will, no provision being made for them, take the same share of the real and personal estate of the parent which they would have taken had such parent died intestate. Such children do not take under the will or subject to any of its provisions.[1] At common law the mere birth of children did not operate to revoke a will;[2] hence this enactment.

[1] 2 R. S. 65, § 49; as amd. by chap. 22, Laws of 1869; Smith v. Robertson, 89 N. Y. 555; S. C., 24 Hun, 210; Drischler v. Vander Henden, 49 N. Y. Super. Ct. 508; Rockwell v. Geery, 4 Hun, 606; § 1868, Code Civ. Proc. Prior to the amendment of 1869, chap. 22, the Revised Statutes did not apply to the will of the mother. Cotheal v. Cotheal, 40 N. Y. 405, overruling Plummer v. Murray, 51 Barb. 201.

[2] Cotheal v. Cotheal, 40 N. Y. 405 408.

§ 293. **Inheritance, sole or in common.**— When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or share of an inheritance descends to several persons they shall take as tenants in common, in proportion to their respective rights.

Formerly 1 Revised Statutes, 753, section 17:

§ 17. Whenever there shall be but one person entitled to inherit, according to the provisions of this 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 this Chapter, they shall take as tenants in common, in proportion to their respective rights.[1]

Comment on Section 293. This section, transcribed from the Revised Statutes, was inserted in that revision in conformity with the earlier statutes of 1782[2] and 1786,[3] which had both provided that whenever estates descended to two or more persons they should take and hold as tenants in common. It will be observed that the prior section of this act, providing for the succession of all lineal descendants and making the inheritance then partible equally,[4] does not provide that such lineals shall take as tenants in common. Nor do the sections providing for collateral descent provide that collaterals shall take as tenants in common.[5] Hence this section is indispensable to regulate the kind of tenancy descendants and collaterals shall take by descent.[6] So, when the Revised Statutes extended collateral succession beyond the acts of 1782 and 1786, so as to include both uncles and aunts, and their descendants,[7] it was necessary to provide specifically that they, if of the same degree, should not only inherit equal shares, but that they should hold as tenants in common. This section does not, however, modify one prior section of this act,[8] and where the common law now prevails it has no application to the succession ;[9] so that presumably great aunts (being sisters) would succeed, if at all, as coparceners,[10] section 56 of this act being limited to grants and devises.

[1] Repealed, chap. 547, Laws of 1896.
[2] *Supra*, p. 616.
[3] *Supra*, p. 617.
[4] § 282, The Real Prop. Law.
[5] §§ 286, 287, 288, The Real Prop. Law.
[6] Cole v. Irvine, 6 Hill 634, 638.
[7] *Supra*, §§ 286, 287, 288, The Real Prop. Law.
[8] § 291, The Real Prop. Law.
[9] Hunt v. Kingston, 3 Misc. Rep. 309.
[10] 2 Black. Comm. 187.

§ 294. **Alienism of ancestor.**— A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor.

Formerly 1 Revised Statutes, 754, section 22:

§ 22. 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.[1]

Comment on Section 294. The Revised Statutes first provided that no person capable of inheriting should be precluded from such inheritance by reason of the alienism of any ancestor.[2] The original revisers intended thus to change what they call a harsh rule of existing law.[3] The common law had in England been changed in this respect by the act 11 and 12 William III, chapter 6,[4] which was not part of the law of New York; certainly after the general act repealing those English statutes not then re-enacted in a new form as laws of New York.[5]

Interpretation of this Section. This provision of the Revised Statutes was held strictly prospective in operation;[6] to embrace lineal, as well as collateral ancestors,[7] and estates derived *ex parte materna* as well as those derived *ex parte paterna.* While this section permitted citizens thereafter to inherit, notwithstanding they deduced title through an alien ancestor, yet it did not so change the course of descents as to enable one not an heir at law to succeed in the place of one living and debarred by alienage,[8] or to permit aliens to inherit otherwise than as provided by law.[9]

Section Refers to Dead, not Living Ancestor. This section refers to such alien ancestors as are dead, and not to those who are alive.[10]

[1] Repealed, chap. 547, Laws of 1896.

[2] 1 R. S. 754, § 22; § 294, The Real Prop. Law.

[3] Note to chap. 2, part 2, R. S.; *vide infra* Appendix II.

[4] *Cf.* 25 Geo. II, chap. 40; Hargrave, Notes, 8a, Co. Litt.

[5] Jackson v. Green, 7 Wend. 333, 339; Levy v. McCartee, 6 Pet. 102, 109, 110; Jackson v. Fitzsimmons, 10 Wend. 9; Banks v. Walker, 3 Barb. Ch. 438, 446.

[6] Redpath v. Rich, 3 Sandf. 79; Jackson v. Green, 7 Wend. 333.

[7] McCarthy v. Marsh, 5 N. Y. 263; Lynch v. Clarke, 1 Sandf. Ch. 583, 637.

[8] McLean v. Swanton, 13 N. Y. 535; McCarthy v. Marsh, 5 id. 263; Redpath v. Rich, 3 Sandf. 79; People v. Irvin, 21 Wend. 128; Heeney v. Brooklyn Benevolent Society, 33 Barb. 360, 368.

[9] See authorities cited under § 5, The Real Prop. Law, *supra.* p. 66.

[10] People v. Irwin, 21 Wend. 128; Luhrs v. Eimer, 80 N. Y. 171, 179; Renner v. Muller, 44 N. Y. Super Ct. 535; Lerreau v. Davignon, 5 Abb. Pr.

One cannot inherit in the place of a living person under this section.[1]

"Ancestor" Embraces Collaterals. The term "ancestor," in this section, embraces collaterals, as well as lineals.[2]

Descent through Illegimates not Aided by this Section. Where the mother of an illegitimate is an alien and deceased, this section does not aid so-called brothers of such illegitimate to inherit from him, as the common law did not give inheritable blood to illegitimates.[3] The descent between brothers is immediate, not through the parent.[4]

(N. S.) 367, 370; Callahan v. O'Brien, 72 Hun, 216.

[1] McCreery's Lessee v. Somerville, 9 Wheat. 354.

[2] *Supra*, pp. 646, 647; Renner v. Muller, 57 How. Pr. 229, 241.

[3] St. John v. Northrup, 23 Barb. 25, and see § 289, The Real Prop. Law, *supra*.

[4] *Supra*, p. 68; Renner v. Muller, 57 How. Pr. 229, 241.

§ 295. **Advancements.**— If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased,[1] such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement. An 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, is an advancement.

Formerly 1 Revised Statutes, 737, section 127, and 1 Revised Statutes, 754, sections 23, 24, 25, 26:

§ 127. 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 this Act.[2]

§ 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.[3]

§ 24. But if such advancement 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.[4]

[1] Spelled deceosed in Session Laws of 1896, p. 622.

[2] Repealed, chap. 547, Laws of 1896.

[3] Repealed, chap. 547, Laws of 1896.

[4] Repealed, chap. 547, Laws of 1896.

§ 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.[1]

§ 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.[2]

Some Account of this Enactment. The doctrines of "advancements" by a parent or person *in loco parentis* spring from two sources, "equity"[3] and the "Statute of Distributions" (22 and 23 Car. II, chap. 10).[4] The chancellor long "favoured the heir," in analogy to the like legal doctrines, and consequently deprecated double portions to younger children, because they were at the expense of the heir. In a State where real inheritances are now partible, the maxim "equality is equity" applies with still greater force, and the equitable presumption that a sum paid by a parent to a child is intended as an "advancement," or ademption, is very strong in favor of other children, equally entitled, who receive nothing. The source referred to by Kent as the sole origin of the New York statute regulating advances, *i. e.*, the English Statute of Distributions,[5] was re-enacted here in the year 1774.[6] It was subsequently re-embodied in the first general revision of the laws of the State,[7] and thence continued to the Revised Statutes.[8] The Statute of Distributions had no reference to real estate,[9] and consequently, until the Revised Statutes, the general doctrine of "advancements," if ever applied to real property, could have stood only upon the general principles of equity.[10] The Revised Statutes first applied the principle of the old Statute of Distributions to real estates as well as personal estates.[11] The present

[1] Repealed, chap. 547, Laws of 1896.

[2] Repealed, chap. 547, Laws of 1896.

[3] 2 Spence, Eq. Juris. 427.

[4] 4 Kent, Comm. 417, 418; Beebee v. Estabrook, 79 N. Y. 246; Terry v. Dayton, 31 Barb. 519. But the custom of bringing personal estate into hotchpot is older than the Statute of Distributions in London city. Tomlins, Litt. 307.

[5] 22 and 23 Car. II. chap. 10, explained by 29 Car. II, chap. 31, § 25; Terry v. Dayton, 31 Barb. 519, 523.

[6] Laws of 1774, chap. 11

[7] 2 J. & V. 71; Laws of 1787, chap. 38.

[8] 1 K. & R. 535; 1 R. L. 311, 313; 1 R. S. 754, §§ 23, 24, 25, 26, *supra*.

[9] Real estate among coparceners was brought into hotchpot long before the Statute of Distributions. 2 Black. Comm. 190.

[10] Parker v. McCluer, 5 Abb. Pr. (N. S.) 97. *Cf.* 2 Black. Comm. 190; 4 Kent, Comm. 419; Terry v. Dayton, 31 Barb. 519, 523.

[11] Terry v. Dayton, 31 Barb. 519, 523.

statute now regulates the entire subject of advancements out of real estate.[1]

Construction of this Section. The term "*advancements*" is strictly a technical one, and not the equivalent of "advances."[2] It relates to children only, not to widows of intestates.[3] The sections of the Statute of Distribution, relating to "advancements" of personal estate,[4] and this section of The Real Property Law, relating to "advancements" of real estate,[5] are to be read together, being *in pari materia*.[6] Where a man dies leaving a will disposing of a part only of his estate, this section has no application. It does not apply to partial intestacy.[7] Interest is not allowed, as a rule, on property or sums to be treated as "advancements."[8]

Education and Maintenance of Minor not Advancements. It being the duty of parents to maintain and educate their minor children, sums thus expended are, by this section, declared not to be "advancements."[9] Where property is given to a child by a parent, and it appears that such gift was not intended as an "advancement," the intention is controlling.[10]

Purchase of Real Estate by Father in Child's Name. Where a father pays the consideration and takes title to real estate in a child's name, the transaction is *prima facie* an "advancement."[11]

[1] Hicks v. Gildersleeve, 4 Abb. Pr. 1, 3; Parker v. McCluer, 36 How. Pr. 301; S. C., 5 Abb. Pr. (N. S.) 97; Thompson v. Carmichael, 3 Sandf. Ch. 120, 127; The Real Prop. Law, §§ 295, 296.

[2] Chase v. Ewing, 51 Barb. 597; Bruce v. Griscom, 9 Hun, 280.

[3] Matter of Morgan, 104 N. Y. 74; Burnham v. Comfort, 37 Hun, 216, 218.

[4] §§ 2732, 2733, Code Civ. Proc.

[5] § 295, The Real Prop. Law.

[6] Beebee v. Estabrook, 79 N. Y. 246, affg. 11 Hun, 523.

[7] Arnold v. Haronn, 43 Hun, 288; Thompson v. Carmichael, 3 Sandf. Ch. 120; Hays v. Hibbard, 3 Redf. 28; Kent v. Hopkins, 86 Hun, 611; De Caumont v. Bogert, 36 id. 382. The doctrines relating to "ademption of legacies" correspond to advancement, but regulate testate successions. Langdon v. Astor's Exrs., 16 N. Y. 9, 33; Hine v. Hine, 39 Barb. 507. "Advances" apply only to intestate succession. Burnham v. Comfort, 37 Hun, 216, 218.

[8] Matter of Keenan, 15 Misc. Rep. 368, 372.

[9] *Supra*, § 295, The Real Prop. Law; Vail v. Vail, 10 Barb. 69.

[10] Matter of Morgan, 104 N. Y. 74.

[11] *Supra*, p. 246; § 74, The Real Prop. Law; Sandford v. Sandford, 5 Lans. 486, 491; S. C., 61 Barb. 293; S. C., 4 Hun, 753; Partridge v. Havens, 10 Paige, 618; Piper v. Barse, 2 Redf. 19. *Cf.* Smith v. Balcom, 24 App. Div. 437; Jackson v. Matsdorf, 11 Johns. 91; Proseus v. McIntyre, 5 Barb. 424; Matter of Morgan, 104 N. Y. 74.

But where a conveyance is made to the husband or wife of a child it is incumbent on those claiming that the transaction is an "advancement," to establish it by other evidence than the conveyance.[1]

Sums Advanced for Child's Portion or Settlement in Life. Sums advanced for the purpose of portioning or settling a child in life, are not "advancements" under this statute.[2] But a considerable sum given a son to enable him to start in business is *prima facie* an advancement; although small or inconsiderable sums given for spending money or traveling expenses are not.[3]

The Doctrine of Representation. Where grandchildren succeed to the share of their parent by representation, under the Statute of Descents, they always take subject to such "advancements" as have been made to their parent by his parents or those standing to him *in loco parentis*.[4]

Advancements, how Proven. The declaration, oral or written, of a parent, his entries and charges in his books of account, or any explicit memorandum by him, are said to be proper evidence that payments to a child are "advancements," after proof that such child has received money from the parent.[5] The declarations of a testator are not, however, evidence in favor of the executor against children, to prove that "advancements" are loans.[6]

[1] Palmer v. Culbertson, 143 N. Y. 213, 217; Ex parte Oakey, 1 Bradf. 281. *Cf.* Piper v. Barse, 2 Redf. 19.

[2] § 295, The Real Prop. Law; McRea v. McRea, 3 Bradf. 199, 207.

[3] Sandford v. Sandford, 5 Lans. 480, 491; S. C., 61 Barb. 293; S. C., 4 Hun, 753; Vail v. Vail, 10 Barb. 69, 74; Kinyon v. Kinyon, 6 Misc. Rep. 584; Kintz v. Friday, 4 Den. 540. *Cf.* McRea v. McRea, 2 Bradf. 199, 207.

[4] Parker v. McCluer, 36 How. Pr. 301; S. C., 5 Abb. Pr. (N. S.) 97; S. C., 3 Keyes, 318; 3 Sharswood & Budd, Lead. Cas. Real Prop. 418; Beebee v. Estabrook, 79 N. Y. 246, affg. 11 Hun, 523.

[5] Hicks v. Gildersleeve, 4 Abb. Pr. 1; Palmer v. Culbertson, 143 N. Y. 213, 217; Parker v. McCluer, 3 Keyes, 318. *Cf.* Chase v. Ewing, 51 Barb. 597.

[6] Chase v. Ewing, 51 Barb. 597. *Cf.* Piper v. Barse, 2 Redf. 19.

§ 296. **How advancements adjusted.**—When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other.

Comment on this Section. The Commissioners of Statutory Revision, in their report to the Legislature, state that this section is new, and drawn to correspond with the provisions of the Code of Civil Procedure.[1] The provisions of the Code of Civil Procedure, upon the adjustment of advances,[2] was taken from the Revised Statutes,[3] which, in turn, was a revision of the old Statute of Distributions.[4] The Revised Statutes made express provision for the adjustment of advances out of real estate of an intestate. And it has been stated that such provision was a new departure in principle, although this may be doubted, for by custom it was long anterior to that revision, and equity exercised some sort of jurisdiction over advancements of real estate independently of statute.[5] It is now very clear, under the present statute, that the section of the Code of Civil Procedure, relating to advancements of personalty,[6] and this section relating to realty,[7] are both to be read together.[8]

Advancements, how Adjusted. Whenever "advancements" have been made, the estate of an intestate now comes into "hotchpot,"[9] and the donee must account for the value of the property advanced as of the time when given, unless the value be acknowledged, in writing, by him, as provided for by the prior section of this act.[10] When the persons entitled to the real, and those entitled to the personal, estate are not the same, the real advances must be computed out of the real estate, and the advances of

[1] Note to § 296, Appendix I, *infra*.

[2] § 2733, Code Civ. Proc. *Cf.* 2 R. S. 98, § 79.

[3] 2 R. S. 95, §§ 76, 77, 78, 79.

[4] 1 R. L. 311, 313; 2 J. & V. 71, reenacting 22 & 23 Car. II, chap. 10, as explained by 29 id. chap. 31, § 25.

[5] *Vide supra*, p. 656, under § 295, The Real Prop. Law.

[6] § 2733, Code Civ. Proc.

[7] § 296, The Real Prop. Law.

[8] Beebee v. Estabrook, 79 N. Y. 246, affg. 11 Hun, 523.

[9] As to this term, see 2 Black. Comm. 190.

[10] § 295, The Real Prop. Law; Parker v. McCluer, 3 Keyes, 318. *Cf.* Marsh v. Gilbert, 2 Redf. 465.

money or goods out of the personal estate.[1] The surrogate has jurisdiction to allow the advancements out of personal estate in a decree for distribution.[2] The adjustment may be made in a partition suit, at least where it appears that the intestate left no personal estate,[3] and even where it does not so appear,[4] as the administrators are now necessary parties to a partition suit.[5] So "advancements" to plaintiff may be set up as an equitable defense, in an action of ejectment against the heirs of an intestate.[6]

Post-testamentary Children. How far "advancements" are to be allowed in computing shares of a post-testamentary child, is considered in Sandford v. Sandford.[7]

[1] Terry v. Dayton, 31 Barb. 519 524.

[2] § 2733, Code Civ. Proc.; Matter of Morgan, 104 N. Y. 74.

[3] Parker v. McCluer, 3 Keyes, 318; Palmer v. Culbertson, 143 N. Y. 213.

[4] Hobart v. Hobart, 58 Barb. 296.

[5] § 1538, Code Civ. Proc.

[6] Bell v. Champlain, 64 Barb. 396.

[7] 4 Hun, 753.

ARTICLE X.

Laws Repealed; When to Take Effect.

Section 300. Laws repealed.
301. When to take effect.

SECTION 300. **Laws repealed.**— Of the laws enumerated in the schedule hereto annexed that portion specified in the last column is repealed.

§ 301. **When to take effect.**— This chapter shall take effect on October 1, 1896.

SCHEDULE OF LAWS REPEALED.

Revised Statutes, part II, chapters 1, 2, 3		All, except §§ 5, 6, 7 of tit. I of ch. 1, and § 63, tit. II, ch. 1.
Revised Statutes, part II, chapter 7, title I		All.
Laws of—	Chapter.	Section.
1798	72	All.
1802	49	All.
1804	109	26.
1805	25	All.
1807	123	2.
1808	175	All.
1819	25	All.
1829	222	All.
1830	171	All.
1834	272	All.
1835	275	All.
1839	295	5.
1843	87	All.
1843	199	All.
1843	210	5.
1845	109	All.
1845	110	All.
1845	115	All.
1848	195	All.
1855	547	All.
1857	576	All.
1858	259	All.

Laws of—	Chapter.	Section.
1860	322	All.
1860	345	All.
1860	396	All.
1863	246	All.
1865	421	All.
1868	513	All.
1870	208	All.
1872	120	All.
1872	141	All.
1872	358	All.
1874	261	All.
1875	38	All.
1875	336	All.
1875	545	All.
1877	111	All.
1879	249	All.
1880	300	All.
1880	115	All.
1880	530	All.
1882	275	All.
1883	80	All.
1884	26	All.
1886	257	All.
1888	246	All.
1889	42	All.
1890	61	All.
1890	475	All.
1891	100	All.
1891	172	All.
1891	209	All.
1892	208	All.
1892	616	All.
1893	123	All.
1893	182	All.
1893	207	All.
1893	599	All.
1894	315	All.
1894	729	All.
1895	525	All.
1895	886	All.

APPENDIX NO. I.

REPORT

OF THE

COMMISSIONERS OF STATUTORY REVISION

ON THE

REAL PROPERTY LAW.

THE REAL PROPERTY LAW.

[This bill became chapter 547 of the Laws of 1896.]

REVISERS' PRELIMINARY NOTE TO THE REAL PROPERTY LAW.

In submitting this proposed revision of the statutory law of real property, we are not unmindful of the paramount importance of the work we have undertaken. Closely related as it is to the tenure of the homes of the people of this State, and their permanent locations for business purposes, we have deemed it highly essential to exercise the utmost care to prevent any encroachments on established principles, pertaining to the acquisition and transmission of title to lands. To this end, we have earnestly endeavored to preserve intact the substance of the law, as heretofore enacted, in all cases where by any possibility a change might interfere with vested rights, and as a general rule, we have only made such changes of form as seemed to us appropriate to a clearer comprehension of legislative intent, and only such changes of substance as are in conformity with well-considered judicial decisions.

We have also taken care not to make any changes in the phraseology of any statute that has been the subject of judicial decision, by which the construction thereof, as established by such decision, can be affected or impaired. Nevertheless, in some instances, we have found that changes are indispensable in order to intelligibly express the meaning of the statutes, but at the end of each section we have noted the character and reasons of the change.

We have not been able to understand why the language of the written law should defy all attempts at improvement, more than the language of any other science, or upon any other subject. It must be susceptible of emendation by undergoing the process which improves every other production of human skill, and more especially when new interests arise which it was not originally intended to embrace. But, as already suggested, whenever it was practicable and consistent with the general plan of the revision, we have preferred to retain the language of the present statutes, where they have received a settled construction. For nearly one hundred years our statutes have been the subject of professional criticism and judicial exposition. For centuries those borrowed from England have been in like manner illustrated and expounded; if at this time a knowledge of their meaning and their defects has not been attained, it probably can never be fully acquired. We have endeavored, however, to ascertain and remedy discrepancies and incongruities, so that the meaning of the law may be made apparent, not only to the members of the legal profession, but to all who are expected to comply with its requirements.

The table immediately following the schedule of laws repealed shows the corresponding disposition of the laws repealed by this chapter in the revision or elsewhere. In the course of our revision of these statutes, we have had occasion to investigate the laws of other States and nations, in relation to the rights of aliens, and, incidentally, the laws of the States as affected by national treaties, the result of which investigation appears in the following additional note:

ALIENS.

The first Constitution of the State of New York, adopted on the 20th of April, 1777, provided that "such parts of the common law of England and of the statute laws of England and Great Britain, and of the acts of the Legislature of the colony of New York, as together did form the law of the said colonies on the 19th day of April, in the year of our Lord 1775, shall be and continue the law of this State, subject to such alterations and provisions as the Legislature of this State shall, from time to time, make concerning the same." (Art. 35.)

This provision of the Constitution operated to re-enact as a part of the law of New York the statute of William and Mary, which declared "the alienage of the ancestor to be no bar to a claimant of real property." This continued to be the law of the State until the 1st day of May, 1788.

Laws of 1788, chapter 46, last paragraph, provided that "from and after the 1st day of May (1788) none of the statutes of England or of Great Britain, shall operate or be construed as law of this State." This provision was re-enacted in Laws of 1828, second session, chapter 21, section 3, and now constitutes section 30 of the Statutory Construction Law.

Upon the abrogation and repeal of the statutes of England by the act of 1788, the common law alone governed the rights of aliens to take and hold land within the State. At common law, an alien could acquire a defeasible title to real property by purchase, including acquisition by devise, but could not inherit from either an alien ancestor or a citizen. With the exception of several statutes entitling aliens who became residents of this State during limited periods of time to hold real property under peculiar conditions, there was no legislation on the subject until 1825. In that year the first general act enabling resident aliens to take and hold real property within the State was passed, providing "that upon filing a deposition in the office of the Secretary of State that he is a resident in, and intends always to reside in the United States, and to become a citizen thereof as soon as he can be naturalized, and that he has taken such incipient measures as the laws of the United States require to enable him to obtain naturalization, an alien may take and hold lands and real estate, of any kind whatsoever, to him and his heirs and assigns forever." But the act provided that an alien should not be capable of taking or holding any lands or real estate which may have descended or been devised or conveyed to him previously to his having become such resident as aforesaid and made such affidavit or affirmation.

Under the act of 1825, therefore, an alien who had not filed the deposition as required by its provisions was unable to take by conveyance, devise or descent. The act of 1825 continued to be the law of the State until the

adoption of the Revised Statutes in 1830. The Revised Statutes provided for the filing of a deposition substantially the same as that authorized by the act of 1825, and any alien who has filed such deposition may take, hold, sell, assign, mortgage, devise and dispose of real property in the same manner as a citizen, during six years from the filing thereof. Aliens who have not filed such deposition, whether resident or non-resident, are prohibited from taking real property by descent, devise or conveyance. If an alien dies while entitled to hold real property, his heirs who are inhabitants of the United States take by descent. If real property is mortgaged by an alien entitled to hold the same, he is authorized to repurchase the premises on foreclosure.

The Statute of Wills (R. S. part II, chap. 6, tit. 1, § 4), adopted in 1830 as part of the Revised Statutes, expressly provided that "every devise or any interest in real property to a person who at the time of the death of the testator shall be an alien, not authorized by statute to hold real estate, shall be void."

Thus, by the Revised Statutes of 1830, an alien, whether resident or non-resident, who has not filed a deposition, was unable to take real property by conveyance, devise or descent.

The laws of the State in relation to the powers of aliens to take and hold real property, was revised and extended by Laws of 1845, chapter 115.

It has been claimed that the act of 1845 was temporary and referred only to aliens, residents of the State in that year. Although the act (Laws of 1857, chap. 576) appears to refer to the act of 1845 as temporary, it will not bear such construction, and the courts have uniformly regarded it as being of permanent force, applying equally to aliens who became residents of the State before, as well as after, its passage. (Hall *v.* Hall, 81 N. Y. 130, 138.)

By section 1 of the act of 1845, a resident alien is enabled to take real property within this State by conveyances or devise, and to hold the same upon filing the deposition required by law. This section superseded the provisions of the Revised Statutes, including the Statute of Wills, which prohibited an alien who had not filed a deposition from taking by conveyance or devise.

Sections 4 and 5 of the act of 1845, as amended by Laws of 1875, chapter 38, authorized the persons answering to the description of heirs of an alien resident or citizen, or being his devisee, and of his blood, to take his real property as heirs or devisees, but if alien males, required by filing of a deposition in order to hold the same.

The section appears to permit alien women to take real property within the State by devise or descent, and to hold the same without filing a deposition. The act does not confer upon non-resident aliens, certainly not upon non-resident male aliens, any power to hold real property within the State.

Section 2 of the act of 1845 gives to the widow of a resident alien, whether she be an alien or citizen of the United States, dower in his real property.

Sections 7 and 8 of the act of 1845 authorize a woman who is an alien resident, to take real property by devise, or an estate or interest in real property by way of marriage settlement, created by the will of her husband or by any person capable of devising real property.

Section 5 of the proposed revision confers upon resident aliens as broad powers in reference to taking real property, as are provided by the act of 1845. Aliens are authorized to take real property by devise or descent, the same as citizens, but in order to hold it are required to file a deposition within one year after the death of the decedent, or if minors, within one year after majority. The widow of an alien is entitled to dower in his real property, but can only obtain admeasurement of the same upon the filing of a deposition, as required by law.

By the terms of this section, if property is devised or descends to a non-resident alien, he is unable to hold the same without becoming a resident of the United States, and filing the deposition required by law; and the intention of becoming a resident and citizen, whether the property passes to a resident or non-resident, or a man or a woman, is made the test of the right to hold the same.

The commissioners believe that with the exception contained in section 6, allowing a woman who marries a foreigner and resides in a foreign country to take real property and transmit it to her heirs, the State of New York has conferred as broad powers upon aliens as are desirable at the present time. They have, therefore, omitted from the revision, and repealed without re-enactment, chapter 207 of the Laws of 1893, which permitted the alien heirs or devisees of a citizen, whether such heirs or devisees are residents or non-residents, and without filing any deposition, to take and hold his real property. If the revision becomes a law, non-resident aliens with the exception contained in section 6, and as their rights may be extended by treaties of the United States with foreign governments, will be unable to take and hold real property within the State. This, it is believed, affects no substantial change in the general policy of the State (which, until 1893, seems to have uniformly required residence and the filing of a deposition, in order to entitle an alien to hold real property within the State. It is believed that the tendency of modern legislation in this country is to restrict the holding of real property by aliens, to such as are residents of the United States.

The following synopsis of laws of the several States in relation to the power of aliens to hold real property will be interesting as indicating the present tendency of legislation in this country:

Alabama.— Constitution, article 1, section 36. "Foreigners, who are or may hereafter become *bona fide* residents of this State, shall enjoy the same right in respect to the possession, enjoyment and inheritance of property, as native-born citizens."

Alabama Code (1886), section 1914. "An alien resident or non-resident may take and hold property, real and personal, in this State, either by purchase, descent or devise, and may dispose of and transmit the same by sale, descent or devise as a native citizen."

Arkansas.— Constitution, article 2, section 20. "No distinction shall ever be made by law between resident aliens and citizens in regard to the possession, enjoyment or descent of property."

Revised Statutes (1884), chapter 3, sections 232–234. (Laws of 1874, Document 15.) All distinctions between aliens and citizens as to the holding, transmission or descent of real property are abolished and their personal property is to be distributed the same as the property of a citizen.

California.— Constitution (1879), article 1, section 17. "Foreigners of the white race or of the African descent, eligible to become citizens of the United States under the naturalization laws thereof, while *bona fide* residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of property, as native-born citizens."

Civil Code, sections 671, 672. "Any person, whether a citizen or alien, may take, hold and dispose of property, real and personal, within the State." "If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession or be barred."

Section 1404. By this section aliens are enabled to take by succession the same as citizens.

Colorado.— Constitution (1876), article 2, section 27. "Aliens who are or may hereafter become *bona fide* residents of this State, may acquire, inherit, possess, enjoy and dispose of property, real and personal, as native-born citizens."

Mills Annotated Statutes (1891), chapter 3, section 99. (Laws of 1861, page 57, as amended by Laws of 1883, page 132.) By this section all distinctions between aliens and citizens abolished.

Section 100. (Laws of 1887, page 24, as amended by Laws of 1889, page 227.) Non-resident aliens are prohibited from acquiring more than 2,000 acres of agricultural land.

Section 1529. "The alienage of the descendants shall not invalidate any title to real estate which shall descend from him or her."

Connecticut.— General Statutes (1888), section 15. Resident aliens of the United States and citizens of France, so long as France shall accord the same right to citizens of the United States, may purchase, hold, inherit or transmit real estate in as full a manner as native-born citizens. The wife of such alien or citizen may take and hold real estate by devise or inheritance and be entitled to dower. Lineal descendants may take and hold as heirs at law.

Alien non-residents authorized to acquire and hold quarrying or mining property, and transmit the same by conveyance, devise, or inheritance, but a non-resident alien shall not acquire greater rights than his grantor, etc.

Delaware.— Revised Code (1852), amended in 1893, title 12, chapter 81, section 1. An alien residing within the State who has declared his intention of becoming a citizen, may hold and transmit property, and his resident heirs or devisees may take the same if they reside within the United States. Non-resident aliens are prohibited from holding real property.

Florida.— Constitution (1885); Declaration of Rights. Section 18. "Foreigners shall have the same rights as to the ownership, inheritance and disposition of property in this State as citizens of the State."

Digest of Laws (1881), chapter 92, section 7. "Aliens of any country or nation whatever, may purchase, hold, enjoy, sell, convey or devise any lands or tenements in the State to the same extent and with the same right as citizens of the United States." Section 14. Aliens as well as citizens may take by inheritance, and shall be entitled to share and share alike.

Georgia.— Code of Georgia, section 1661. "Aliens or subjects of governments at peace with the United States and this State, shall be entitled to

all the rights of citizens of other States resident in this State, and shall have the privilege of purchasing, holding and conveying real estate in this State."

Idaho.— Revised Statutes (1887), section 2827. "Any person, whether a citizen or alien, may take, hold and dispose of property, real or personal." § 5715. Resident aliens may take in all cases by succession as citizens, but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.

By the act of 1891, February 26, persons who are not citizens or who have not declared their intention to become such, and corporations, except railroad corporations, whose members are not exclusively citizens, or persons who have declared their intention of becoming citizens, are prohibited from acquiring any land or title thereto or interest therein, other than mineral lands or such as may be necessary for the actual working of mines and the reduction of the products thereof, but liens may be enforced by foreclosure, and widows or heirs may take by inheritance, but all lands so acquired shall be sold within five years after the title thereto shall be perfected in such sale.

Illinois.— By a law approved February 17, 1851, all distinctions between aliens and citizens were abolished, but by a law passed in 1887, approved June 16, as amended by Laws of 1891, approved June 19, the act of 1851 is repealed, and non-resident aliens are prohibited from taking or holding real property; except that the heirs of aliens who hold property at the time of the enactment of the law, may hold for three years; if under twenty-one, for the term of five years, during which time they must dispose of the same or become actual residents of the State or declare their intention of becoming citizens. Resident aliens, who have declared their intention of becoming citizens, are entitled to hold, sell, assign, mortgage, devise and dispose of real property for six years after such declaration. Resident alien females are entitled to hold without filing and declaring an intention of becoming citizens.

Indiana.— Revised Statutes (1894), section 3328 (Laws of 1861), provides that no person except a citizen or an alien who is a *bona fide* resident, shall take, hold, convey, devise or pass by descent, lands except in such case of descent or devise as are provided for by law. Section 3389 (Laws of 1881). "Natural persons who are aliens, whether they reside in the United States or in foreign countries, may acquire, hold and enjoy real estate, and make, convey, devise, mortgage or otherwise incumber the same in like manner and with the same effect as citizens of this State." Sections 3332–34 (Laws of 1885). Resident aliens who have declared their intention to become citizens, only are entitled to acquire and hold real estate in the same manner as citizens. Other aliens may take and hold lands by devise and descent only, and may convey the same at any time within five years thereafter, and no longer, and all lands so left and remaining unconveyed at the end of five years shall escheat to the State.

Iowa.— Constitution (1857), article 1, section 22. "Foreigners who are or may hereafter become residents of this State, shall enjoy the same rights, in respect to the possession, enjoyment and descent of property, as native-

born citizens." Section 1908 of the Code of 1873, provided that non-resident aliens should enjoy the same property rights as resident aliens, but this section is repealed by Laws of 1888, chapter 85. By this act resident aliens are accorded the same rights as citizens. Non-resident aliens are prohibited from acquiring real property by descent, devise or purchase, but the widow or heirs of aliens who have heretofore acquired property are entitled to take and hold the same for a period of ten years. Non-resident aliens are, however, authorized to hold not to exceed 320 acres of land or city property to the value of $10,000, provided that, within five years from the date of purchase, the same is placed in the hands of a relative of such alien who is an actual occupant of the land and becomes a naturalized citizen within ten years from the date of the purchase of such land.

Kansas.— Constitution (1859), article 1, section 17, provided that no distinction should be made between citizens and aliens in reference to the purchase, enjoyment or descent of property, but this section was amended in 1888, by providing that "The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law." In pursuance of this constitutional provision the Legislature enacted (Laws of 1891, chap. 3), that, "Non-resident aliens and corporations of foreign countries are declared to be incapable of acquiring title to, or taking or holding any lands or real estate in this State by descent, devise, purchase or otherwise, except that the heirs of aliens who have heretofore acquired land in this State under the laws thereof, and the heirs of aliens who may acquire lands under the provisions of this act, may take such land by devise or descent and hold the same for the space of three years; or, if under twenty-one, for the space of five years. Corporations, more than twenty per centum of the stock of which is owned by aliens, are prohibited from acquiring, holding or owning real estate in the State of Kansas. Resident aliens, on filing declaration of intention of becoming citizens, may acquire real property for a term of six years after filing such declaration. Females are not required to file declaration of intention of becoming citizens.

Kentucky.— By Laws of 1874, February 23, all disabilities of aliens, whether resident or non-resident, were removed, but since that time a change of policy has been made.

Kentucky Statutes (1894), section 334. Resident aliens who have declared their intention of becoming citizens, are enabled to take, hold and transmit by inheritance or otherwise, real property the same as citizens. Aliens who have not declared intention, may hold for a term of twenty-one years. If real estate passes to a non-resident alien, by descent or devise, the non-resident alien has eight years in which to dispose of the same.

Louisiana.— The common law never prevailed in Louisiana, and, therefore, the disability of alienage as to the ownership of real property was unknown to its laws. It was, however, the policy of the State to impose a heavy succession tax upon all property passing by devise or descent to a non-resident alien. This succession tax law was, however, repealed in 1877, and since that time all disability of aliens as to holding of real property in the State seems to have been removed.

Maine.— Revised Statutes (1883), chapter 73, section 2. "An alien may take, hold, convey and devise real estate or any interest therein. All con-

veyances or devises of such estate or interest already made by or to an alien are valid."

Maryland.— Public General Laws, article 3, page 9 (Laws of 1874), chapter 354. "Aliens not enemies, may take and hold lands, tenements and hereditaments acquired by purchase, or to which they would, if citizens, be entitled by this act; may sell, devise or dispose of the same, or transmit the same to their heirs as fully and effectually and in the same manner, as if by birth they were citizens of this State."

Massachusetts.— Public Statutes (1882), chapter 126, section 1. "Aliens may hold, transmit and convey real estate, and no title to real estate shall be invalid on account of the alienage of a former owner."

Michigan.— Constitution, article 18, section 13. "Aliens who are or who may hereafter become, *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property, as native-born citizens."

Howell's Annotated Statutes (1882), section 5775. "An alien may acquire and hold lands or any right thereto or interest therein by purchase, devise or descent, and he may convey, mortgage and devise the same, and if he shall die intestate the same shall descend to his heirs; but in all cases such lands shall be held, conveyed, mortgaged or devised, and shall descend in like manner and with like effect as if such alien were a native citizen of this State, or of the United States."

Minnesota.— Statutes of Minnesota (1891), section 5410. "Aliens may take, hold, transmit and convey real estate; and no title to real estate shall be invalid on account of the alienage of any former owner." But this section is qualified by chapter 204 of the Laws of 1887, as amended by Laws of 1889, chapter 113, which provided that it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention of becoming such citizens, or any corporation of a foreign country, to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein in this State, except such as may be acquired by devise or inheritance, or in good faith in the ordinary course of justice in the collection of debts hereafter created, or such as may be held as security for indebtedness heretofore or hereafter created. Rights secured by treaties of the United States are preserved. Actual settlers, upon farms, although aliens, are entitled to hold 160 acres. Aliens are allowed to hold small city lots.

Corporations, more than twenty per centum of the stock of which is held by aliens, are prohibited from taking or holding real estate within the State. Titles are not to be affected by alienage of former owners.

Mississippi.— The Constitution of 1868, article 2, section 1, provided that "No distinction shall ever be made by law between citizens and alien friends in reference to the possession, enjoyment and descent of property.

The Constitution of 1890, article 4, section 84, provided that "The Legislature shall enact laws to limit, restrict or prevent the acquiring and holding of land in this State by non-resident aliens."

In conformity with the Constitution of 1890, the Annotated Code of 1892, section 2439, provides that "Resident aliens may acquire and hold land and may dispose of it and transmit it by descent, as citizens of the State; but

non-resident aliens shall not hereafter acquire or hold land." Non-resident aliens may force liens on real property by acquiring the property, and may hold the same for twenty years, but must, within that time, dispose of the same to a citizen or other person capable of holding real property within the State. Title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, whether resident or non-resident, is not to be affected by alienage of former owner."

Missouri.—The Revised Statutes (1889), chapter 4, section 342 (re-enacting section 325 of the Revised Statutes of 1879), provided that "Aliens shall be capable of acquiring by purchase, devise or descent, real estate in this State, and of holding, devising or alienating the same, and shall incur the like duties and liabilities in relation thereto, as if they were citizens of the United States and residents of this State.

But in 1895 (Laws of 1895, page 207) the Legislature enacted, "It shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention of becoming such citizen, or for a corporation of a foreign country to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein, in this State, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts." The treaty rights are saved. Corporations, more than twenty percentum of the stock of which is held by aliens, are prohibited from holding lands within the State.

Montana.—Constitution (1889), article 3, section 25. Aliens and denizens shall have the same rights as citizens in respect to acquiring, purchasing, passing, enjoying, conveying, transmitting and inheriting mining property.

There appears to be no legislative enactment on the subject.

Nebraska.—Constitution (1875), article 1, section 25. "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.

Prior to 1889, non-resident aliens were accorded the same rights as resident aliens, but the Consolidated Statutes (1891), section 4396 (Laws of 1889, page 483), provides as follows: "Non-resident aliens and corporations not incorporated under the laws of the State of Nebraska, are hereby prohibited from acquiring title, or taking or holding any lands or real estate in this State by descent, devise, purchase or otherwise. Where the descent of lands already held by aliens in pursuance of law is cast on non-resident aliens, or such lands are devised, they are given ten years in which to dispose of the property before escheat."

Nevada.—Constitution (1864), article 1, section 16. "Foreigners who are, or who may hereafter become, *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native-born citizens."

General Statutes (1885), section 2655. "Any non-resident alien person or corporation, except subjects of the Chinese empire, may take, hold and enjoy any real property or any interest in lands, tenements or heredita-

ments within the State of Nevada as fully, freely and upon the same terms and conditions, as any resident citizen, person or domestic corporation." The statute of eminent domain is granted to non-resident or foreign corporations.

New Hampshire.— Public Statutes of New Hampshire (1891) chapter 137, section 16. "An alien resident of this State may take, purchase, hold, convey or devise real estate; and it may descend in the same manner as if he were a native citizen."

New Jersey.—Revision of New Jersey (1877), page 6. By an act of 1886, alien friends are empowered to hold land within the State, in the same manner as native-born citizens, and their heirs and devisee take in the same manner as citizens.

New York.— See preceding portion of this note.

North Carolina.— Code (1883), section 7 (Laws of 1870–71, chapter 255). "It shall be lawful for aliens to take, both by purchase and descent or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this State can or may do, any law or usage to the contrary notwithstanding."

North Dakota.— The laws of the Territory of Dakota were continued in force in the State of North Dakota by the act of Congress of 1889, February 22, admitting the State into the Union. The Compiled Laws of Dakota (1887), section 2680, provided, "Any person, whether a citizen or an alien, may take, hold and dispose of property, real or personal, within this State."

Section 3417. "Aliens may take in all cases by succession as well as citizens, and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative."

These sections of the Compiled Laws of the Territory of Dakota become the laws of North Dakota, if they were in force at the time of its admission in 1889. Prior to that date in 1887, March 3, Congress passed a law prohibiting non-resident aliens from acquiring property within the Territories of the United States, except by inheritance or in the course of the collection of debts. This law would seem to supersede section 2686 of the Compiled Laws of Dakota. Section 3417 does not seem to be inconsistent with its provisions.

Ohio.— Revised Statutes (1894), section 4173. "No person who is capable of inheriting shall be deprived of the inheritance by reason of any of his or her ancestors having been aliens, and aliens may hold, possess and enjoy lands, tenements and hereditaments within this State either by descent, devise, gift or purchase as fully and effectually as any citizen of the United States or of this State can do."

Oregon.— Constitution, article 1, section 31. "White foreigners who are or may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and descent of property as native-born citizens."

Annotated Laws of Oregon (1887), section 2988, being an act of October 4, 1872. "Any alien may acquire and hold land, or any right thereto, or interest therein, by purchase, devise or descent, and he may mortgage and devise the same, and if he shall die intestate, the same shall descend to his heirs, and in all cases such lands shall be held, conveyed, mortgaged or devised;

or shall descend in like manner and with like effect, as if such alien were a native citizen of this State, or of the United States."

Pennsylvania.— The legislation of this State is confused and unsatisfactory. The laws on the subject are collated in Brightley's Purdon's Digest (1894, page 91). An act of 1791, February 23, provided that "Every person being a citizen or subject of any foreign State, shall be able and capable in law of acquiring and taking by devise or descent, lands or other real property in this Commonwealth and of holding and disposing of the same in as full and ample a manner as a citizen of this State may or can do." It was held by the Supreme Court of Pennsylvania that this section did not authorize inheritance from an alien ancestor. (Rubeck v. Gardner, 7 Watts, 455.) An act of 1807, February 10, authorized resident aliens who have declared their intention of becoming citizens to acquire and hold not to exceed 500 acres of land. An act of 1861, May 1, allows aliens to purchase and hold not more than 5,000 acres of land, the annual income of which does not exceed $20,000.

Rhode Island.— Public Statutes (1882), chapter 172, section 6. "Aliens may take, hold, convey and transmit title to real estate and may sue and recover possession of the same in the same way and with the same effect as if they were native-born citizens of the United States."

South Carolina.— Laws of 1872, February 27. "Real and personal property of every description may be taken, acquired, held and disposed of, by an alien in the same manner in all respects as by a natural-born citizen; and a title to real and personal property of every description may be derived through, from or in succession of an alien, in the same manner in all respects as through, from or in succession of a natural-born citizen." Laws of 1873, November 19, provides that the act of 1872 shall be held to include corporations.

South Dakota.— See North Dakota. The law is the same in each State. An act of 1890, February 6, re-enacts all laws of the Territory of Dakota in force at the time of the admission of South Dakota as a State.

Tennessee.— Code (1884), section 2804ff (Laws of 1875, chapter 282). "An alien resident or non-resident may take and hold property, real or personal, in this State, either by purchase, descent or devise, and dispose of and transmit the same by sale, descent or devise as a native citizen; and in all cases where aliens, resident or non-resident, have heretofore acquired title to property, real or personal, in this State in a lawful manner, the said aliens, their assigns, heirs, devisees or representatives shall hold and dispose of the same in the same manner as native citizens."

"The heir or heirs of an alien, whether resident or non-resident, in the United States may take any lands so held by descent or otherwise, as citizens of the United States.

"Any alien to whom property, personal or real, shall descend under the provisions of this chapter, shall have the right to hold, sell, alienate and convey the same in as full and ample a manner as if he or she were a citizen of the United States."

Texas.— Civil Statutes (1889), title 3, article 9. "An alien shall have and enjoy in the State of Texas such rights as are, or shall be, granted to citizens of the United States by the laws of the nation to which such alien

belongs, or by the treaties of such nation with the United States." (Laws of 1854, February 13), article 10. "Any alien who shall become a resident of this State and shall, in conformity with the naturalization laws of the United States, have declared his intention to become a citizen of the United States, shall have the right to acquire and hold real property in this State in the same manner as if he were a citizen of the United States."

Article 1658. "In making title to land by descent, it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien, and every alien to whom any land may be devised or may descend, shall have nine years to become a citizen of the State and take possession of such land, or shall have nine years to sell the same; provided, that an alien may take and hold by devise or descent in Texas in the same manner in which citizens of the United States can take and hold by devise or descent in the country of such alien."

Utah.—Compiled Laws of 1888, chapter 2758. Resident aliens may hold in all cases by succession as citizens, but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent.

Vermont.—Constitution, chapter 2, section 39, provides that "Every person who comes to settle in the State, having taken an oath of allegiance, may purchase, hold and transfer land, and after one year's residence shall be deemed a free denizen," but in the case of The State v. Boston, Concord & Montreal R. R. Co., 25 Vt. 435, the court held that there was no prohibition in the Constitution against aliens holding real property; that escheat of land to the sovereign in consequence of a conveyance to an alien is a result of purely feudal character, which does not exist in Vermont. The law of Vermont may be said to be that aliens, whether they have taken the oath of allegiance to the State, and settled within it, or not, may hold real property with the same rights as citizens.

Virginia.—Code, section 43 (1872, chapter 187, section 1). "Any alien not an enemy may acquire by purchase or descent and hold real estate in the State, and the same shall be transmitted in the same manner as real estate held by citizens."

Washington.—Constitution, article 2, section 33. "The ownership of lands by aliens other than those who, in good faith, have declared their intention to become citizens of the United States, is prohibited in this State, except where acquired by inheritance under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien, directly or in trust for such alien shall be void; provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metal, iron, coal or fire-clay, and the necessary lands for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

The act of Congress admitting Washington as a State continued the laws of the Territory in force at the time of admission. Section 2955 of the General Statutes of the Territory of Washington (Laws 1886, January 29) removed all disability of alienage within the Territory. This act was prob-

ably superseded so far as non-resident aliens are concerned by the act of Congress of 1887, approved March 3, which prohibited non-resident aliens from taking real property within the Territories of the United States, except by inheritance. As to resident aliens, it is probably still in force and should be construed in connection with the constitutional provisions.

Laws 1895, chapter 111, confirms to present holders the title to all lands conveyed to, or acquired by, aliens prior to the adoption of the Constitution.

West Virginia.— Article 2, section 5. "No distinction shall be made between resident aliens and citizens, as to acquisition, tenure, disposition or descent of property."

Code of West Virginia (1891), chapter 70. "An alien not an enemy may take and hold by inheritance or purchase, real estate within this State, as if he were a citizen of the State. Any such alien may convey or devise any real estate held by him, and if he die intestate, it shall descend to his heirs at law; and any such alien, devisee or heir, whether a citizen or an alien, may take under such alienation, devise or descent."

Wisconsin.— Constitution, article 1, section 15. "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property."

Section 2200 of the Annotated Statutes, being a re-enactment of the Revised Statutes of 1849, chapter 62, section 35, abolished all distinctions between aliens and citizens. This act was superseded in part by Annotated Statutes (1889), section 2200a (Laws of 1887, chap. 479, § 1): "It shall be unlawful for any alien not a resident of this State or of the United States, or for any corporation not created by or under the laws of the United States, or of some State or Territory of the United States, to hereafter acquire, hold or own more than three hundred and twenty acres of land in this State or any interest therein, except such as may be acquired by devise, inheritance or in good faith in the course of justice in the collection of debts heretofore created."

"Section 2. No corporation or association, more than twenty per centum of the stock of which is or may be owned by any person, corporation or association who are alien non-residents in this State or of the United States, shall hereafter acquire, hold or own more than three hundred and twenty acres of land in this State or any interest therein, except such as may be acquired in good faith in the course of justice in the collection of debts."

Wyoming.— Constitution, article I, section 29. "No distinction shall ever be made by law between resident aliens and citizens as to the possession, taxation, enjoyment and descent of property."

Revised Statutes of Wyoming, section 2226 (Laws of 1876, chap. 42). The alienage of the descendant shall not invalidate any title to real estate which shall descend from him or her.

Prior to the time Wyoming became a State, this was as far as the Legislature could go in conferring powers upon aliens. There has been no legislation on the subject since the adoption of the Constitution.

District of Columbia and Territories.— An act of Congress of 1887, approved March 3, provides as follows: "It shall be unlawful for any person or persons, not citizens of the United States or who have not lawfully declared their intention to become such a citizen, or for any corporation

not created by or under the laws of the United States, or of some State or Territory of the United States, to hereafter acquire, hold or own real estate so hereafter acquired or any interest therein, in any of the Territories of the United States, or in the District of Columbia, except such as may be acquired by inheritance, or in good faith in the ordinary course of justice in the collection of debts heretofore created; provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force and no longer. No corporation or association, more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the Territories of the United States or the District of Columbia."

Recapitulation.— In twenty-one States, all, or practically all, distinction between the rights of aliens and citizens has been abolished. It will be observed that in most of these States the statutes or constitutional provision on the subject was enacted prior to 1885. In eighteen of the States all distinction between resident aliens and citizens is abolished, but non-resident aliens, or those who have not declared their intention of becoming citizens, are prohibited from holding real property within the State. They are, however, in most cases given the power to take the same by succession, provided the property is transferred within a limited period of time to a person capable of holding the same, or provided that within such time they become qualified to hold the property themselves. Corporations, more than twenty per centum of the stock of which is held by aliens, are prohibited from acquiring real property within the State. Nearly all of the legislation on this subject in these States is of a very recent date, superseding, in many instances, provisions of constitutions and statutes which were much more liberal in terms. These later statutes are uniform, and may be said to indicate the present policy of this country to restrict the holding of real property to citizens and alien residents who have declared their intention of becoming citizens. In several States, notably those recently admitted to statehood, the legislation is unsatisfactory, but the general tendency of the country is revealed in the recent legislation of States like Illinois, Idaho, Indiana, Iowa, Kansas, Minnesota, Mississippi, Missouri, Nebraska, Washington and Wisconsin, in all of which the legislation on the subject was enacted since 1885.

LAWS OF FOREIGN COUNTRIES.

Argentine Republic.— Constitution, chapter 1, article 20. "Aliens shall enjoy in the territory of the nation the same civil rights as the citizens; they shall be allowed to engage in industrial, commercial and professional occupations; to own, hold and sell real estate; to navigate the rivers and travel along the coast; to practice freely their religion; to dispose by will of their property, and to contract marriage according to the laws. They are not bound to become citizens, nor to pay forced extraordinary taxes. They

can obtain naturalization by residing two consecutive years in the republic; but this period of time can be shortened upon application and sufficient proof that the applicant has rendered services to the republic."

Austria.— Section 33 of the Austrian Civil Code provides that "Foreigners enjoy the same civil rights and are subject to the same duties as citizens, except when the condition of citizenship is especially demanded for the enjoyment of a certain right. Foreigners must, in doubtful cases, however, in order to enjoy equal rights with citizens, prove that in regard to the law in question, Austrians enjoy the same rights in their country as do the citizens."

Belgium.— By an act of 1865, April 27, the *droit d'aubaine* was abolished in Belgium, and foreigners were declared capable of succeeding, disposing and receiving. (Principes De Droit Civil by F. Laurent, p. 539.)

Canada.— The Revised Statutes of Canada (1886), chapter 113, section 3, provide that "Real and personal property of any description may be taken, acquired, held and disposed of by an alien in the same manner, in all respects, as by a natural-born British subject; and a title to real and personal property of any description may be derived through, from or in succession to an alien, in the same manner in all respects as through, from or in succession to a natural-born British subject."

Costa Rica.— Constitution, article 12. "Foreigners enjoy every civil right."

England.—A law of 33 Victoria (1870), chapter 14, section 2, provides that "Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner, in all respects, as by a natural-born British subject, and a title to real and personal property of every description may be derived through, from or in succession to an alien, in the same manner in all respects, as through, from or in succession to a natural-born subject."

France.— The *droit d'aubaine*, which obtained in France prior to the revolution of 1789, was a principle of the feudal law by which the estate of a foreigner who died in France was appropriated by the lord. The *droit d'aubaine* originally imposed upon foreigners a double incapacity, both of transmitting and succeeding to property. At a later period, however, it came to mean the incapacity of succeeding only, and a foreigner dying in France leaving subject heirs might transmit his property to them by testament, and they could succeed to his estates in the same manner as the heirs of a subject. Such was the condition of foreigners in France when the Constituent Assembly, on the 6th of August, 1790, unanimously abolished the *droit d'aubaine*, "considering," said the illustrious Assembly, "that the *droit d'aubaine* is inconsistent with the principle of fraternity which ought to unite all men whatever their country or government; that the *droit d'aubaine*, established in a barbarous age, ought to be proscribed among a people which has founded its constitution on the rights of man and of the citizen, and that France liberated ought to open its bosom to all the peoples of the world, by inviting them to enjoy, under a free government, the sacred and inviolable rights of humanity." A second decree of the 8th of April, 1791, gave to foreigners the right of disposing of their goods by every means which the law authorized, and permitted them to

receive successions left in France by their relatives, whether foreigners or French. (Principes De Droit Civil, by F. Laurent, vol. I, p. 535.)

The Assembly had hoped that other nations would follow its example and abolish the *droit d'aubaine*. This hope was not realized, and upon its adoption the Code Napoleon re-enacted, to some extent, at least, the *droit d'aubaine*.

Article 11 of the Code provided that "An alien shall enjoy in France the same civil rights as those granted to French people by the treaties of the nation to which such alien belongs."

Article 726 prohibited an alien from inheriting property which his French or foreign relative owned in the territory of the kingdom, except as such right may be acquired by article 2, and article 912 provided that "One cannot dispose in favor of an alien unless the latter can dispose in favor of a Frenchman." Articles 726 and 912 were repealed in 1819. The discussion of the rights of aliens in relation to real property by French law writers refers to the Code before 1819. The writers have generally admitted that article 11 only referred to civil rights as distinguished from the natural rights of man, and while denying civil rights to foreigners, except in cases of reciprocal relations, did not deny to them natural rights. Other writers have contended that, under the article, aliens were entitled to all the civil rights which were not denied by the laws of France, and that such of them as were denied might be acquired by treaty relations. As to what constitutes natural and civil rights there is considerable conflict of opinion. In relation to the holding of real property, it is pretty generally admitted that an alien by natural right can acquire property (except by succession) and exchange and sell the same. (Principes De Droit, by F. Laurent, p. 522.) But as to whether he might acquire the same by testament, donation or *inter vivos*, there is considerable doubt. Laurent states that acquisition by testament or donation is not a civil right. (Id. p. 542.) Mourlon states that the right of acquiring or transmitting by donation is a natural right, of which aliens were not deprived by article 11. (Mourlon's Repetitions sur le Code Civil, vol. I, p. 74.) Demolombe contends that the Code Napoleon did not prohibit transmissions by inheritance to a subject of France, since article 726 only declared an alien incapable of succeeding, and that an alien might dispose by donation *inter vivos* and by will, since article 912 only declared an alien incapable of receiving. (Demolombe's Code Napoleon, vol. I, p. 372.) But in this latter contention he does not appear to have been followed by other commentators on the law. Article 3 of the Code impliedly recognizes the right of foreigners to own real estate in France, but does not give to them the right of disposing by donation or will. Laurent, in his great work on the Civil Law, is of the opinion that, under the Code Napoleon, the right of disposing of property by testament or donation was not possessed by foreigners.

All discussion on the subject seems to be settled by an act of July 14, 1819, which repealed articles 726 and 912 of the Code Napoleon, and all incapacity of aliens to hold and dispose of real property in France seems to have been swept away, aliens being declared capable of succeeding, of disposing and of receiving in the same manner as Frenchmen in all the territories of the kingdom. (Principes De Droit Civil, by F. Laurent, vol. I,

p. 538; Demolombe's Code Napoleon, vol. 1, p. 369; Borleux's "Commentaire sur de Code Napoleon," vol. 1, p. 54.)

While under article 11, aliens may still be denied in France all other civil rights not acquired by treaty, the civil rights in relation to real property are accorded by the Laws of 1819, and with the exception contained in article 2 of that act, aliens to-day enjoy in France substantially all the rights enjoyed by Frenchmen in relation to holding and disposing of real property. The principle of reciprocal relation is, to some extent, preserved by section 2 of the act of 1819, which provides that in the case of the division of the same succession by co-heirs, alien and French, the latter shall be entitled to levy upon the goods in France a portion equal to the value of the goods situated in a foreign country of which they will be deprived by virtue of the local laws or customs.

Demolombe contends that this provision means that a Frenchman shall only be entitled to levy upon goods in France when he is deprived of property in a foreign country by the laws thereof as a Frenchman. Thus, if a man dies leaving $10,000 worth of real property in France and $10,000 worth of real property in a foreign country, and has for heirs his father and brother, the Code Napoleon accords to the father a quarter and to the brother three-quarters of the succession. (Art. 749.) Suppose that the foreign law accords to each of them one-half, the father thus being entitled to $5,000 of the $10,000 worth of property situated in a foreign country, the brother would not be entitled to claim that the father, having received a quarter of the entire estate, would not be entitled to any portion of the estate in France.

Demolombe argues that this would raise an interminable conflict between the statutes of the two countries. If the foreign law entitled the father to one-half the estate, it should in the supposed case reciprocally provide that he should have the entire property situated in a foreign country, that is to say, $10,000. He concludes that the property in a foreign country and the property in France constitutes two distinct estates, and unless the brother is deprived of some portion of the estate situated in a foreign country, as a Frenchman, he will not be entitled to levy upon the father's portion of the estate in France. (Demolombe's Code Napoleon, 103.)

Germany.— There appears to be no imperial legislation applying to the entire German empire in relation to the rights of aliens to take and hold real property. The laws of the various states and principalities which together constitute the empire vary, but for the most part tend to the abolition of all distinctions as to the rights of alien friends, reserving, however, to the government the right to prescribe a different rule by the way of retaliation.

Greece.— Laws of 1890, article 13. "An alien enjoys the same civil rights in Greece as does a Greek, except when modified by treaties."

Honduras.— Constitution, chapter 3, article 13. "No foreigner is more privileged than another. All shall enjoy the civil rights of Honduraneans. Consequently they are permitted to buy, sell, locate, exercise industries or professions; to own all kinds of property and to dispose of them in the form prescribed by law."

Italy.—Laws of 1891, section 53. "An alien is permitted to enjoy civil rights enjoyed by citizens."

Roumania.—Civil Code, article 11. "Aliens in Roumania enjoy the same civil rights as Roumanians enjoy, except in cases where the law prescribes otherwise."

Spain.—Civil Code, article 27. "Foreigners enjoy in Spain the rights that the civil law concedes to Spaniards, saving what is provided in article 2 of the Constitution of the state, or in international treaties."

Article 2 of the Constitution does not affect the holding of real property.

United States of Columbia.—Constitution, title 2, article 11. "Foreigners shall enjoy in Columbia the same rights that are conceded to Columbians by the laws of the nation to which the foreigner belongs, except those which are stipulated in public treaties."

Venezuela.—Constitution, title 1, article 10. "Foreigners shall enjoy the same civil rights as Venezuelans, and the same security in their persons and property. They can only take advantage of diplomatic means in accordance with public treaties and in cases where right permits it."

THE TREATY-MAKING POWERS.

The Constitution of the United States vests in the President, by and with the advice and consent of the Senate, the power of making treaties, and section 2 of article 6 provides that: "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." To what extent the national government through the treaty-making power conferred by the Constitution can modify or supersede the laws concerning private rights of a particular State, thus accomplishing indirectly what it cannot accomplish directly by an act of Congress, is a question of great interest and importance.

Many treaties contain provisions in relation to the holding and disposition of real property by aliens which are inconsistent with the laws of the individual States, and if upheld, must be deemed to supersede or modify them. If treaty provisions in relation to the holding of real property by aliens are to be deemed of force not only in the Territories but in the States of the Union, then the statutes of a State reveal only in part the rights of aliens within its territory, and reference must be had to the treaties of the national government in order to determine them.

The question of the supremacy of a treaty as affecting matters of State jurisdiction concerning which Congress has no power to legislate, has been before the Supreme Court of the United States in several cases. In the case of Ware v. Hylton, 3 Dal. 199, decided in 1796, the Supreme Court held that a law of Virginia which provided for the confiscation of debts due to British creditors, although within the power of the State of Virginia at the time of its passage, was superseded by the treaty of 1783 with Great Britain, which granted to British creditors the recovery of debts incurred before the treaty was made. The supremacy of the treaty over the State law was sustained, and the court held that Virginia, by becoming a State of the Union, had vested in the national government the treaty-making power.

Chief Justice CHASE said: "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State Legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State and paramount to its Legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the State Legislature, must be prostrated? * * * But it is asked: Did the fourth article intend to annul a law of the State, and to destroy rights acquired under it? I answer that the fourth article did intend to destroy all lawful impediment, past and future, and that the law of Virginia, and the payment under it, is a lawful impediment and would bar a recovery, if not destroyed by this article of the treaty."

In the case of Chrirac v. Chrirac, 2 Wheat. 259, a native of France who had become a naturalized citizen of the United States died, leaving real property in the State of Maryland. A law of the State of Maryland provided that his foreign heirs might inherit, but could only hold property for ten years, unless they became citizens of the State of Maryland. A treaty of peace with France adopted in 1870, prior to the death of the decedent, enabled the people of one country, holding lands in the other, to dispose of the same by testament or otherwise, as they shall think proper; and to inherit lands in their respective countries without being obliged to obtain letters of naturalization. Chief Justice MARSHALL, in delivering the opinion of the court, said: "The plaintiffs having failed to convey the property in question, their estate has terminated unless it be supported in some other manner than by the act of Maryland. * * * It (the treaty) does away with the incapacity of alienage and places the defendants in error in precisely the same situation with respect to lands as if they had become citizens. It renders the performance of the condition a useless formality and seems to the court to release the rights of the State as entirely in this case as in the case of one who had purchased instead of taking by descent. The act of Maryland had no particular reference to the case of Chrirac, but is a general rule of State policy, prescribing the terms on which French subjects may take and hold land. This rule is changed by the treaty."

In the case of Hauenstein *v.* Lynham, 100 U. S. 483, a law of Maryland which only allowed alien heirs or devisees being in the State to take and hold real property, upon filing a declaration of intention to reside within this State, was before the court for construction. An alien resident of Virginia died, leaving alien heirs residing in Switzerland, Our treaty of 1850 with Switzerland provided that "If a citizen of one nation should inherit real property in the other, which by the law of the State or Canton he could not hold on account of being an alien, he might nevertheless have such time to dispose of the same as the laws of the State or Canton will permit." There being no such law in Maryland, the property will escheat to the State, if the law was not deemed to be qualified by the provisions of the treaty. The court said: "If it had not such a law, it was competent to enact one and until one exists there can be no bar arising from the lapse of time. * * * That the laws of the State irrespective of the treaty would put funds into her coffers is no objection to the right or remedy claimed by the plaintiffs in error." The rule was reiterated in the case of Geoffrey v. Riggs, 133 U. S. 258, and in In re Parrott, 6 Saw. 349. In the former case the

court admitted that there was some limitation upon the treaty-making power, but in respect to the holding and disposing of real property by aliens reiterated the rule that the treaty is supreme over State Constitutions and laws. Although there may be no decision of the Supreme Court of the United States which is entirely satisfactory, the doctrine of the supremacy of treaties over State laws and constitutions is laid down so broadly and emphatically that the provisions of treaties in relation to the taking, holding and disposing of real property by aliens, cannot be disregarded in an investigation of this subject.

Numerous treaties have been made containing no reference to the rights of citizens or subjects of one nation relative to the ownership of real property in the other. But the treaties with the following nations regulate the capacity of their citizens or subjects to take and transfer real property in the United States:

Argentine Confederation (1853).— Same rights as American citizens.

Austria-Hungary (1848).— Take by inheritance, but must dispose of the property within two years.

Bolivia (1858).— Take by inheritance, but must dispose of the property within the time prescribed by law.

Borneo (1850).— Possess all the rights the United States grants to the most favored nation.

Brunswick-Luneburg (1854).— Take by inheritance, but must dispose of the property within the time prescribed by law.

Congo (1891).— Possess all the rights the United States grants to the most favored nation.

New Granada (1846).— Take by succession and may dispose of the property at pleasure.

Dominican Republic (1867).— Take by inheritance, but must dispose of the property within the time prescribed by law.

Ecuador (1839).— Take by inheritance, but must dispose of the property within three years.

France (1853).— The rights of Frenchmen are subject to the laws of the different States.

Grand Duchy of Hesse (1844).— Take by inheritance, but must dispose of the property within two years, or within a reasonable time thereafter.

Hawaiian Islands (1849).— Take by inheritance, and are allowed a reasonable time to dispose of the property.

Italy (1871).— "As for the case of real estate, citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation."

Mecklenburg-Schwerin (1847).— Take by inheritance, and are allowed a reasonable time to dispose of the property.

Nicaragua (1867).— Take by inheritance, but in a State where they are not permitted to hold property, they are allowed such time to sell the same as the law permits.

Orange Free State (1871).— Take by inheritance, and are allowed such time to sell the property as the law, where the same is situated, permits.

Peru (1887).— Take by inheritance, and may dispose of the property at pleasure.

Portugal (1840).— Take by inheritance, and may dispose of the property within the time prescribed by law, or within a reasonable time.

Prussia (1828).— Take by inheritance, and are allowed a reasonable time to sell the property.

Russia (1832).— Take by inheritance, and may dispose of the property within the time prescribed by law, or if no time is prescribed, then within a reasonable time.

Salvador (1870).— Possess full rights of ownership and disposition of real property.

Saxony (1845).— Take by inheritance, but must dispose of the property within three years.

Servia (1881).— Possess all the rights the United States grants to the most favored nation.

Spain (1795).— Take by inheritance, and are allowed a reasonable time to sell the property.

Swiss Confederation (1850).— Take by inheritance, and allowed a term of not less than three years to sell the property.

Tonga (1886).— Possess all the rights the United States grants to the most favored nation.

Wurtemberg (1844).— Take by inheritance, and are allowed two years to sell the property, which term may be extended,

Respectfully submitted,

CHARLES Z. LINCOLN,
WILLIAM H. JOHNSON,
A. JUDD NORTHRUP.

THE REAL PROPERTY LAW.

AN ACT relating to real property, constituting chapter forty-six of the general laws.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

CHAPTER XLVI OF THE GENERAL LAWS.

The Real Property Law.

ARTICLE 1. Tenure of real property. (§§ 1–9.)
2. Creation and division of estates. (§§ 20–56.)
3. Uses and trusts. (§§ 70–93.)
4. Powers. (§§ 110–163.)
5. Dower. (§§ 170–187.)
6. Landlord and tenant. (§§ 190–202.)
7. Conveyances and mortgages. (§§ 205–234.)
8. Recording instruments affecting real property. (§§ 240–277.)
9. Descent of real property. (§§ 280–296.)
10. Laws repealed; when to take effect. (§§ 300–301.)

ARTICLE I.

Tenure of Real Property.

SECTION 1. Short title; definitions; effect.
2. Capacity to hold real property.
3. Capacity to transfer real property.
4. Deposition of resident alien.
5. When and how alien may acquire and transfer real property.
6. Effect of marriage with alien.
7. Title through alien.
8. Liabilities of alien holders of real property.
9. Heirs of patriotic Indian.

SECTION 1. **Short title; definitions; effect.**— This chapter shall be known as the real property law. The terms "real property" and "lands" as used in this chapter are coextensive in meaning with lands, tenements and hereditaments. This chapter does not alter or impair any vested interest or right, nor alter or affect the construction of any conveyance, will or other instrument which has taken effect at any time before this chapter becomes a law.

R. S. 2461, pt. II, ch. 1, tit. V, §§ 10, 11, unchanged in substance. See definition of real property in Statutory Construction Law, § 3.

§ 2. **Capacity to hold real property.**— A citizen of the United States is capable of holding real property within this state, and of taking the same by descent, devise or purchase.

R. S. 2419, pt. II, ch. 1, tit. I, § 8, unchanged in substance.

§ 3. **Capacity to transfer real property.**—A person other than a minor, an idiot, or person of unsound mind, seized of or entitled to an estate or interest in real property, may transfer such estate or interest.

R. S. 2419, pt. II, ch. 1, tit. I, § 10, unchanged in substance.

§ 4. **Deposition of resident alien.**— An alien who, pursuant to the laws of the United States, has declared his intention of becoming a citizen, and who is, and intends to remain, a resident thereof, may make a written deposition to such facts, before any officer authorized to take the acknowledgment or proof of deeds to entitle them to be recorded within the state. Such deposition must be certified by the officer before whom it is made, and may be filed in the office of the secretary of state, and when so filed, must be recorded by him in a book kept for that purpose. Such deposition shall be presumptive evidence of the facts therein contained.

R. S. 2420, pt. II, ch. 1, tit. I, § 15, as am. by L. 1834, ch. 272, unchanged in substance. Section 847 of the Code of Civil Procedure allows an affirmation. See U. S. R. S. § 2165.

§ 5. **When and how alien may acquire and transfer real property.**—An alien may, for a term of six years after filing the deposition described in the last preceding section, take, hold, convey and devise real property. If such deposition be filed, or such alien be admitted to citizenship, a grant, devise, contract or mortgage theretofore made to or by him is as valid and effectual as if made thereafter; provided, however, that a devise to an alien shall not be valid unless a deposition be filed by him, or he be admitted to citizenship, within one year after the death of the testator, or if the devisee is a minor, within one year after his majority. If a person who has filed such a deposition dies within six years thereafter, and before he is admitted to citizenship, his widow is entitled to dower in his real property, and if he dies intestate, his heirs or the persons who would otherwise answer to the description of heirs, inherit his real property, upon such persons being admitted to citizenship, or filing a deposition in their own behalf, within one year after such death, or if minors, within one year after their majority. If an action or proceeding is commenced by the state to recover real property held by an alien, such action or proceeding shall be suspended upon the filing of such deposition, and the service of a certified copy thereof upon the attorney-general, and the payment of the costs to the time of such service.

R. S. 2420, pt. II, ch. 1, tit. I, §§ 16–19; Id. 2422, L. 1802, ch. 49, §§ 1, 2; Id. 2422, L. 1804, ch. 19, § 31; Id. 2423, L. 1808, ch. 175, § 2; Id. 2424, L. 1819, ch. 25, § 2; Id. 2424, L. 1830, ch. 171; Id. 2425, L. 1845, ch. 115, §§ 1–8, 10; L. 1893, ch. 207. See revisers' note to this chapter for full discussions of the subject of aliens in relation to their rights respecting real property.

§ 6. **Effect of marriage with alien.**—A woman who, being a citizen of the United States, marries an alien not entitled to hold real property in this state, may, notwithstanding such marriage, take by grant, will or descent, and hold, convey and devise real property within this state; and the descendants of such a woman who dies intestate, inherit her real property within this state, and any real property which she would have been entitled to take, by descent, if living; and such descendants may take real property by grant or devise from their mother, or from any citizen to whom she would be an heir, may hold real property acquired under this section, and may convey and devise it to any person capable of holding the same.

R. S. 2428, L. 1872, ch. 120; R. S. (supp.) 3351, L. 1889, ch. 42, re-enacted with the following change: The children of a woman who marries an alien are permitted to inherit any real property which the mother could have taken by descent, while the act of 1889 (chap. 42) only permitted the children to take real property from the mother and from or through some ancestor of the mother. The principle of section 6, allowing a woman who has married an alien and resides abroad to take and hold real property within the state, has been followed in several states which do not allow non-resident aliens to hold property within their territory.

In Indiana, the Revised Statutes (§ 3328) provide: "The marriage of a woman with an alien, and her residence in a foreign country, shall not bar her right to hold, convey, devise or pass by descent lands which may have come to her by descent or purchase." In Missouri, section 343 of the Revised Statutes provides that "A woman born in the United States, married to an alien, and residing in a foreign country, may convey or devise real property within the state." Article 19 of the Code Napoleon provides that "A French woman who marries an alien follows the nationality of her husband, unless her marriage does not confer his nationality upon her, and in that event she remains French."

§ 7. **Title through alien.**— The right, title or interest in or to real property in this state of any person entitled to hold the same can not be questioned or impeached by reason of the alienage of any person through whom such title may have been derived. Nothing in this section affects or impairs the right of any heir, devisee, mortgagee, or creditor by judgment or otherwise.

R. S. 2419, pt. II, ch. 1, tit. I, § 9; Id. 2422, L. 1802, ch. 49, § 3; Id. 2423, L. 1807, ch. 123, § 2; Id. 2427, L. 1845, ch. 115, § 9; Id. 2427, L. 1857, ch. 576, § 1; Id. 2428, L. 1868, ch. 513, § 1; Id. 2428, L. 1872, ch. 141, §§ 1–3; Id. 2428, L. 1872, ch. 358, § 1; Id. 2429, L. 1875, ch. 336, §§ 1–2; Id. 2429, L. 1877, ch. 111, §§ 1–2, unchanged in substance.

§ 8. **Liabilities of alien holders of real property.**— Every alien holding real property in this state is subject to duties, assessments, taxes and burdens as if he were a citizen of the state.

R. S. pt. II, ch. 1, tit. I, § 20; Id. 2447, L. 1845, ch. 115, § 12, with the following change: The words "but shall not be elected to any office or serve on any jury," are omitted as unnecessary. The Code of Civil Procedure (§ 1027) prescribes the qualifications of trial jurors, and the Revised Statutes (Pt. IV, ch. 2, § 3, p. 720) prescribes the qualifications of persons who may be placed on the grand jury lists. Public Officers Law (§ 3) prescribes the qualifications for holding office.

§ 9. **Heirs of patriotic Indian.**— The heirs of an Indian to whom real property was granted for military services rendered during the war of the revolution, may take and hold such real property by descent, as if they were citizens of the state at the time of the death of their ancestors. A conveyance of such real property to a citizen of this state, executed by such Indian or his heirs after March seventh, eighteen hundred and nine, is valid, if executed with the approval of the surveyor-general or state engineer and surveyor, indorsed thereupon.

R. S. 2420, pt. I, ch. 1, tit. II, § 13, unchanged in substance.

ARTICLE II.

Creation and Division of Estates.

SECTION 20. Enumeration of estates.
21. Estate in fee simple and fee simple absolute.
22. Estates tail abolished; remainders thereon.
23. Freeholds; chattels real; chattel interests.
24. When estate for life of third person is freehold; when chattel real.

SECTION 25. Estates in possession and expectancy.
26. Enumeration of estates in expectancy.
27. Definition of future estates.
28. Definition of remainder.
29. Definition of reversion.
30. When future estates are vested; when contingent.
31. Power of appointment not to prevent vesting.
32. Suspension of power of alienation.
33. Limitation of successive estates for life.
34. Remainders on estates for life of third person.
35. When remainder to take effect if estate be for lives of more than two persons.
36. Contingent remainder on term of years.
37. Estate for life as remainder on term of years.
38. Meaning of heirs and issue in certain remainders
39. Limitations of chattels real.
40. Creation of future and contingent estates.
41. Future estates in the alternative.
42. Future estates valid though contingency improbable.
43. Conditional limitations.
44. When heirs of life tenants take as purchasers.
45. When remainder not limited on contingency defeating precedent estate takes effect.
46. Posthumous children.
47. When expectant estates are defeated.
48. Effect on valid remainders of determination of precedent estate before contingency.
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54. When expectant estates are deemed created.
55. Estates in severalty, joint tenancy and in common.
56. When estate in common; when in joint tenancy.

SECTION 20. **Enumeration of estates.**— Estates in real property are divided into estates of inheritance, estates for life, estates for years, estates at will, and by sufferance.

R. S. 2430, pt. II, ch. 1, tit. II, § 1, unchanged in substance.

§ 21. **Estates in fee simple and fee simple absolute.**— An estate of inheritance continues to be termed a fee simple, or fee, and, when not defeasible or conditional, a fee simple absolute, or an absolute fee.

R. S. 2431, pt. II, ch. 1, tit. II, § 2, unchanged in substance.

§ 22. **Estates tail abolished; remainders thereon.**— Estates tail have been abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed before the twelfth day of July, seventeen hundred and eighty-two, shall be deemed a fee simple; and if no valid remainder be limited thereon, a fee simple absolute. Where a remainder in fee shall be limited on any estate which would be a fee tail, according to the law of this state, as it existed previous to such date, such remainder shall be valid, as a contingent limitation on a fee, and shall vest in possession on the death of the first taker, without issue living at the time of such death.

R. S. 2431, pt. II, ch. 1, tit. II, §§ 3, 4, unchanged in substance.

§ 23. **Freeholds; chattels real; chattel interests.**— Estates of inheritance and for life, shall continue to be termed estates of freehold; estates for years are chattels real; and estates at will or by sufferance, continue to be chattel interests, but not liable as such to sale on execution.

R. S. 2431, pt. II, ch. 1, tit. II, § 5, unchanged in substance.

§ 24. **When estate for life of third person is freehold, when chattel real.**— An estate for 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; after his death it shall be deemed a chattel real.

R. S. 2431, pt. II, ch. 1, tit. II, § 6, unchanged in substance.

§ 25. **Estates in possession and expectancy.**— Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy. An estate which entitles the owner to immediate possession of the property, is an estate in possession. An estate, in which the right of possession is postponed to a future time, is an estate in expectancy.

R. S. 2431, pt. II, ch. 1, tit. II, §§ 7, 8, unchanged in substance.

§ 26. **Enumeration of estates in expectancy.**— All expectant estates, except such as are enumerated and defined in this article, have been abolished. Estates in expectancy are divided into,

1. Future estates; and
2. Reversions.

R. S. 2431, pt. II, ch. 1, tit. II, § 9; Id. 2435, pt. II, ch. 1, tit. II, § 42, unchanged in substance.

§ 27. **Definition of future estates.**— A future estate, is an estate limited to commence in possession at 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.

R. S. 2431, pt. II, ch. 1, tit. II, § 10, unchanged in substance.

§ 28. **Definition, remainder.**— Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

R. S. 2431, pt. II, ch. 1, tit. II, § 11, unchanged in substance.

§ 29. **Definition, reversion.**— A reversion is 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.

R. S. 2431, pt. II, ch. 1, tit. II, § 12, unchanged in substance.

§ 30. **When future estates are vested; when contingent.**— A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

R. S. 2432, pt. II, ch. 1, tit. II, § 13, unchanged in substance.

§ 31. **Power of appointment not to prevent vesting.**— The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power.

New. It has seemed to the revisers that the doubts on this subject which have occasionally been referred to since 1830, should be settled by the Legislature. The proposed section

is in harmony with the weight of authority and with the rest of the law on this subject. See 2 Smith's Fearne, 193; Root v. Stuyvesant, 18 Wend. 268; Hawley v. James, 5 Paige, 467.

§ 32. **Suspension of power of alienation.**— The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, 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 that a contingent remainder in fee 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, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority.

R. S. 2432, pt. II, ch. 1, tit. II, §§ 14, 15, 16, unchanged in substance, except that the last sentence, which is declaratory of existing law, is new. See Lang v. Ropke, 3 Sandf. 369.

§ 33. **Limitation of successive estates for life.**— Successive estates for life 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 on the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created.

R. S. 2432, pt. II, ch. 1, tit. II, § 17, unchanged in substance.

§ 34. **Remainders on estates for life of third person.**— A remainder shall not be created on an estate for the life of any other person 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.

R. S. 2432, pt. II, ch. 1, tit. II, § 18, unchanged in substance.

§ 35. **When remainders to take effect if estate be for lives of more than two persons.**— When a remainder is created on any such life estate, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder shall take effect on the death of the two persons first named, as if no other lives had been introduced.

R. S. 2433, pt. II, ch. 1, tit. II, § 19, unchanged in substance.

§ 36. **Contingent remainder on term of years.**— A contingent remainder shall not 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 on the termination thereof.

R. S. 2433, pt. II, ch. 1, tit. II, § 20, unchanged in substance.

§ 37. **Estate for life as remainder on term of years.**— No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

R. S. 2433, pt. II, ch. 1, tit. II, § 21, unchanged in substance.

§ 38. **Meaning of heirs and issue in certain remainders.**— Where 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.

R. S. pt. II, ch. 1, tit. II, § 22, unchanged in substance.

§ 39. **Limitations of chattels real.**— All the provisions contained in this article, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, 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.

R. S. 2433, pt. II, ch. 1, tit. II, § 23, unchanged in substance.

§ 40. **Creation of future and contingent estates.**— Subject to the provisions 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 or other less estate, may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article.

R. S. 2433, pt. II, ch. 1, tit. II, § 24; the words "or other less estate" are added. See 2 Black. Comm. 173.

§ 41. **Future estates in the alternative.**— Two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

R. S. 2433, pt. II, ch. 1, tit. II, § 25, unchanged in substance.

§ 42. **Future estate valid though contingency improbable.**— A future estate, otherwise valid, shall not be void on the ground of the improbability of the contingency on which it is limited to take effect.

R. S. 2433, pt. II, ch. 1, tit. II, § 26, unchanged in substance.

§ 43. **Conditional limitations.**— A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation.

R. S. 2433, pt. II, ch. 1, tit. II, § 27, unchanged in substance.

§ 44. **When heirs of life tenant take as purchasers.**— 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 is given, the persons who, on the termination of the life estate, are the heirs, or heirs of the body, of such tenant for life, shall take as purchasers, by virtue of the remainder so limited to them.

R. S. 2433, pt. II, ch. 1, tit. II, § 28, unchanged in substance.

§ 45. **When remainder not limited on contingency defeating precedent estate, takes effect.**— When a remainder on an estate for life or for years is not 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.

R. S. 2433, pt. II, ch. 1, tit. II, § 29, unchanged in substance.

§ 46. **Posthumous children.**— Where a future estate is limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parents; and a future estate, dependent on the contingency of the death of any person without heirs, or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent.

R. S. 2434, pt. II, ch. 1, tit. II, §§ 30, 31, unchanged in substance.

§ 47. **When expectant estates are defeated.**— An expectant estate can not be defeated or barred by any transfer 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; but an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation.

R. S. 2434, pt. II, ch. 1, tit. II, §§ 32, 33, unchanged in substance.

§ 48. **Effect on valid remainders of determination of precedent estate before contingency.**— A remainder valid in its creation shall not be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder was limited to take effect; should such contingency afterwards happen the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period.

R. S. 2434, pt. II, ch. 1, tit. II, § 34, unchanged in substance.

§ 49. **Qualities of expectant estates.**— An expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession.

R. S. 2434, pt. II, ch. 1, tit. II, § 35, unchanged in substance.

§ 50. **Dispositions of rents and profits.**— A disposition of the rents and profits of real property 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 this article, for future estates in real property.

R. S. 2434, pt. II, ch. 1, tit. II, § 36, unchanged in substance.

§ 51. **Accumulations.**— All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real property as follows:

1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority.

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority.

3. If in either case such direction be for a longer term than during the minority of the beneficiaries it shall be void only as to the time beyond such minority.

R. S. 2434–5, pt. II, ch. 1, tit. II, §§ 37, 38, unchanged in substance.

§ 52. **Anticipation of directed accumulation.**— Where such rents and profits are directed to be accumulated for the benefit of a minor entitled to the expectant estate, and such minor is destitute of other sufficient means of support and education, the supreme court, at a special term, or, if such accumulation has been directed by will, the surrogate's court of the county in which such will has been admitted to probate, may, on the application of his general or testamentary guardian, direct a suitable sum out of such rents and profits to be applied to his maintenance or education.

R. S. 2435, pt. II, ch. 1, tit. II, § 39, as am. by L. 1891, ch. 172. The words "general or testamentary" before the word "guardian" are new.

§ 53. **Undisposed profits.**— When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.

R. S. 2435, pt. II, ch. 1, tit. II, § 40, unchanged in substance.

§ 54. **When expectant estates are deemed created.**— Where an expectant estate is created by grant, the delivery of the grant, and, where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate.

R. S. 2435, pt. II, ch. 1, tit. II, § 41, unchanged in substance.

§ 55. **Estates in severalty, joint tenancy and in common.**— Estates in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy and in common; the nature and properties of which respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter.

R. S. 2435, pt. II, ch. 1, tit. II, § 43, unchanged in substance.

§ 56. **When estate in common; when in joint tenancy.**— Every 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; but every estate vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereafter granted or devised.

R. S. 2435, pt. II, ch. 1, tit. II, § 44, unchanged in substance.

ARTICLE III.

Uses and Trusts.

SECTION 70. Executed uses existing.
71. Certain uses and trusts abolished.
72. When right to possession creates legal ownership.
73. Trustees of passive trust not to take.

SECTION 74. Grant to one where consideration paid by another.
75. Bona fide purchasers protected.
76. Purposes for which express trusts may be created.
77. Certain devises to be deemed powers.
78. Surplus income of trust property liable to creditors.
79. When an authorized trust is valid as a power.
80. Trustee to express trust to have whole estate.
81. Qualification of last section.
82. Interest remaining in grantor of express trust.
83. What trust interest may be aliened.
84. Transferee of trust property protected.
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87. Notice to beneficiary where trust property is conveyed, mortgaged or leased.
88. Person paying money to trustee protected.
89. When estate of trustee ceases.
90. Termination of trusts for the benefit of creditors.
91. Trust estate not to descend.
92. Resignation or removal of trustee and appointment of successor.
93. Grants and devises of real property for charitable purposes.

SECTION 70. **Executed uses existing.**— Every estate which is now held as a use, executed under any former statute of the state, is confirmed as a legal estate.

R. S. 2436, pt. II, ch. 1, tit. II, § 46, unchanged in substance.

§ 71. **Certain uses and trusts abolished.**— Uses and trusts concerning real property, except as authorized and modified by this article, have been abolished; every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter.

R. S. 2436, pt. II, ch. 1, tit. II, § 45, unchanged in substance.

§ 72. **When right to possession creates legal ownership.**— Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or 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; but this section does not divest the estate of the trustee in any trust existing on the first day of January, eighteen hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.

R. S. 2436, pt. II, ch. 1, tit. II, §§ 47, 48, unchanged in substance.

§ 73. **Trustee of passive trust not to take.**— Every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section nor the preceding sections of this article shall extend to trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this chapter.

R. S. 2437, pt. II, ch. 1, tit. II, §§ 49, 50, unchanged in substance.

§ 74. **Grant to one where consideration paid by another.**— A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment, to the person paying the consideration, or in his favor, unless the grantee either,

1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or,

2. In violation of some trust, purchases the property so conveyed with money or property belonging to another.

R. S. 2437, pt. II, ch. 1, tit. II, §§ 51, 52, 53, unchanged in substance.

§ 75. **Bona fide purchasers protected.**— An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust.

R. S. 2437, pt. II, ch. 1, tit. II, § 54, unchanged in substance.

§ 76. **Purposes for which express trusts may be created.**— An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors;

2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;

4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.

R. S. pt. II, ch. 1, tit. II, § 55, unchanged in substance.

§ 77. **Certain devises to be deemed powers.**— A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power.

R. S. 2438, pt. II, ch. 1, tit. II, § 56, unchanged in substance.

§ 78. **Surplus income of trust property liable to creditors.**— Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution.

R. S. 2438, pt. II, ch. 1, tit. II, § 57, unchanged in substance.

§ 79. **When an authorized trust is valid as a power.**— Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees; 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 this chapter. Where a trust is valid

as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power.

R. S. 2438, pt. II, ch. 1, tit. II, §§ 58, 59, unchanged in substance.

§ 80. **Trustee of express trust to have whole estate.**— Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the proprety, but may enforce the performance of the trust.

R. S 2438, pt. II, ch. 1, tit. II, § 60, unchanged in substance.

§ 81. **Qualification of last section.**— The last section shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under him.

R. S. 2438, pt. II, ch. 1, tit. II, § 61, unchanged in substance.

§ 82. **Interest remaining in grantor of express trust.**— Where an express trust is created, every legal 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.

R. S. 2349, pt. II, ch. 1, tit. II, § 62, unchanged in substance.

§ 83. **What trust interest may be alienated.**— The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust may be transferred. Whenever a beneficiary in a trust for the receipt of the rents and profits of real property is entitled to a remainder in the whole or a part of the principal fund so held in trust subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such rents and profits, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder.

R. S. 2439, pt. II, ch. 1, tit. II, § 63, as am. by L. 1893, ch. 452, unchanged in substance as to real property without repeal.

§ 84. **Transferee of trust property protected.**— Where an express trust is created, but is not contained or declared in the conveyance to the trustee, the conveyance shall be deemed absolute as to the subsequent creditors of the trustee not having notice of the trust, and as to subsequent purchasers from the trustee, without notice and for a valuable consideration.

R. S. 2439, pt. II, ch. 1, tit. II, § 64, unchanged in substance.

§ 85. **When trustee may convey trust property.**— If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section, shall be absolutely void. The supreme court may, by order, on such terms and conditions as may seem just and proper, authorize any

such trustee to mortgage or sell such real property, or any part thereof, whenever it appears to the satisfaction of the court that is for the best interest of such estate, or that it is necessary for the benefit of the estate, to raise funds for the purpose of preserving and improving it; and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold, if it shall appear to the court to be for the best interest of such estate.

R. S. 2439, pt. II, ch. 1, tit. II, § 65, as am. by L. 1895, ch. 886, re-enacted in part; unchanged in substance, except that the proceeding is required to be held in court, instead of in court before a judge thereof, as at present.

§ 86. **When trustee may lease trust property.**— A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to or for the use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The supreme court may, by order, on such terms and conditions as seem just and proper, in respect to rental and renewals, authorize such a trustee to lease such real property for a term not exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate, and may authorize such trustee to covenant in the lease to pay at the end of the term, or renewed term, to the lessee, the then fair and reasonable value of any building which may have been erected on the premises during such term.

If any such trustee has leased any such trust property before June fourth, eighteen hundred and ninety-five, for a longer term than five years, the supreme court, on the application of such trustee, may, by order, confirm such lease, and such order, on the entry thereof, shall be binding on all persons interested in the trust estate.

R. S. 2349, pt. II, ch. 1, tit. II, § 65, as am. by L. 1895, ch. 886, re-enacted in part; unchanged in substance, except that the proceeding is required to be had in court, instead of in court or before a judge thereof.

§ 87. **Notice to beneficiary where trust property is conveyed, mortgaged or leased.**— The supreme court shall not grant an order under either of the last two preceding sections, unless it appears to the satisfaction of such court that a written notice, stating the time and place of the application therefor, has been served upon the beneficiary of such trust property at least eight days before the making thereof, if such beneficiary is an adult within the state or if a minor, lunatic, person of unsound mind, habitual drunkard or absentee, until proof of the service on such person of such notice as the court, or a justice thereof, prescribes.

R. S. 2439, pt. II, ch. 1, tit. II, § 65, as am. by L. 1895, ch. 886, unchanged in substance.

§ 88. **Person paying money to trustee protected.**— A 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 not be responsible for the proper application of the money, according to the trust; and any right or title derived by him from the trustee in consideration of the payment shall not be impeached or called in question in consequence of a misapplication by the trustee of the money paid.

R. S. 2440, pt. II, ch. 1, tit. II, § 66, unchanged in substance.

§ 89. **When estate of trustee ceases.**— When the purpose for which an express trust is created ceases the estate of the trustee shall also cease.

R. S. 2440, pt. II, ch. 1, tit. II, § 67, unchanged in substance.

§ 90. **Termination of trusts for the benefit of creditors.**— Where an estate or interest in real property has heretofore vested or shall hereafter vest in the assignee or other trustee for the benefit of creditors, it shall cease at the expiration of twenty-five years from the time when the trust was created, except where a different limitation is contained in the instrument creating the trust, or is especially prescribed by law. The estate or interest remaining in the trustee or trustees shall thereon revert to the assignor, his heirs, devisee or assignee, as if the trust had not been created.

R. S. 2440, pt. II, ch. 1, tit. II, § 67; L. 1875, ch. 545, unchanged in substance.

§ 91. **Trust estate not to descend.**— On the death of the last surviving or sole trustee of an express trust, the trust estate shall not descend to his heirs nor pass to his next of kin or personal representatives; but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the supreme court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court, who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice in such manner as the court or a justice thereof may direct.

R. S. 2440, pt. II, ch. 1, tit. II, § 68; Id. 2444; L. 1882, ch. 185, unchanged in substance.

§ 92. **Resignation and removal of trustee and appointment of successor.**— The supreme court has power, subject to the regulations established for the purpose in the general rules of practice:

1. On his application by petition or action, to accept the resignation of a trustee, and to discharge him from the trust on such terms as are just.

2. In an action brought, or on a petition presented, by any person interested in the trust, to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust.

3. In case of the resignation or removal of a trustee, to appoint a new trustee in his place, and in the meantime, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction.

This section shall not apply to a trust arising or resulting by implication of law, nor where other provision is specially made by law, for the resignation or removal of a trustee or the appointment of a new trustee.

R. S. 2440, pt. II, ch. 1, tit. II, § 69. Sections 70, 71, 72 unchanged in substance. The language of § 72, R. S. proved somewhat ambiguous in practice. (See Van Buskerck v. Herrick, 35 Barb. 259.) It is believed that it was not directed to the exclusion of those trusts which were valid only as powers, but merely of those referred to in R. S. 2436, pt. II, ch. 1, tit. II, § 50, re-enacted in § 73 of revision.

§ 93. **Grants and devises of real property for charitable purposes.**— A conveyance or devise of real property for religious, educational, charitable or benevolent uses, which is in other respects valid, is not to be

deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument making such conveyance or devise. If in such instrument, a trustee is named to execute the same, the legal title to the real property granted or devised shall vest in such trustee. If no person is named as trustee, the title to such real property vests in the supreme court, and such court shall have control thereof. The attorney-general shall represent the beneficiaries in such cases and enforce such trusts by proper proceedings.

L. 1893, ch. 701, unchanged as to real property.

ARTICLE IV.

Powers.

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112. Definitions of grantor, grantee.
113. Division of powers.
114. General power.
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117. General power in trust.
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120. How power may be granted.
121. Capacity to take and execute a power.
122. Capacity of married woman to take power.
123. Capacity to take a special and beneficial power.
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SECTION 153. Consent of grantor or third person to execution of power.
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155. Omission to recite power.
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157. Disposition not void because too extensive.
158. Computation of term of suspension.
159. Capacity to take under a power.
160. Purchaser under defective execution.
161. Instrument affected by fraud.
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SECTION 110. **Effect of article.**—Powers, as they existed by law on the thirty-first day of December, eighteen hundred and twenty-nine, have been abolished. Hereafter the creation, construction and execution of powers, affecting real property, shall be subject to the provisions of this article; but this article does not extend to a simple power of attorney, to convey real property in the name, and for the benefit of the owner.

R. S. 2445, pt. II, ch. 1, tit. II, §§ 73, 134, unchanged in substance.

§ 111. **Definition of a power.**—A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform.

R. S. 2445, pt. II, ch. 1, tit. II, § 74, unchanged in substance.

§ 112. **Definitions of grantor, grantee.**—The word "grantor" is used in this article, in connection with a power, as designating the person by whom the power is created, whether by grant or by devise; and the word "grantee" is so used as designating the person in whom the power is vested, whether by grant, devise or reservation.

R. S. 2451, pt. II, ch. 1, tit. II, § 135, unchanged in substance.

§ 113. **Division of powers.**—A power, as authorized in this article, is either general or special, and either beneficial or in trust.

R. S. 2446, pt. II, ch. 1, tit. II, § 76, unchanged in substance.

§ 114. **General power.**—A power is general, where it authorizes the transfer or encumbrance of a fee, by either a conveyance or a will of or a charge on the property embraced in the power, to any grantee whatever.

R. S. 2446, pt. II, ch. 1, tit. II, § 77, unchanged in substance. See Tallmage v. Sill, 21 Barb. 52.

§ 115. **Special power.**—A power is special where either:

1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated; or,

2. The power authorizes the transfer or encumbrance, by a conveyance, will or charge, of any estate less than a fee.

R. S. 2446, pt. II, ch. 1, tit. II, § 78, unchanged in substance.

§ 116. **Beneficial power.**—A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article, is void.

R. S. 2446, pt. II, ch. 1, tit. II, §§ 79, 92, unchanged in substance.

§ 117. **General power in trust.**—A general power is in trust, where any person or class of persons, other than the grantee of the power, is desig-

nated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution.

R. S. 2447, pt. II, ch. 1, tit. II, § 94, unchanged in substance. See Coster v. Lorillard, 14 Wend. 265; Germond v. Jones, 2 Hill, 574.

§ 118. **Special power in trust.**—A special power is in trust, where either,

1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or,

2. A 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.

R. S. 2447, pt. II, ch. 1, tit. II, § 95, unchanged in substance.

§ 119. **Capacity to grant a power.**— A person is not capable of granting a power, who is not, at the same time, capable of transferring an interest in the property to which the power relates.

R. S. 2446, pt. II, ch. 1, tit. II, § 75, unchanged in substance.

§ 120. **How power may be granted.**— A power may be granted either:

1. By a suitable clause, contained in an instrument sufficient to pass an estate in the real property, to which the power relates; or,

2. By a devise contained in a will.

R. S. 2448, pt. II, ch. 1, tit. II, § 106, unchanged in substance.

§ 121. **Capacity to take and execute a power.**— A power may be vested in any person capable in law of holding, but can not be exercised by a person not capable of transferring real property.

R. S. 2449, pt. II, ch. 1, tit. II, § 109, unchanged in substance, omitting the exception relating to married women, which is obsolete.

§ 122. **Capacity of married woman to take power.**— A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee.

R. S. 2446, pt. II, ch. 1, tit. II, § 80, unchanged in substance.

§ 123. **Capacity to take a special and beneficial power.**— A special and beneficial power may be granted,

1. To a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her, in the property to which the power relates; or,

2. To a tenant for life, of the real property embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life; and such a power is valid to authorize a lease for that period but is void as to the excess.

R. S. 2447, pt. II, ch. 1, tit. II, § 87, unchanged in substance, except that the last clause of subdivision 2 is new, and has been inserted to settle a question which has been involved in some obscurity. See Root v. Stuyvesant, 18 Wend. 257.

§ 124. **Reservation of a power.**— The grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and a power thus reserved, shall be subject to the provisions of this article, in the same manner as if granted to another.

R. S. 2448, pt. II, ch. 1, tit. II, § 105, unchanged in substance.

§ 125. **Effect of power to revoke.**— Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he

is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

R. S. 2447, pt. II, ch. 1, tit. II, § 86, unchanged in substance.

§ 126. **Power to sell in a mortgage.**— Where a power to sell real property is given to a mortgagee, or to the grantee in any other conveyance intended to secure the payment of money, the power is deemed a part of the security, and vests in, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid.

R. S. 2451, pt. II, ch. 1, tit. II, § 133, unchanged in substance.

§ 127. **When power is a lien.**— A power is a lien or charge on the real property which it embraces, as against creditors, purchasers and encumbrancers in good faith and without notice, of or from a person having an estate in the property, only from the time the instrument containing the power is duly recorded. As against all other persons, the power is a lien from the time the instrument in which it is contained takes effect.

R. S. 2449, pt. II, ch. 1, tit. II, § 107, unchanged in substance.

§ 128. **When power is irrevocable.**— A power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power.

R. S. 2449, pt. II, ch. 1, tit. II, § 108, unchanged in substance.

§ 129. **When estate for life or years is changed into a fee.**— Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

R. S. 2446, pt. II, ch. 1, tit. II, § 81, unchanged in substance.

§ 130. **Certain powers create a fee.**— Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and encumbrancers.

§ 131. **When grantee of power has absolute fee.**— Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.

R. S. 2446, pt. II, ch. 1, tit. II, § 83, unchanged in substance.

§ 132. **Effect of power to devise in certain cases.**— Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections.

R. S. 2446, pt. II, ch. 1, tit. II, § 84, unchanged in substance.

§ 133. **When power of disposition absolute.**— Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.

R. S. 2447, pt. II, ch. 1, tit. II, § 85, unchanged in substance. See Jackson v. Edwards, 7 Paige, 386; 22 Wend. 509.

§ 134. **Power subject to condition.**— A general and beneficial power may be created subject to a condition precedent or subsequent, and until the power becomes absolutely vested it is not subject to any provision of the last four sections.

New. It seems wise to place this provision in statutory form although it is probably the law. See Taggert v. Murray, 53 N. Y. 238; Wright v. Tallmadge, 15 id. 309.

§ 135. **Power of life tenant to make leases.**— The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a grant of such estate unless specially excepted. If so excepted, it is extinguished.

Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished.

R. S. 2447, pt. II, ch. 1, tit. II, §§ 88, 89, unchanged in substance.

§ 136. **Effect of mortgage by grantee.**— A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein, and the effects on the power of such lien by mortgage are:

1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires; and,

2. That any subsequent estate, created by the owner, in execution of the power, becomes subject to the mortgage as if in terms embraced therein.

R. S. 2447, pt. II, ch. 1, tit. II, §§ 90, 91, unchanged in substance.

§ 137. **When a trust power is imperative.**— A 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 for the benefit of the person interested. 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 beneficiaries of the trust.

R. S. 2448, pt. II, ch. 1, tit. II, §§ 96, 97, unchanged in substance.

§ 138. **Distribution when more than one beneficiary.**— Where a disposition under a power is directed to be made to, among, or between, two or more 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; but when the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others.

R. S. 2448, pt. II, ch. 1, tit. II, §§ 98, 99, unchanged in substance.

§ 139. **Beneficial power subject to creditors.**— A special and beneficial power is liable to the claims of creditors in the same manner as other interests that can not be reached by execution; and the execution of the power may be adjudged for the benefit of the creditors entitled.

R. S. 2447, pt. II, ch. 1, tit. II, § 93, unchanged in substance.

§ 140. **Execution of power on death of trustee.**— If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its

execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust.

R. S. 2448, pt. II, ch. 1, tit. II, § 100, unchanged in substance.

§ 141. **When power devolves on court.**— Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution devolves on the supreme court.

R. S. 2448, pt. II, ch. 1, tit. II, § 101, unchanged in substance.

§ 142. **When creditors may compel execution of trust power.**— The execution, wholly or partly, of a trust power may be adjudged for the benefit of the creditors or assignees of a person entitled as a beneficiary of the trust, to compel its execution, where his interest is assignable.

R. S. 2448, pt. II, ch. 1, tit. II, § 103, unchanged in substance.

§ 143. **Defective execution of trust power.**— Where the execution of a power in trust is defective, wholly or partly, under the provisions of this article, its proper execution may be adjudged in favor of the person designated as the beneficiary of the trust.

R. S. 2451, pt. II, ch. 1, tit. II, § 131, unchanged in substance.

§ 144. **Effect of insolvent assignment.**— A beneficial power and the interest of every person entitled to compel the execution of a trust power, shall pass, respectively, to a trustee or committee of the estate of the person in whom the power or interest is vested, or an assignee for the benefit of creditors.

R. S. 2448, pt. II, ch. 1, tit. II, § 104, unchanged in substance.

§ 145. **How power must be executed.**— A power can be executed only by a written instrument, which would be sufficient to pass the estate, or interest, intended to pass under the power, if the person executing the power were the actual owner.

R. S. 2449, pt. II, ch. 1, tit. II, § 113, unchanged in substance.

§ 146. **Execution by survivors.**— Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors.

R. S. 2449, pt. II, ch. 1, tit. II, § 112, unchanged in substance.

§ 147. **Execution of power to dispose by devise.**— Where a power to dispose of real property is confined to a disposition by devise or will, the instrument must be a written will, executed as required by law.

R. S. 2449, pt. II, ch. 1, tit. II, § 115, unchanged in substance.

§ 148. **Execution of power to dispose by grant.**— Where a power is confined to a disposition by grant, it can not be executed by will, although the disposition is not intended to take effect until after the death of the person executing the power.

R. S. 2449, pt. II, ch. 1, tit. II, § 116, unchanged in substance.

§ 149. **When direction by grantor does not render power void.**— Where the grantor of a power has directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the provisions of this article.

R. S. 2450, pt. II, ch. 1, tit. II, § 118, unchanged in substance.

§ 150. **When directions by grantor need not be followed.**— Where the grantor of a power has directed any formality to be observed in its execution, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formality is not necessary to the valid execution of the power.

R. S. 2450, pt. II, ch. 1, tit. II, § 119, unchanged in substance.

§ 151. **Nominal conditions may be disregarded.**— Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.

R. S. 2450, pt. II, ch. 1, tit. II, § 120, unchanged in substance.

§ 152. **Intent of grantor to be observed.**— Except as provided in this article, the intentions of the grantor of a power as to the manner, time and conditions of its execution must be observed; subject to the power of the supreme court, to supply a defective execution as provided in this article.

R. S. 2450, pt. II, ch. 1, tit. II, § 121, unchanged in substance.

§ 153. **Consent of grantor or third person to execution of power.**— Where the consent of the grantor or 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 in a written certificate thereon. In the first case, the instrument of execution, in the second, the certificate, must be subscribed by the person whose consent is necessary; and to entitle the instrument to be recorded, such signature must be acknowledged or proved and certified in like manner as a deed to be recorded.

R. S. 2450, pt. II, ch. 1, tit. II, § 122, unchanged in substance. See Kissam v. Durkes, 49 N. Y. 602, in which Judge Rapallo says: "Whether one of the grantors of the power would come under the designation of a third party as used in this section, is not very material to the present case, though we think that the correct construction of the section would require an affirmative answer to that question if it arose."

§ 154. **When all must consent.**— Where the consent of two or more persons to the execution of a power is requisite, all must consent thereto; but if, before its execution, one or more of them die, the consent of the survivor or survivors is sufficient, unless otherwise prescribed by the terms of the power.

New. The last clause of this section is not now the law; see Barber v. Cary, 11 N. Y. 397, but it seems to be just and corresponds to the provisions of § 146.

§ 155. **Omission to recite power.**— An instrument executed by the grantee of a power, conveying an estate or creating a charge, which he would have no right to convey or create, except by virtue of the power, shall be deemed a valid execution of the power, although the power be not recited or referred to therein.

R. S. 2450, pt. II, ch. 1, tit. 11, § 124, unchanged in substance.

§ 156. **When devise operates as an execution of the power.**— Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication.

R. S. 2450, pt. II, ch. 1, tit. II, § 126, unchanged in substance.

§ 157. **Disposition not void because too extensive.**—A disposition or charge by virtue of a power is not void on the ground that it is more extensive than was authorized by the power; but an estate or interest so created, so far as embraced by the terms of the power, is valid.

R. S. 2450, pt. II, ch. 1, tit. II, § 123, unchanged in substance.

§ 158. **Computation of term of suspension.**—The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power must be computed, not from the date of such instrument, but from the time of the creation of the power.

R. S. 2450, pt. II, ch. 1, tit. II, § 128, unchanged in substance.

§ 159. **Capacity to take under a power.**—An estate or interest can not be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.

R. S. 2451, pt. II, ch. 1, tit. II, § 129, unchanged in substance, but with some change of language to remove the difficulty of construction suggested in Dempsey v. Tylee, 3 Duer, 73, 98, 101, 102. Compare Hoey v. Kenny, 25 Barb. 396.

§ 160. **Purchase under defective execution.**—A purchaser for a valuable consideration, claiming under a defective execution of a power, is entitled to the same relief as a similar purchaser, claiming under a defective conveyance from an actual owner.

R. S. 2451, pt. II, ch. 1, tit. II, § 132, unchanged in substance.

§ 161. **Instrument affected by fraud.**—An instrument in execution of a power is affected by fraud, in the same manner as a conveyance or will, executed by an owner or by a trustee.

R. S. 2450, pt. II, ch. 1, tit. II, § 125, unchanged in substance.

§ 162. **Sections applicable to trust powers.**—Sections ninety-one to ninety-three of this chapter, both inclusive, in relation to express trust estates, and the trustee thereof, apply equally to trust powers, however created, and to the grantees of such powers.

R. S. 2448, pt. II, ch. 1, tit. II, § 102, unchanged in substance.

ARTICLE V.

Dower.

SECTION 170. Dower.
171. Dower in lands exchanged.
172. Dower in land mortgaged before marriage.
173. Dower in lands mortgaged for purchase money.
174. Surplus proceeds of sale under purchase money mortgages.
175. Widow of mortgagee not endowed.
176. When dower barred by misconduct.
177. When dower barred by jointure.
178. When dower barred by pecuniary provisions.
179. When widow to elect between jointure and dower.
180. Election between devise and dower.
181. When deemed to have elected.
182. When provision in lieu of dower is forfeited.
183. Effect of acts of husband.

SECTION 184. Widow's quarantine.
185. Widow may bequeath crop.
186. Divorced woman may release dower.
187. Married woman may release dower by attorney.

SECTION 170. **Dower.**— 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.

R. S. 2454, pt. II, ch. 1, tit. III, § 1, unchanged in substance.

§ 171. **Dower in lands exchanged.**— If a husband seized of an estate of inheritance in lands, exchanges them for other lands, his widow shall not have dower of both, but she must make her election, to be endowed of the lands given, or of those taken, in exchange; and if her election be not evinced by the commencement of an action to recover her dower of the lands given in exchange, within one year after the death of her husband, she is deemed to have elected to take her dower of the lands received in exchange.

R. S. 2454-55, pt. II, ch. 1, tit. III, § 3, unchanged in substance.

§ 172. **Dower in lands mortgaged before marriage.**— Where a person seized of an estate of inheritance in lands, executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him.

R. S. 2455, pt. II, ch. 1, tit. III, § 4, unchanged in substance.

§ 173. **Dower in lands mortgaged for purchase-money.**— Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase-money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person.

R. S. 2455, pt. II, ch. 1, tit. III, § 5, unchanged in substance.

§ 174. **Surplus proceeds of sale, under purchase-money mortgages.**— Where, in a case specified in the last section, the mortgagee, or a person claiming under him, causes the land mortgaged to be sold, after the death of the husband, either under a power of sale contained in the mortgage, or by virtue of a judgment in an action to foreclose the mortgage, and any surplus remains, after payment of the money due on the mortgage and the costs and charges of the sale, the widow is nevertheless entitled to the interest or income of one-third part of the surplus for her life, as her dower.

R. S. 2454, pt. II, ch. 1, tit. III, § 6, unchanged in substance.

§ 175. **Widow of mortgagee not endowed.**— A widow shall not be endowed of the lands conveyed to her husband by way of mortgage, unless he acquires an absolute estate therein, during the marriage.

R. S. 2456, pt. II, ch. 1, tit. III, § 7, unchanged in substance.

§ 176. **When dower barred by misconduct.**— In case of a divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

R. S. 2455, pt. II, ch. 1, tit. III, § 8, unchanged in substance.

§ 177. **When dower barred by jointure.**— Where an estate in real property is conveyed to a person and his intended wife, or to the intended wife alone, or to a person in trust for them or for the intended wife alone, for the purpose of creating a jointure for her, and with her assent, the jointure bars her right or claim of dower in all the lands of the husband. The assent of the wife to such a jointure is evidenced, if she be of full age, by her becoming a party to the conveyance by which it is settled; if she be a minor, by her joining with her father or guardian in that conveyance.

R. S. 2455, pt. II, ch. 1, tit. III, §§ 9, 10, unchanged in substance.

§ 178. **When dower barred by pecuniary provisions.**— Any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her as prescribed in the last section, bars her right or claim of dower in all the lands of her husband.

R. S. 2455, pt. II, ch. 1, tit. III, § 11, unchanged in substance.

§ 179. **When widow to elect between jointure and dower.**— If, before the marriage, but without her assent, or, if after the marriage, real property is given or assured for the jointure of a wife, or a pecuniary provision is made for her, in lieu of dower, she must make her election whether she will take the jointure or pecuniary provision, or be endowed of the lands of her husband; but she is not entitled to both.

R. S. 2455, pt. II, ch. 1, tit. III, § 12, unchanged in substance.

§ 180. **Election between devise and dower.**— If real property is devised to a woman, or a pecuniary or other provision is made for her by will in lieu of her dower, she must make her election whether she will take the property so devised, or the provision so made, or be endowed of the lands of her husband; but she is not entitled to both.

R. S. 2455, pt. II, ch. 1, tit. III, § 13, unchanged in substance. This section was amended by L. 1895, ch. 171, but restored by L. 1895, ch. 1022.

§ 181. **When deemed to have elected.**— Where a woman is entitled to an election, as prescribed in either of the last two sections, she is deemed to have elected to take the jointure, devise or pecuniary provision, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for her dower. But, during such period of one year after the death of her said husband, her time to make such election may be enlarged by the order of any court competent to pass on the accounts of executors, administrators or testamentary trustees, or to admeasure dower, on an affidavit showing the pendency of a proceeding to contest the probate of the will containing such jointure, devise or pecuniary provision, or of an action to construe or set aside such will, or that the amount of claims against the estate of the testator can not be ascertained within the period so limited, or other reasonable cause, and on notice given to such persons, and in such manner, as such court may direct. Such order shall be indexed and recorded in the same manner as a notice of pendency of action in the office of the clerk of each county wherein the real property or a portion thereof affected thereby is situated.

R. S. 2455, pt. II, ch. 1, tit. III, § 14, as am. by L. 1890, ch. 61, unchanged in substance.

§ 182. **When provision in lieu of dower is forfeited.**— Every jointure, devise and pecuniary provision in lieu of dower is forfeited by the woman

for whose benefit it is made in a case in which she would forfeit her dower; and on such forfeiture, an estate so conveyed for jointure, or devised, or a pecuniary provision so made, immediately vests in the person or legal representatives of the person in whom they would have vested on the determination of her interest therein, by her death.

R. S. 2455, pt. II, ch. 1, tit. III, § 15, unchanged in substance.

§ 183. **Effect of acts of husband.**— An 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 contingent right of dower of a married woman, or a judgment or decree confessed by or recovered against him or any laches, default, covin or crime of a husband, does not prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof.

R. S. 2455, pt. II, ch. 1, tit. III, § 16, unchanged in substance.

§ 184. **Widow's quarantine.**— A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband.

R. S. 2456, pt. II, ch. 1, tit. III, § 17, unchanged in substance.

§ 185. **Widow may bequeath a crop.**— A woman may bequeath a crop in the ground of land held by her in dower.

R. S. 2456, pt. II, ch. 1, tit. III, § 25, unchanged in substance.

§ 186. **Divorced woman may release dower.**— A woman who is divorced from her husband, whether such divorce be absolute or limited, or granted in his or her favor, by any court of competent jurisdiction, may release to him, by an instrument in writing, sufficient to pass title to real estate, her inchoate right of dower in any specific real property theretofore owned by him, or generally in all such real property, and such as he shall thereafter acquire.

L. 1892, ch. 616. The original law provides that the release shall take effect upon the execution, delivery and recording of the release, together with the filing or recording in the proper office, of a certified copy of the judgment or decree granting the divorce.

§ 187. **Married woman may release dower by attorney.**— A married woman of full age may release her inchoate right of dower in real property by attorney in fact in any case where she can personally release the same.

L. 1893, ch. 599; L. 1835, ch. 275, unchanged in substance.

ARTICLE VI.

Landlord and Tenant.

SECTION 190. Action for use and occupation.
191. Rent due on life leases recoverable.
192. When rent is apportionable.
193. Rights where property or lease is transferred.
194. Attornment by tenant.
195. Notice of action adverse to possession of tenant.

SECTION 196. Effect of renewal on sub-lease.
197. When tenant may surrender premises.
198. Termination of tenancies at will or by sufferance, by notice.
199. Liability of tenant holding over after giving notice of intention to quit.
200. Liability of tenant holding over after giving notice to quit.
201. Liability of landlord where premises are occupied for unlawful purpose.
202. Duration of certain agreements in New York.

SECTION 190. **Action for use and occupation.**— The landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which he is entitled.

R. S. 2459, pt. II, ch. 1, tit. IV, § 26, unchanged in substance.

§ 191. **Rent due on life leases recoverable.**— Rent due on a lease for life or lives, is recoverable by action, as well after as before the death of the person on whose life the rent depends, and in the same manner as rent due on a lease for years.

R. S. 2458, pt. II, ch. 1, tit. IV, §§ 19, 20, 21, unchanged in substance.

§ 192. **When rent is apportionable.**— Where a tenant for life, who shall have demised the real property, dies before the first rent day, or between two rent days, his executor or administrator may recover the proportion of rent which accrued to him before his death.

R. S. 2458, pt. II, ch. 1, tit. IV, § 22, modified to avoid some of the consequences of the decisions in Fay v. Holloran, 35 Barb. 295; Marshall v. Moseley, 21 N. Y. 280, that certain rents could not be apportioned. The modification seems to be in the direction of justice and the spirit of modern legislation on the subject.

§ 193. **Rights where property or lease is transferred.**— The grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease, or the heir or personal representative of either of them, has the same remedies, by entry, action or otherwise, for the non-performance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had, or would have had, if the reversion had remained in him. A lessee of real property, his assignee or personal representative, has the same remedy against the lessor, his grantee or assignee, or the representative of either, for the breach of an agreement contained in the lease, that the lessee might have had against his immediate lessor, except a covenant against incumbrances or relating to the title or possession of the premises leased. This section applies as well to a grant or lease in fee, reserving rent, as to a lease for life or for years; but not to a deed of conveyance in fee, made before the ninth day of April, eighteen hundred and five, or after the fourteenth day of April, eighteen hundred and sixty.

R. S. 2459, pt. II, ch. 1, tit. IV, §§ 23, 24, 25; Id. 2460, L. 1860, ch. 396, unchanged in substance.

§ 194. **Attornment by tenant.**— The attornment of a tenant to a stranger is absolutely void, and does not in any way affect the possession of the landlord unless made either:

1. With the consent of the landlord; or,

2. Pursuant to or in consequence of a judgment, order, or decree of a court of competent jurisdiction; or,

3. To a mortgagee, after the mortgage has been forfeited.

R. S. 2457, pt. II, ch. 1, tit. IV, § 3, unchanged in substance.

§ 195. **Notice of action adverse to possession of tenant.**— Where a process or summons in an action to recover the real property occupied by him, or the possession thereof, is served upon a tenant, he must forthwith give notice thereof to his landlord; otherwise he forfeits the value of three years' rent of such property, to the landlord or other person of whom he holds.

R. S. 2459, pt. II, ch. 1, tit. IV, § 27, unchanged in substance.

§ 196. **Effect of renewal on sub-lease.**— The surrender of an under-lease is not requisite to the validity of the surrender of the original lease, where a new lease is given by the chief landlord. Such surrender and renewal do not impair any right or interest of the chief landlord, his lessee or the holder of an under-lease, under the original lease; including the chief landlord's remedy by entry, for the rent or duties secured by the new lease, not exceeding the rent and duties reserved in the original lease surrendered.

R. S. 2457, pt. II, ch. 1, tit. IV, § 2, unchanged in substance.

§ 197. **When tenant may surrender premises.**— Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, and no express agreement to the contrary, has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender.

R. S. 2495, L. 1860, ch. 345, unchanged in substance.

§ 198. **Termination of tenancies at will or by sufferance by notice.**— A tenancy at will or by sufferance, however created, may be terminated by a written notice of not less than thirty days given in behalf of the landlord, to the tenant, requiring him to remove from the premises; which notice must be served, either by delivering to the tenant or to a person of suitable age and discretion, residing upon the premises, or if neither the tenant nor such a person can be found, by affixing it upon a conspicuous part of the premises, where it may be conveniently read. At the expiration of thirty days after the service of such notice, the landlord may re-enter, maintain ejectment, or proceed, in the manner prescribed by law, to remove the tenant, without further or other notice to quit.

R. S. 2459, pt. II, ch. 1, tit. IV, §§ 7, 8, 9, unchanged in substance.

§ 199. **Liability of tenant holding over after giving notice of intention to quit.**— If a tenant gives notice of his intention to quit the premises held by him, and does not accordingly deliver up the possession thereof, at the time specified in such notice, he or his personal representatives must, so long as he continues in possession, pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, to be recovered at the same time, and in the same manner, as the single rent.

R. S. 2457, pt. II, ch. 1, tit. IV, § 10, unchanged in substance.

§ 200. **Liability of tenant holding over after giving notice to quit.**— Where, on the termination of an estate for life, or for years, the person entitled to the possession demands the same, and serves, in the same manner as for the termination of a tenancy at will, a written notice to quit, if the tenant, or any person in possession under him, or by collusion with him, willfully holds over, after the expiration of thirty days from such service, he must pay to the person so kept out of possession, or his representatives, at the rate of double the yearly value of the property detained, for the time while he so detains the same, together with all damages incurred by the person so kept out by reason of such detention. There is no equitable defense or relief against a demand accrued, or a recovery had, under this section.

R. S. 2457, pt. II, ch. 1, tit. IV, § 11, unchanged in substance. See Code of Civil Procedure, § 2231, for summary proceedings.

§ 201. **Liability of landlord where premises are occupied for unlawful purpose.**— The owner of real property, knowingly leasing or giving possession of the same to be used or occupied, wholly or partly, for any unlawful trade, manufacture or business, or knowingly permitting the same to be so used, is liable severally, and also jointly with one or more of the tenants or occupants thereof, for any damage resulting from such unlawful use, occupancy, trade, manufacture or business.

R. S. 2460, L. 1873, ch. 583, § 2, unchanged in substance.

§ 202. **Duration of certain agreements in New York.**— An agreement, for the occupation of real property in the city of New York, which shall not particularly specify the duration of the occupation, shall be deemed to continue until the first day of May, next after the possession commences under the agreement; and rent thereunder is payable at the usual quarter days, for the payment of rent in that city, unless otherwise expressed in the agreement.

R. S. 2456–7, pt. II, ch. 1, tit. VI, § 1, unchanged in substance.

ARTICLE VII.

Conveyances and Mortgages.

SECTION 205. Definitions and use of terms.
206. Livery of seisin abolished.
207. When written conveyance necessary.
208. Grant of fee or freehold.
209. When grant takes effect.
210. Estate which passes by grant or devise.
211. Certain deeds declared grants.
212. Conveyance by tenant for life or years of greater estate than possessed.
213. Effect of conveyance where property is leased.
214. Covenants in mortgages.
215. Mortgages on real property inherited or devised.
216. Covenants not implied.
217. Lineal and collateral warranties abolished.
218. Construction of covenants in grants of freehold interests.
219. Construction of covenants in mortgages and bonds.
220. Construction of grant of appurtenances and of all the rights and estate of grantor.

SECTION 221. Construction of grant in executor's or trustee's deed of appurtenances, and of the estate of testator and grantor.
222. Covenants to bind representatives of grantor and mortgagor and inure to the benefit of whom.
223. Short forms of deeds and mortgages.
224. When contract to lease or sell void.
225. Effect of grant or mortgage of real property adversely possessed.
226. Conveyances with intent to defraud purchasers and incumbrancers void.
227. Conveyances with intent to defraud creditors void.
228. Conveyances void as to creditors, purchasers and incumbrancers, void as to heirs and assigns.
229. Fraudulent intent, question of fact.
230. Rights of purchaser or incumbrancer for valuable consideration protected.
231. Conveyances with power to revoke, determine or alter.
232. Disaffirmance of fraudulent act by executor and others.
233. When remainderman may pay interest owed by life tenant.
234. Powers of courts of equity not abridged.

§ 205. **Definitions and use of terms.**— The term "heirs," or other words of inheritance, are not requisite to create or convey an estate in fee. The term "conveyance," as used in this article, includes every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered. Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law. The terms "estate" and "interest in real property," include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent.

R. S. 2593, pt. II, ch. 7, tit. III, §§ 6, 7; R. S. 2461, pt. II, ch. 1, tit. V, §§ 1, 2; R. S. 2449, pt. II, ch. 1, tit. II, § 114, unchanged in substance.

§ 206. **Livery of seizin abolished.**— The conveyance of real property by feoffment, with livery of seizin, has been abolished.

R. S. 2451, pt. II, ch. 1, tit. II, § 136, unchanged in substance.

§ 207. **When written conveyance necessary.**— An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot 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 person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this section does not affect the power of a testator in the disposition of his real property by will; nor prevent any trust from arising or being extinguished by implication or operation of law, nor any declaration of trust from being proved by a writing subscribed by the person declaring the same.

R. S. 2589, pt. II, ch. 8, tit. I, §§ 6, 7, as am. by L. 1860, ch. 322, unchanged in substance. Alienation by fine has been abolished. Const. art. 1, § 14. The reference to fines has been omitted.

§ 208. **Grant of fee or freehold.**— A grant in fee or of a freehold estate, must be subscribed by the person from whom the estate or interest con-

veyed is intended to pass, or by his lawful agent. If not duly acknowledged before its delivery, according to the provisions of this chapter, its execution and delivery must be attested by at least one witness, or, if not so attested, it does not take effect as against a subsequent purchaser or encumbrancer until so acknowledged.

R. S. 2451, pt. II, ch. 1, tit. II, § 137, unchanged in substance, except that the provision that a grant must be under seal is omitted. See Voorhees v. Presb. Ch., 17 Barb. 108; Roggen v. Avery, 63 id. 65.

§ 209. **When grant takes effect.**— A grant takes effect, so as to vest the estate or interest intended to be conveyed, only from its delivery; and all the rules of law, now in force, in respect to the delivery of deeds, apply to grants hereafter executed.

R. S. 2452, pt. II, ch. 1, tit. II, § 138, unchanged in substance.

§ 210. **Estate which passes by grant or devise.**— A grant or devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass a less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom. A greater estate or interest does not pass by any grant or conveyance, than the grantor possessed or could lawfully convey, at the time of the delivery of the deed; except that every grant is conclusive against the grantor and his heirs claiming from him by descent, and as against a subsequent purchaser or encumbrancer from such grantor, or from such heirs claiming as such, other than a subsequent purchaser or encumbrancer, in good faith and for a valuable consideration, who acquires a superior title by a conveyance that has been first duly recorded.

R. S. 2452, pt. II, ch. 1, tit. II, art. 4, §§ 143, 144; Id. 2461, pt. II, ch. 1, tit. V, § 1, unchanged in substance.

§ 211. **Certain deeds declared grants.**— Deeds of bargain and sale, and of lease and release, may continue to be used; and are to be deemed grants, subject to all the provisions of law in relation thereto.

R. S. 2452, pt. II, ch. 1, tit. II, § 142, unchanged in substance.

§ 212. **Conveyance by tenant for life or years of greater estate than possessed.**— A conveyance made by a tenant for life or years, of a greater estate than he possesses, or can lawfully convey, does not work a forfeiture of his estate, but passes to the grantee all the title, estate or interest which such tenant can lawfully convey.

R. S. 2452, pt. II, ch. 1, tit. II, § 45, unchanged in substance.

§ 213. **Effect of conveyance where property is leased.**— An attornment to a grantee is not requisite to the validity of a conveyance of real property occupied by a tenant, or of the rents or profits thereof, or any other interest therein. But the payment of rent to a grantor, by his tenant, before notice of the conveyance, binds the grantee; and the tenant is not liable to such grantee, before such notice, for the breach of any condition of the lease.

R. S. 2453, pt. II, ch. 1, tit. II, § 146, unchanged in substance.

§ 214. **Covenants in mortgages.**— A mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other

separate instrument to secure such payment, has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage.

R. S. 2452, pt. II, ch. 1, tit. II, § 139, unchanged in substance.

§ 215. **Mortgages on real property inherited or devised.**— Where real property, subject to a mortgage executed by an ancestor or testator, descends to an heir, or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.

R. S. 2461, pt. II, ch. 1, tit. V, § 4, unchanged in substance.

§ 216. **Covenants not implied.**— A covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not.

R. S. 2452, pt. II, ch. 1, tit. II, § 140, unchanged in substance.

§ 217. **Lineal and collateral warranties abolished.**— Lineal and collateral warranties, with all their incidents, have been abolished; but the heirs and devisees of a person, who has made a covenant or agreement, are answerable thereon, to the extent of the real property descended or devised to them, in the cases and in the manner prescribed by law.

R. S. 2452, pt. II, ch. 1, tit. II, § 141, unchanged in substance.

§ 218. **Construction of covenants in grants of freehold interests.**— In grants of freehold interests in real property, the following or similar covenants must be construed as follows:

1. **Seizin.**—A covenant that the grantor "is seized of the said premises (described) in fee simple, and has good right to convey the same," must be construed as meaning that such grantor, at the time of the execution and delivery of the conveyance, is lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the premises thereby conveyed, with the tenements, hereditaments and appurtenances thereto belonging, and has good right, full power and lawful authority to grant and convey the same by the said conveyance.

2. **Quiet enjoyment.**—A covenant that the grantee "shall quietly enjoy the said premises," must be construed as meaning that such grantee, his heirs, successors and assigns, shall and may, at all times thereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the grantor, his heirs, successors or assigns, or any person or persons lawfully claiming or to claim the same.

3. **Freedom from incumbrances.**—A covenant "that the said premises are free from incumbrances," must be construed as meaning that such premises are free, clear, discharged and unincumbered of and from all former and other gifts, grants, titles, charges, estates, judgments, taxes, assessments, liens and incumbrances, of what nature or kind soever.

4. **Further assurance.**— A covenant that the grantor will "execute or procure any further necessary assurance of the title to said premises," must

be construed as meaning that the grantor and his heirs, or successors, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in, or to the premises conveyed by, from, under, or in trust for him or them, shall and will at any time or times thereafter upon the reasonable request, and at the proper costs and charges of the grantee, his heirs, successors and assigns, make, do, and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises thereby granted or so intended to be, in and to the grantee, his heirs, successors or assigns forever, as by the grantee, his heirs, successors or assigns, or his or their counsel learned in the law, shall be reasonably advised or required.

5. **Warranty of title.**— A covenant that the grantor "will for ever warrant the title" to the said premises, must be construed as meaning that the grantor and his heirs, or successors, the premises granted, and every part and parcel thereof, with the appurtenances, unto the grantee, his heirs, successors, and assigns, against the grantor and his heirs or successors, and against all and every person or persons whomsoever lawfully claiming or to claim the same shall and will warrant and forever defend.

6. **Grantor has not encumbered.**— A covenant that the grantor "has not done or suffered anything whereby the said premises have been encumbered," must be construed as meaning that the grantor has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or incumbered in any manner or way whatsoever.

L. 1890, ch. 475, § 1, unchanged in substance.

§ 219. **Construction of covenants in mortgages and bonds.**— In mortgages of real property, and in bonds secured thereby, the following or similar covenants must be construed as follows:

1. **Agreement that whole sum shall become due.**—The words "and it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of said mortgagee or obligee after default in the payment of interest for ..... days, or after default in the payment of any tax or assessment for ..... days, after notice and demand," must be construed as meaning that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, or should any tax or assessment, which now is or may be hereafter imposed upon the premises hereinafter described, become due or payable, and should the said interest remain unpaid and in arrear for the space of ..... days, or such tax or assessment remain unpaid and in arrear for ..... days after written notice by the mortgagee or obligee, his executors, administrators, successors or assigns, that such tax or assessment is unpaid, and demand for the payment thereof, then and from thenceforth, that is to say, after the lapse of either one of said periods, as the case may be, the aforesaid principal sum, with all arrearage of interest thereon, shall, at the option of the said mortgagee or obligee, his executors, administrators, successors or assigns, become and be due and payable immediately

thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in any wise notwithstanding.

2. **In default of payment, mortgagee to have power to sell.**— A covenant that the mortgagor "will pay the indebtedness, as provided in the mortgage, and if default be made in the payment of any part thereof, the mortgagee shall have power to sell the premises therein described, according to law," must be construed as meaning that the mortgagor for himself, his heirs, executors and administrators or successors, doth covenant and agree to pay to the mortgagee, his executors, administrators, successors and assigns, the principal sum of money secured by said mortgage, and also the interest thereon as provided by said mortgage. And if default shall be made in the payment of the said principal sum or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth it shall be lawful for the mortgagee, his executors, administrators or successors to enter into and upon all and singular the premises granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said mortgagor, his heirs, executors, administrators, successors and assigns therein, at public auction, according to the act in such case made and provided, and as the attorney of the mortgagor for that purpose duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance for the same in fee simple (or otherwise, as the case may be) and out of the money arising from such sale, to retain the principal and interest which shall then be due, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase-money, if any there shall be, unto the mortgagor, his heirs, executors, administrators, successors or assigns, which sale so to be made shall forever be a perpetual bar both in law and equity against the mortgagor, his heirs, successors and assigns, and against all other persons claiming or to claim the premises, or any part thereof by, from or under him, them or any of them.

3. **Mortgagor to keep buildings insured.**— A covenant "that the mortgagor will keep the buildings on the said premises insured against loss by fire, for the benefit of the mortgagee," must be construed as meaning that the mortgagor, his heirs, successors and assigns will, during all the time until the money secured by the mortgage shall be fully paid and satisfied, keep the buildings erected on the premises insured against loss or damage by fire, to an amount and in a company to be approved by the mortgagee, and will assign and deliver the policy or policies of such insurance to the mortgagee, his executors, administrators, successors or assigns, so and in such manner and form that he and they shall at all time and times, until the full payment of said moneys, have and hold the said policy or policies as a collateral and further security for the payment of said money, and in default of so doing, that the mortgagee or his executors, administrators, successors or assigns, may make such insurance from year to year, in a sum not exceeding the principal sum for the purposes aforesaid, and pay the premium or premiums therefor, and that the mortgagor will pay to the mortgagee, his executors, administrators, successors or assigns, such premium or

premiums so paid, with interest from the time of payment, on demand, and that the same shall be deemed to be secured by the mortgage, and shall be collectible thereupon and thereby in like manner as the principal moneys, and in default of such payment by the mortgagor, his heirs, executors, administrators, successors or assigns, or of assignment and delivery of policies as aforesaid the whole of the principal sum and interest secured by the mortgage shall, at the option of the mortgagee, his executors, administrators, successors or assigns, immediately become due and payable.

4. **Mortgagor to give further assurance of title.**— A covenant that the mortgagor "will execute any further necessary assurance of the title to said premises, and will forever warrant said title," must be construed as meaning that the mortgagor shall and will make, execute, acknowledge and deliver in due form of law, all such further or other deeds or assurances as may at any time hereafter be reasonably desired or required for the more fully and effectually conveying the premises by the mortgage described, and thereby granted, or intended so to be, unto the said mortgagee, his executors, administrators, successors or assigns, for the purpose aforesaid, and unto all and every person or persons, corporation or corporations, deriving any estate, right, title or interest therein, under the said indenture of mortgage, or the power of sale therein contained, and the said granted premises against the said mortgagor, and all persons claiming through him will warrant and defend.

L. 1890, ch. 475, § 4, unchanged in substance.

§ 220. **Construction of grant of appurtenances and of all the rights and estate of grantor.**— In any grant or mortgage of freehold interests in real estate, the words, "together with the appurtenances and all the estate and rights of the grantor in and to said premises," must be construed as meaning, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, dower and right of dower, curtesy, and right of curtesy, property, possession, claim and demand whatsoever, both in law and in equity, of the said grantor of, in and to the said granted premises and every part and parcel thereof, with the appurtenances.

L. 1890, ch. 475, § 2, unchanged in substance.

§ 221. **Construction of grant in executor's or trustee's deed of appurtenances, and of the estate of testator and grantor.**— In any deed by an executor of, or trustee under a will, the words "together with the appurtenances and also all the estate which the said testator had at the time of his decease in said premises, and also the estate therein which said grantor has or has power to convey or dispose of, whether individually or by virtue of said will or otherwise," must be construed as meaning, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease, or which the said grantor has or has power

to convey or dispose of, whether individually or by virtue of the said last will and testament or otherwise, of, in and to the said granted premises, and every part and parcel thereof, with the appurtenances.

L. 1890, ch. 475, § 3, unchanged in substance.

§ 222. **Covenants to bind representatives of grantor and mortgagor and enure to the benefit of whom.**— All covenants contained in any grant or mortgage of real estate bind the heirs, executors, administrators, successors and assigns, of the grantor or mortgagor, and enure to the benefit of the heirs, executors, administrators, successors and assigns of the grantee or mortgagee in the same manner and to the same extent, and with like effect as if such heirs, executors, administrators, successors and assigns were so named in such covenants, unless otherwise in said grant or mortgage expressly provided.

L. 1890, ch. 475, § 5, unchanged in substance.

§ 223. **Short forms of deeds and mortgages.**— The use of the following forms of instruments for the conveyance and mortgage of real property is lawful, but this section does not prevent or invalidate the use of other forms:

SCHEDULE A.

Deed with Full Covenants.

This indenture, made the.....day of....., in the year eighteen hundred and....., between.....of (insert residence) of the first part, and ..... of (insert residence) of the second part.

Witnesseth, that the said party of the first part, in consideration of..... dollars lawful money of the United States, paid by the party of the second part, doth hereby grant and release unto the said party of the second part, his heirs and assigns forever (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever. And the said party of the first part doth covenant with said party of the second part as follows:

First. That the party of the first part is seized of said premises in fee simple, and has good right to convey the same.

Second. That the party of the second part shall quietly enjoy the said premises.

Third. That the said premises are free from incumbrances.

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises.

Fifth. That the party of the first part will forever warrant the title to said premises.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

In presence of:

SCHEDULE B.

Executor's Deed.

This indenture, made the... ....day of....., eighteen hundred and ..... between ..... as executor of the last will and testament of ...., late of ....., deceased, of the first part, and of ....., of second part, witnesseth:

That the said party of the first part, by virtue of the power and authority to him given in and by the said last will and testament, and in consideration of ..... dollars, lawful money of the United States, paid by the said party of the second part, doth hereby grant and release unto the said party of the second part, his heirs and assigns forever (description) together with the appurtenances, and also all the estate which the said testator had at the time of his decease in said premises, and also the estate therein which the said party of the first part has or has power to dispose of, whether individually or by virtue of said will or otherwise.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever.

And the said party of the first part covenants with said party of the second part that the party of the first part has not done or suffered anything whereby the said premises have been incumbered in any way whatever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

In the presence of:

SCHEDULE C.

Mortgage.

This indenture, made the ..... day of ....., in the year eighteen hundred and.....,between.... . of....., party of the first part, and .... of... ...., party of the second part.

Whereas, the said ..... is justly indebted to the said party of the second part in the sum of ..... dollars, lawful money of the United States, secured to be paid by his certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of ..... dollars, on the ..... day of ....., eighteen hundred and ....., and the interest thereon, to be computed from ..... at the rate of ..... per centum per annum and to be paid ....

It being thereby expressly agreed that the whole of the said principal sum shall become due after default in the payment of interest, taxes or assessments, as hereinafter provided.

Now this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar, paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth hereby grant and release unto the said party of the second part, and to his heirs (or successors) and assigns forever (description), together with the appurtenances,

and all the estate and rights of the party of the first part in and to said premises.

To have and hold the above granted premises unto the said party of the second part, his heirs and assigns forever.

Provided always, that if the said party of the first part, his heirs, executors or administrators, shall pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents, and the estate hereby granted, shall cease, determine and be void.

And the said party of the first part covenants with the party of the second part as follows:

1. That the party of the first part will pay the indebtedness as hereinbefore provided, and if default be made in the payment of any part thereof, the party of the second part shall have power to sell the premises therein described according to law.

2. That the party of the first part will keep the buildings on the said premises insured against loss by fire for the benefit of the mortgagee.

3. And it is hereby expressly agreed that the whole of said principal sum shall become due at the option of the said party of the second part after default in the payment of interest for ..... days, or after default in the payment of any tax or assessment for ..... days, after notice and demand.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

In the presence of:

L 1890, ch. 475, § 6, unchanged in substance.

§ 224. **When contract to lease or sell void.**— A contract for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agent.

R. S. 2589-90, pt. II, ch. 7, tit. I, §§ 8-9, unchanged in substance.

§ 225. **Effect of grant or mortgage of real property adversely possessed.**— A grant of real property is absolutely void, if at the time of the delivery thereof, such property is in the actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, and has preference over any judgment or instrument, subsequent to the recording thereof; and if there are two or more such mortgages, they severally have preference according to the time of recording thereof, respectively.

R. S. 2453, pt. II, ch. 1, tit. II, §§ 147-148, unchanged in substance.

§ 226. **Conveyances with intent to defraud purchasers and encumbrancers void.**— A conveyance of an estate or interest in real property, or the rents and profits thereof, and every charge thereon, made or created with intent to defraud prior or subsequent purchasers or encumbrancers, for a valuable consideration, of the same real property, rents or profits, is

void as against such purchasers and encumbrancers. Such a conveyance or charge shall not be deemed fraudulent in favor of a subsequent purchaser or encumbrancer, who, at the time of his purchase or encumbrance, has actual or legal notice thereof, unless it appears that the grantee in the conveyance, or the person to be benefited by the charge, was privy to the fraud intended.

R. S. 2588, pt. II, ch. 7, tit. I, §§ 1–2, unchanged in substance.

§ 227. **Conveyances with intent to defraud creditors void.**— A conveyance or assignment in writing or otherwise, of an estate, interest, or existing trust in real property, or the rents or profits issuing therefrom, or a charge on real property, or on the rents or profits thereof, made with the intent to hinder, delay or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands, or a bond or other evidence of debt given, suit commenced or decree or judgment suffered, with the like intent, is void as against every person so hindered, delayed or defrauded.

R. S. 2592, pt. II, ch. 7, tit. III, § 1, unchanged in substance as far as the same relates to real property.

§ 228. **Conveyances void as to creditors, purchasers and encumbrancers, void as to heirs and assigns.**— A conveyance, charge, instrument or proceeding, declared by this article to be void as against creditors, purchasers or encumbrancers, is equally void as against their heirs, successors, personal representatives or assigns.

R. S. 2593, pt. II, ch. 3, tit. III, § 3, unchanged in substance.

§ 229. **Fraudulent intent, question of fact.**— The question of fraudulent intent in a case arising under this article, shall be deemed a question of fact and not of law; and a conveyance or charge shall not be adjudged fraudulent as against creditors, purchasers or encumbrancers, solely on the ground that it was not founded on a valuable consideration.

R. S. pt. II, ch. 7, tit. III, § 4, unchanged in substance.

§ 230. **Rights of purchaser and encumbrancer for valuable consideration protected.**— This article does not in any manner affect or impair the title of a purchaser or encumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

R. S. 2593, pt. II, ch. 7, tit. III, § 5, unchanged in substance.

§ 231. **Conveyances with power to revoke, determine or alter.**— A conveyance of or charge on an estate or interest in real property, containing a provision for the revocation, determination or alteration of the estate or interest, or any part thereof, at the will of the grantor, is void, as against subsequent purchasers and encumbrancers, from the grantor, for a valuable consideration, of any estate or interest so liable to be revoked or determined, although the same be not expressly revoked, determined or altered by the grantor, by virtue of the power reserved or expressed in the prior conveyance or charge.

Where a power to revoke a conveyance of real property or the rents and profits thereof, and to reconvey the same, is given to any person, other than the grantor in such conveyance, and such person thereafter conveys the

same real property, rents or profits to a purchaser or encumbrancer for a valuable consideration, such subsequent conveyance is valid, in the same manner and to the same extent as if the power of revocation were recited therein, and the intent to revoke the former conveyance expressly declared.

If a conveyance to a purchaser or encumbrancer, under this section, be made before the person making it is entitled to execute his power of revocation, it is nevertheless valid, from the time the power of revocation actually vests in such person, in the same manner, and to the same extent, as if then made.

R. S. 2588–9, pt. II, ch. 7, tit. I, §§ 3, 4, 5, unchanged in substance.

§ 232. **Disaffirmance of fraudulent act by executor and others.**— An executor, administrator, receiver, assignee or other trustee, may, for the benefit of creditors, or of others interested in real property held in trust, disaffirm, treat as void and resist any act done or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate or property; and a person who fraudulently receives, takes, or in any manner interferes with the real property of a deceased person, or an insolvent corporation, association, partnership, or individual, is liable to such executor, administrator, receiver or other trustee for the same, or the value thereof, and for all damages caused by such act to the trust estate.

A creditor of a deceased insolvent debtor, having a claim or demand exceeding one hundred dollars against such deceased, may, for the benefit of creditors or others interested in the real property of such deceased, disaffirm, treat as void, and resist any act done or conveyance, transfer or agreement made by such deceased in fraud of the rights of any creditor, including himself, and may maintain an action to set aside such act, conveyance, transfer or agreement, without having first obtained a judgment on such claim or demand; but the same, if disputed, may be established on the trial. The judgment in such action may provide for the sale of the premises or property involved, when a conveyance or transfer thereof is set aside, and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law.

R. S. 2594; L. 1858, ch. 314, as am. by L. 1889, ch. 487, and L. 1894, ch. 740, unchanged in substance.

§ 233. **When remainderman may pay interest owed by life tenant.**— Whenever real property held by any person for life is encumbered by mortgage or other lien, the interest on which should be paid by the life tenant, and such life tenant neglects or refuses to pay such interest, the remainderman may pay such interest, and recover the amount thereof, together with interest thereon from the time of such payment, of the life tenant.

L. 1894, ch. 315, unchanged in substance.

§ 234. **Powers of courts of equity not abridged.**— Nothing contained in this article abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance.

R. S. 2590, pt. II, ch. 7, tit. I, § 10, unchanged in substance.

ARTICLE VIII.

Recording Instruments Affecting Real Property.

SECTION 240. Definitions; effect of article.
241. Recording of conveyances.
242. By whom conveyance must be acknowledged or proved.
243. Recording of conveyances heretofore acknowledged or proved.
244. Recording executory contracts and powers of attorney.
245. Recording of letters patent.
246. Recording copies of instruments which are in secretary of state's office.
247. Certified copies may be recorded.
248. Acknowledgments and proofs within the state.
249. Acknowledgments and proofs in other states.
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274. Penalty for using long forms of covenants.
275. Certain acts not affected.
276. Actions to have certain instruments canceled of record.
277. Officers guilty of malfeasance liable for damages.

§ 240. **Definitions; effect of article.**— The term "real property" as used in this article, includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years. The term "purchaser," includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate. The term "conveyance," includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, and although the power be one of revocation only; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of

such property. The term "recording officer," means the county clerk of the county, except in the counties of New York, Kings or Westchester, where it means the register of the county.

This article does not apply to leases for life or lives, or for years, heretofore made, of lands in either of the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware or Schenectady.

R. S. 2449, pt. II, ch. 1, tit. II, § 114; R. S. 2475, pt. II, ch. 3, §§ 36, 37, 38, 39, 42, 43, unchanged in substance, except that the operation of the last paragraph is confined to leases heretofore made.

§ 241. **Recording of conveyances.**—A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded.

R. S. 2469, pt. II, ch. 3, § 1, unchanged in substance. In Payner v. Wilson, 15 Wend. 469, held: That the statute avoiding an unrecorded deed as against a purchaser in good faith, etc., applies only to successive purchasers from same grantor.

§ 242. **By whom conveyance must be acknowledged or proved.**—Except as otherwise provided by this article, such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

R. S. 2470, pt. II, ch. 3, § 4, in part, unchanged in substance.

§ 243. **Recording of conveyances heretofore acknowledged or proved.**—A conveyance of real property, within the state, heretofore executed, and heretofore acknowledged or proved, and certified, so as to be entitled to be read in evidence, or recorded, under the laws in force at the time when so acknowledged or proved, but which has not been recorded, is entitled to be read in evidence, and recorded in the same manner, and with the like effect, as if this chapter had not been passed.

If heretofore executed, but not proved or acknowledged, it may be proved or acknowledged in the same manner as conveyances hereafter executed and with like effect.

R. S. pt. II, ch. 3, §§ 22, 23, unchanged in substance.

§ 244. **Recording executory contracts and powers of attorney.**—An executory contract for the sale or purchase of real property, or an instrument containing a power to convey real property, as the agent or attorney for the owner of the property, acknowledged or proved, and certified, in the manner to entitle a conveyance to be recorded, may be recorded by the recording officer of any county in which any of the real property to which it relates is situated,

R. S. 2475, pt. II, ch. 3, § 39, unchanged in substance.

§ 245. **Recording of letters patent.**—Letters patent, issued under the great seal of the state, granting real property, may be recorded in the county where such property is situated, in the same manner and with like

effect, as a conveyance duly acknowledged or proved and certified so as to entitle it to be recorded.

R. S. 2478, L. 1845, ch. 110, § 1, unchanged in substance.

§ 246. **Recording copies of instruments which are in secretary of state's office.**— A copy of an instrument affecting real property, within the state, recorded or filed in the office of the secretary of state, certified in the manner required to entitle the same to be read in evidence, may be recorded with such certificate, in the office of any recording officer of the state.

R. S. 2476, L. 1839, ch. 295, § 5, unchanged in substance.

§ 247. **Certified copies may be recorded.**— A copy of a record, or of any recorded instrument, certified or authenticated so as to be entitled to be read in evidence, may be again recorded in any office where the original would be entitled to be recorded. Such record has the same effect as if the original were so recorded. A copy of a conveyance or mortgage affecting separate parcels of real property situated in different counties, or of the record of such conveyance or mortgage in one of such counties, certified or authenticated so as to be entitled to be read in evidence, may be recorded in any county in which any such parcel is situated, with the same effect as if the original instrument authenticated as required by section two hundred and fifty-nine of this chapter were so recorded.

R. S. 2477, L. 1843, ch. 210, § 5, as am. by L. 1893, ch. 182, unchanged in substance.

§ 248. **Acknowledgments and proofs within the state.**— The acknowledgment or proof of a conveyance of real property within the state may be made at any place within the state, before a justice of the supreme court; or within the district wherein such officer is authorized to perform official duties, before a judge, clerk, deputy clerk, or special deputy clerk of a court, a notary public, or the mayor or recorder of a city, a justice of the peace, surrogate, special surrogate, special county judge, or commissioner of deeds.

R. S. 2470, pt. II, ch. 3, § 4, subd. 1, unchanged in substance, except that mayors and recorders are restricted to their respective cities.

§ 249. **Acknowledgments and proofs in other states.**— The acknowledgment or proof of a conveyance of real property, within the state, may be made without the state, but within the United States, before either of the following officers acting within his jurisdiction, or of the court to which he belongs:

1. A judge of the supreme court, of the circuit court of appeals, of the circuit court, or of the district court of the United States.
2. A judge of the supreme, superior, or circuit court of a state.
3. A mayor of a city.
4. A commissioner appointed for the purpose by the governor of the state.
5. Any officer of a state, authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.

R. S. 2470, pt. II, ch. 2, § 4, subd. 2; Id. 2476, L. 1829, ch. 222, part; Id. 2477, L. 1845, ch. 109; Id. 2478, L. 1848, ch. 195, § 1; Id. 2479, L. 1850, ch. 270, § 1; Id. 3315, L. 1892, ch. 298, § 1, unchanged in substance. See Executive L. §§ 87–88.

§ 250. **Acknowledgments and proofs in foreign countries.**— The acknowledgment and proof of a conveyance of real property within the

state, may be made without the United States before either of the following officers:

1. An ambassador, a minister plenipotentiary, minister extraordinary, minister resident, or charge des affairs of the United States, residing and accredited within the country.

2. A consul-general, vice-consul general, deputy consul-general, vice-consul or deputy-consul, a consular or vice-consular agent, or a consul or commercial or vice-commercial agent of the United States, residing within the country.

3. A commissioner appointed for the purpose by the governor, and acting within his own jurisdiction.

4. A person specially authorized for that purpose by a commission, under the seal of the supreme court, issued to a reputable person, residing in or going to the country where the acknowledgment or proof is so to be taken.

5. If within the dominion of Canada, it may also be made before any judge of a court of record; or before any officer of such dominion authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.

6. If within the United Kingdom of Great Britain and Ireland or the dominions thereunto belonging, it may also be made before the mayor, provost or other chief magistrate of a city or town therein.

R. S. 2470, pt. II, ch. 3, §§ 5, 6, 7, 8, as am. by L. 1883, ch. 80; Id. 2476, L. 1829, ch. 222; Id. 2482, L. 1863, ch. 246, as am. by L. 1888, ch. 246; Id. 2483, L. 1870, ch. 208; L. 1893, ch. 123. While this bill was pending in the Legislature, another bill passed both houses, giving to a "vice-consul-general or a deputy consul-general" the same power to take acknowledgments as that possessed by a consul-general. The Legislature, therefore, amended this section accordingly.

§ 251. **Acknowledgments and proofs by married women.**— The acknowledgment or proof of a conveyance of real property, within the state, or of any other written instrument, may be made by a married woman the same as if unmarried.

R. S. 2471, pt. II, ch. 3, §§ 10, 11; Id. 2487, L. 1879, ch. 249, as am. by L. 1880, ch. 300, unchanged in substance.

§ 252. **Requisites of acknowledgments.**— An acknowledgment must not be taken by any officer unless he knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument.

R. S. 2471, pt. II, ch. 3, § 9, unchanged in substance.

§ 253. **Proof by subscribing witness.**— Where the execution of a conveyance is proved by a subscribing witness, such witness must state his own place of residence, and that he knew the person described in and who executed the conveyance.

The proof must not be taken unless the officer is personally acquainted with such witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to the conveyance.

R. S. 2472, pt. II, ch. 3, § 12, unchanged in substance.

§ 254. **Compelling witnesses to testify.**— On the application of a grantee in a conveyance, his heir or personal representative, or of a person claiming under either of them, verified by the oath of the applicant, stating

that a witness to the conveyance, residing in the county where the application is made, refuses to appear and testify concerning its execution, and that such conveyance can not be proved without his testimony, any officer authorized to take, within the state, acknowledgment or proof of conveyance of real property may issue a subpœna, requiring such witness to attend and testify before him concerning the execution of the conveyance. A person who, on being duly served with such a subpœna, without reasonable cause refuses or neglects to attend or refuses to answer under oath concerning the execution of such conveyance, forfeits to the person injured one hundred dollars; and may also be committed to prison by the officer who issued the subpœna, there to remain without bail, and without the liberties of the jail, until he answers under oath as required by this section.

R. S. 2472, pt. II, ch. 3, §§ 13, 14, unchanged in substance, except that the provision excepting commissioners of deeds from the officers who may issue subpœnas has been omitted.

§ 255. **Certificate of acknowledgment or proof.**— An officer taking the acknowledgment or proof of a conveyance must indorse thereupon or attach thereto, a certificate, signed by himself, stating all the matters required to be done, known or proved on the taking of such acknowledgment or proof; together with the name and substance of the testimony of each witness examined before him, and if a subscribing witness, his place of residence.

R. S. 2472, pt. II, ch. 3, § 15, unchanged in substance.

§ 256. **When certificate to state time and place.**— Where the acknowledgment or proof is taken by a commissioner appointed by the governor, for a city or county within the United States, and without the state, the certificate must also state the day on which, and the town and county or the city in which, the same was taken.

R. S. 2480, L. 1850, ch. 270, § 5, as am. by L. 1880, ch. 115, unchanged in substance. See Executive L. § 88.

§ 257. **When certificate must be under seal.**— Where a certificate of acknowledgment or proof is made by a commissioner appointed by the governor, or by the mayor or other chief magistrate of a city or town without the United States, or by a minister, charge des affairs, consul-general, vice-consul-general, deputy-consul-general, vice-consul or deputy consul, consular or vice-consular agent, or consul or commercial or vice-commercial agent, of the United States, it must be under his seal of office, or the seal of the consulate to which he is attached.

All acknowledgments or proofs of deeds, mortgages or other instruments relating to real property, the certificates of which were made in the form required by the laws of this state, by a consul-general, vice-consul-general, deputy-consul-general, vice-consul, deputy-consul, consular agent, vice-consular agent, consul or commercial agent or vice-commercial agent of the United States prior to the first day of April, eighteen hundred and ninety-six, are confirmed.

R. S. 2471, pt. II, ch. 3, § 7; Id. 2482, L. 1863, ch. 246, §§ 1, 2; Id. 2485, L. 1875, ch. 136, § 1. See note to § 250. The date of April 1, 1896, was also fixed by the bill there referred to.

§ 258. **Acknowledgment by corporation and form of certificate.**— The acknowledgment of a conveyance or other instrument by a corporation,

must be made by some officer thereof authorized to execute the same by the board of directors of said corporation. The certificate of acknowledgment must be in substantially the following form, the blanks being properly filled.

State of New York,
County of ...., } ss.:

On the .... day of .... in the year ...., before me personally came ..... to me known, who, being by me duly sworn, did depose and say that he resided in .....; that he is the (president or other officer) of the (name of corporation), the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

(Signature and office of officer taking acknowledgment.)

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal

New.,

§ 259. **When county clerk's authentication necessary.**— A certificate of acknowledgment or proof, made within the state, by a commissioner of deeds, justice of the peace, or, except as otherwise provided by law, by a notary public, does not entitle the conveyance to be read in evidence, or recorded, except within the county in which the officer resides at the time of making such certificate, unless authenticated by a certificate of the clerk of the same county. But this section does not apply to a conveyance executed by an agent for the Holland Land company, or of the Pulteney estate, lawfully authorized to convey real property.

R. S. 2472-3, pt. II, ch. 3, §§ 18 in part, 19, unchanged in substance.

§ 260. **When other authentication necessary.**— In the following cases a certificate of acknowledgment or proof is not entitled to be read in evidence or recorded unless authenticated by the following officers, respectively:

1. Where the original certificate of acknowledgment or proof is made by a commissioner appointed by the governor, by the secretary of state.

2. Where made by a judge of a court of record in Canada, by the clerk of the court.

3. Where made by the officer of a state of the United States, or of the dominion of Canada authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein, by the secretary of state of the state, or the clerk, register, recorder or prothonotary of the county in which the officer making the original certificate resided, when the certificate was made, or by the clerk of any court of that county, having by law a seal.

R. S. 2479, L. 1850, ch. 270, § 4; Id. 2483, L. 1870, ch. 208, § 1; Id. 2485, L. 1875, ch. 136, § 2; Id. 2479, L. 1848, ch. 195, § 2, as am. by L. 1894, ch. 729, unchanged in substance.

§ 261. **Contents of certificate of authentication**— An officer authenticating a certificate of acknowledgment or proof must subjoin or attach to the original certificate a certificate under his hand, and if he has, pursuant

to law, an official seal, under such seal. Except when the original certificate is made by a judge of a court of record in Canada, such certificate of authentication must specify that, at the time of taking the acknowledgment or proof, the officer taking it was duly authorized to take the same; that the authenticating officer is acquainted with the former's handwriting, or has compared the signature to the original certificate with that deposited in his office by such officer; and that he verily believes the signature to the original certificate is genuine; and if the original certificate is required to be under seal, he must also certify that he has compared the impression of the seal affixed thereto with the impression of the seal of the officer who took the acknowledgment or proof deposited in his office, and that he verily believes the impression of the seal upon the original certificate is genuine.

A clerk's certificate authenticating a certificate of acknowledgment or proof, taken before a judge of a court of record in Canada, must specify that there is such a court; that the judge before whom the acknowledgment of proof was taken, was, when it was taken, a judge thereof; that such court has a seal; that the officer authenticating is clerk thereof, that he is well acquainted with the handwriting of such judge, and verily believes his signature is genuine.

R. S. 2480, L. 1850, ch. 270, § 4; Id. 2485, L. 1875, ch. 136, § 2; Id. 2479, L. 1848, ch. 195, § 2, as am. by L. 1867, ch. 557; Id. 2483, L. 1870, ch. 208, § 1, unchanged in substance.

§ 262. **Recording of conveyances acknowledged or proved without the state, where parties and certifying officer are dead.**—Where the execution of a conveyance of real property within this state is acknowledged or proved according to the laws of any other state of the United States, and a certificate of the acknowledgment or proof signed by the officer taking it is annexed to or indorsed upon the instrument, if such officer and the grantor or mortgagor be dead and the death of all of them be proved by affidavit, sworn to in such state before an officer authorized by its laws to administer an oath therein, the conveyance, with the affidavit or affidavits annexed thereto, on being authenticated as required by this section, may be read in evidence and recorded in the same manner, and with like effect, as if the conveyance was acknowledged or proved and certified as required by the laws of this state.

To entitle such conveyance and affidavits to be read in evidence, or recorded, a certificate of the clerk, recorder, register or prothonotary of the county in which the deceased officer resided, authenticating his signature, and also certifying that the conveyance is acknowledged or proved in all respects, as required by the laws of such state, must be annexed to the original certificate; and a like certificate of such clerk, recorder, register or prothonotary, authenticating the signature of the officer, before whom the affidavits proving the deaths were taken, must be annexed to such affidavits. The affidavits on being recorded, are presumptive evidence of the matters of fact, required to be stated therein.

R. S. 2480, L. 1858, ch. 259, §§ 1, 2, unchanged in substance.

§ 263. **Proof where witnesses are dead.**— Where the witnesses to a conveyance, authorized to be recorded, are dead, its execution may be proved before any officer authorized to take within the state the acknowledgment and proof of conveyances, other than a commissioner of deeds, a notary

public, or a justice of the peace. The proof of the execution must be made by satisfactory evidence of the death of all the witnesses thereto, and of the handwriting of such witnesses, or any one of them, and of the grantor, which evidence, with the name and residence of each witness examined, must be set forth by the officer taking the same, in his certificate of proof. A conveyance so proved, and certified, may be recorded in the proper office, if the original conveyance be at the same time deposited in the same office, there to remain for the inspection of all persons desiring to examine the same. If the conveyance affects real property in two or more counties, a certified copy of the conveyance, with the proof and certificates, may be recorded in each of such counties. Such recording and deposit are constructive notice of the execution of such conveyance to all purchasers of the same real property, or any part thereof, from the same vendor, his heirs or assigns, subsequent to such recording, but do not entitle the conveyance or the record thereof, or a transcript of the record to be read in evidence.

R. S. 2474, pt. II, ch. 3, §§ 30–33, unchanged in substance.

§ 264. **Recording books.**— Different sets of books must be provided by the recording officer of each county, for the recording of deeds and mortgages; in one of which sets, he must record all conveyances and other instruments absolute in their terms delivered to him, pursuant to law, to be so recorded, which are not intended as mortgages, or securities in the nature of mortgages, and in the other set, such mortgages and securities delivered to him.

R. S. 2470, pt. II, ch. 3, § 2, unchanged in substance.

§ 265. **Indexes.**— Each recording officer must provide, at the expense of his county, proper books for making general indexes of instruments recorded in his office, and must form indexes therein, so as to afford correct and easy reference to the books of record in his office. There must be one set of indexes for mortgages or securities in the nature of mortgages, and another set for conveyances and other instruments not intended as such mortgages or securities. Each set must contain two lists in alphabetical order, one consisting of the names of the grantors or mortgagors, followed by the names of their grantees or mortgagees, and the other list consisting of the names of the grantees or mortgagees, followed by the names of their grantors or mortgagors, with proper blanks in each class of names, for subsequent entries, which entries must be made as instruments are delivered for record.

This section, so far as relates to the preparation of new indexes, shall not apply to a county where the recording officer now has general numerical indexes.

A recording officer who records a conveyance of real property, sold by virtue of an execution, or by a sheriff, referee or other person, pursuant to a judgment, the granting clause whereof states whose right, title or interest was sold, must insert in the proper index, under the head "grantors," the name of the officer executing the conveyance, and of each person whose right, title or interest is so stated to have been sold.

R. S. 2477, L. 1843, ch. 199, §§ 1–3, unchanged in substance. The last paragraph is new and seems to be a desirable provision, conforming the law to § 1244, Code Civil Procedure.

§ 266. **Order of recording.**— Every instrument, entitled to be recorded, must be recorded by the recording officer in the order and as of the time of its delivery to him therefor, and is considered recorded from the time of such delivery.

R. S. 2473, pt. II, ch. 3, § 24, unchanged in substance.

§ 267. **Certificate to be recorded.**— The certificate of the acknowledgment or proof of the execution of an instrument, and the certificate authenticating the signature or seal of the officer so certifying, or both, if required, must be recorded together with the instrument so acknowledged or proved; otherwise neither the record of the instrument nor a transcript thereof can be read in evidence.

R. S. 2473, pt. II, ch. 3, § 20, unchanged in substance.

§ 268. **Time of recording.**— The recording officer must make an entry in the record, immediately after the copy of every instrument recorded by him, stating the hour, day, month and year, when it was recorded, and must indorse upon every such instrument a certificate, stating the time as aforesaid, when, and the book and page where, the same was recorded.

R. S. 2473, pt. II, ch. 3, § 25, unchanged in substance.

§ 269. **Certain deeds deemed mortgages.**— A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time.

R. S. 2470, pt. II, ch. 3, § 3, unchanged in substance.

§ 270. **Recording discharge of mortgage.**— A mortgage, registered or recorded, must be discharged upon the record thereof, by the recording officer, when there is presented to him a certificate signed by the mortgagee, his personal representative or assignee, and acknowledged or proved, and certified, in like manner as to entitle a conveyance to be recorded, specifying that the mortgage has been paid, or otherwise satisfied and discharged. The certificate of discharge, and the certificates of its acknowledgment or proof, must be recorded; and a reference must be made to the book and page containing such record, in the minute of the discharge of such mortgage, made by the officer upon the record thereof.

R. S. 2474, pt. II, ch. 3, §§ 28, 29, unchanged in substance.

§ 271. **Effect of recording assignment of mortgage.**— The recording of an assignment of a mortgage is not in itself, a notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate a payment made by either of them to the mortgagee.

R. S. 2476, pt. II, ch. 3, § 41, unchanged in substance.

§ 272. **Recording of conveyances made by treasurer of Connecticut.** — A conveyance of real property, executed at any time since the tenth day of March, eighteen hundred and twenty-five, by the treasurer of the state of Connecticut, acknowledged by him before the secretary of such state,

and the acknowledgment of which is certified by such secretary of state under the seal of such state, in the manner required for the acknowledgment and certification of a conveyance within this state, may be recorded in the proper office within this state, without further proof thereof.

R. S. 2473, pt. II, ch. 3, § 21, unchanged in substance.

§ 273. **Revocation to be recorded.**—A power of attorney or other instrument, recorded pursuant to this article, is not deemed revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power was recorded.

R. S. 2476, pt. II, ch. 3, § 40, unchanged in substance.

§ 274. **Penalty for using long forms of covenants.**—The recording officer of any county may charge for the recording of an instrument containing any of the covenants mentioned in sections two hundred and eighteen and two hundred and nineteen of this chapter, at large, instead of the short forms thereof, in said sections contained, the sum of five dollars in addition to the fees chargeable by law for such recording.

L. 1890, ch. 475, § 7, unchanged in substance, except that instead of being confined to the counties of New York and Kings, the penalty is extended to the whole State.

§ 275. **Certain acts not affected.**—Nothing contained in this article repeals or affects any act providing for recording and indexing instruments affecting real property in the city of New York, according to city blocks or other limited areas.

New; inserted for greater caution.

§ 276. **Actions to have certain instruments cancelled of record.**—An owner of real property or of any undivided part thereof or interest therein, may maintain an action to have any recorded instrument in writing relating to the same, other than those required by law to be recorded, declared void or invalid, or to have the same cancelled of record as to said real property, or his undivided part thereof or interest therein.

R. S. 2487, L. 1880, ch. 530, § 1, unchanged in substance.

§ 277. **Officers guilty of malfeasance liable for damages.**—An officer authorized to take the acknowledgment or proof of a conveyance or other instrument, or to certify such proof or acknowledgment, or to record the same, who is guilty of malfeasance or fraudulent practice in the execution of any duty prescribed by law in relation thereto, is liable in damages to the person injured.

R. S. 2475, pt. II, ch. 3, § 35, unchanged in substance. The penal provision has been omitted, as it is believed the same is fully covered by sections 117, 154, 162, 163, 164, Penal Code.

ARTICLE IX.

The Descent of Real Property.

SECTION 280. Definitions and use of terms; effect of article.
281. General rule of descent.
282. Lineal descendants of equal degree.
283. Lineal descendants of unequal degree.
284. When father inherits.

SECTION 285. When mother inherits.
286. When collateral relatives inherit; collateral relatives of equal degrees.
287. Brothers and sisters and their descendants.
288. Brothers and sisters of father and mother and their descendants.
289. Illegitimate children.
290. Relatives of the half blood.
291. Cases not hereinbefore provided for.
292. Posthumous children and relatives.
293. Inheritance, sole or in common.
294. Alienism of ancestor.
295. Advancements.
296. How advancements adjusted.

§ 280. **Definitions and use of terms; effect of article.**— The term "real property" as used in this article, includes every estate, interest and right, legal and equitable in lands, tenements and hereditaments except such as are determined or extinguished by the death of an intestate seized or possessed thereof, or in any manner entitled thereto; leases for years, estates for the life of another person; and real property held in trust, not devised by the beneficiary. "Inheritance" means real property as herein defined, descended according to the provisions of this article; the expressions "where the inheritance shall have come to the intestate on the part of the father" or "mother," as the case may be, 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.

When in this article a person is described as living, it means living at the time of the death of the intestate from whom the descent came; when he is described as having died, it means that he died before such intestate.

This article does not affect a limitation of an estate by deed or will, or tenancy by the curtesy of dower.

R. S. 2466, 2467, pt. II, ch. 2, §§ 20, 21, 27, 28, 29, unchanged in substance.

§ 281. **General rule of descendant.** The real property of a person who dies without devising the same shall descend:

1. To his lineal descendants.
2. To his father.
3. To his mother; and
4. To his collateral relatives, as prescribed in the following sections of this article.

R. S. 2463, pt. II, ch. 2, § 1, unchanged in substance.

§ 282. **Lineal descendants of equal degree.**— If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be.

R. S. 2463, pt. II, ch. 2, § 2, unchanged in substance.

§ 283. **Lineal descendants of unequal degree.**— If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall

have died shall respectively take the shares which their ancestor would have received.

R. S. 2463, 2464, pt. II, ch. 2, §§ 3, 4, unchanged in substance.

§ 284. **When father inherits.**— If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

R. S. 2464, pt. II, ch. 2, § 5, as am. by L. 1830, ch. 320, § 13, unchanged in substance.

§ 285. **When mother inherits.**— If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for 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. If the intestate in such case have no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.

R. S. 2464, pt. II, ch. 2, § 6, unchanged in substance.

§ 286. **When collateral relatives inherit; collateral relatives of equal degrees.**— 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 him the common degree of consanguinity may be.

R. S. 2464, pt. II, ch. 2, § 7, unchanged in substance.

§ 287. **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, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

R. S. 2464, 2465, pt. II, ch. 2, §§ 8, 9. The word "collectively" was inserted by the Legislature.

§ 288. **Brothers and sisters of father and mother and their descendants.**— If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of his father, shall descend:

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

3. If all such brothers and sisters shall have died, to their descendants.

4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants.

But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid.

If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner.

In all cases mentioned in this section the inheritance shall extend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

R. S. 2465, pt. II, ch. 2, §§ 10, 11, 12, 13, unchanged in substance.

§ 289. **Illegitimate children.**— If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate.

If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate.

In any other case illegitimate children or relatives shall not inherit.

R. S. 2465, pt. II, ch. 2, §§ 14, 19; Id. 2468, L. 1855, ch. 547, § 1, unchanged in substance.

§ 29. **Relatives of the half-blood.**— Relatives of the half-blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of the ancestor shall be excluded from such inheritance.

R. S. 2465, pt. II, ch. 2, § 15, unchanged in substance.

§ 291. **Cases not hereinbefore provided for.**— In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of common law.

R. S. 2466, pt. II, ch. 2, § 16, unchanged in substance.

§ 292. **Posthumous children and relatives.**— A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

R. S. 2466, pt. II, ch. 2, § 18, unchanged in substance.

§ 293. **Inheritance, sole or in common.**— When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an

inheritance or a share of an inheritance descends to several persons they shall take as tenants in common, in proportion to their respective rights.

R. S. 2466, pt. II, ch. 2, § 17, unchanged in substance.

§ 294. **Alienism of ancestor.**— A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor.

R. S. 2466, pt. II, ch. 2, § 22, unchanged in substance.

§ 295. **Advancements.**— If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to the next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal.

The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given.

Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement.

An 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, is an advancement.

R. S. 2466, 2467, pt. II, ch. 2, §§ 23, 24, 25, 26; Id. 2450, pt. II, ch. 1, tit. II, § 127, unchanged in substance.

§ 296. **How advancements adjusted.**— When an advancement to be adjusted consisted of real property, the adjustment must be made out of real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other

New; drawn to correspond with the provisions of the Code of Civil Procedure.

ARTICLE X.

Laws Repealed; When to Take Effect.

SECTION 300. Laws repealed.
301. When to take effect.

SECTION 300. **Laws repealed.**— Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed.

§ 301. **When to take effect.**— This chapter shall take effect on October 1, 1896.

SCHEDULE OF LAWS REPEALED.

Revised Statutes, part II, chapters 1, 2, 3.		All, except §§ 5, 6, 7 of tit. I of ch. 1, and § 63, tit. II, ch. 1.
Revised Statutes, part II, chapter 7, title I.		All.
Laws of —	Chapter.	Section.
1798	72	All.
1802	49	All.
1804	109	26.
1805	25	All.
1807	123	2.
1808	175	All.
1819	25	All.
1829	222	All.
1830	171	All.
1834	272	All.
1835	275	All.
1839	295	5.
1843	87	All.
1843	199	All.
1843	210.	5.
1845	109	All.
1845	110	All.
1845	115	All.
1848	195	All.
1855	547	All.
1857	576	All.
1858	259	All.
1860	322	All.
1860	345	All.
1860	396	All.
1863	246	All.
1865	421	All.
1868	513	All.
1870	208	All.
1872	120	All.
1872	141	All.
1872	358	All.
1874	261	All.
1875	38	All.
1875	336	All.
1875	545	All.
1877	111	All.
1879	249	All.
1880	600	All.
1880	115	All.
1880	530	All.
1882	275	All.

Laws of—	Chapter.	Section.
1883	80	All.
1884	26	All.
1886	257	All.
1888	246	All.
1889	42	All.
1890	61	All.
1890	475	All.
1891	100	All.
1891	172	All.
1891	209	All.
1892	208	All.
1892	616	All.
1893	123	All.
1893	182	All.
1893	207	All.
1893	599	All.
1894	315	All.
1894	729	All.
1895	525	All.
1895	886	All.

TABLE SHOWING DISPOSITION OF LAWS REPEALED.

Revised Statutes.	Sections.	R. S. 8th ed. page.	Secs. of revisions.	Notes.
Pt. II, ch. 1, tit. 1..	1....	2418....	.....	Const. art. 1, § 10.
Pt. II, ch. 1, tit. 1..	2....	2418....	.....	Public Lands L. § 68.
Pt. II, ch. 1, tit. 1..	3....	2418....	.....	Const. art. 1, §§ 11, 12.
Pt. II, ch. 1, tit. 1..	4....	2418....	.....	Const. art. 1, § 11.
Pt. II, ch. 1, tit. 1..	8....	2419....	2.....	
Pt. II, ch. 1, tit. 1..	9....	2419....	7.....	
Pt. II, ch. 1, tit. 1..	10....	2419....	3.....	
Pt. II, ch. 1, tit. 1..	11....	2419...	.....	Const. art. 1, § 15.
Pt. II, ch. 1, tit. 1..	12....	2419....	.....	Superseded by Ind. L., § 2, and Const. art. 1, § 15.
Pt, II, ch. 1, tit. 1..	13....	2420....	9.....	
Pt. II, ch. 1, tit. 1..	14....	2420....	.....	Obsolete.
Pt. II, ch. 1, tit. 1..	15....	2420....	4.....	
Pt. II, ch. 1, tit. 1..	16...	2420....	5.....	
Pt. II, ch. 1, tit. 1..	17....	2420....	5	
Pt. II, ch. 1, tit. 1..	18....	2421....	5.....	
Pt. II, ch. 1, tit. 1..	19....	2421....	5.....	
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Revised Statutes.	Sections.	R. S. 8th ed. page.	Secs. of revisions.	Notes.
Pt. II, ch. 1, tit. 2..	6....	2431 ...	24.....	
Pt. II, ch. 1, tit. 2..	7....	2431....	25.....	
Pt. II, ch. 1, tit. 2..	8....	2431....	25.....	
Pt. II, ch. 1, tit. 2..	9....	2431....	26	
Pt. II, ch. 1, tit. 2..	10....	2431....	27.....	
Pt. II, ch, 1, tit. 2..	11....	2431....	28.....	
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Pt. II, ch. 1, tit. 2..	14....	2432....	32.....	
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Pt. II, ch. 1, tit. 2..	16....	2432...	32.....	
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Appendix No. II.

NOTES

OF THE

ORIGINAL REVISERS OF THE REVISED STATUTES

WITH CROSS-REFERENCES TO THE PAGES OF

THE REAL PROPERTY LAW

IN THE FOOT NOTES.

NOTES OF THE ORIGINAL REVISERS OF THE REVISED STATUTES.

PART II.

"CHAPTER I."

"OF REAL PROPERTY, AND OF THE NATURE, QUALITIES AND ALIENATION OF ESTATES THEREIN."

"TITLE I.— *Of the tenure of real property, and the persons capable of holding and conveying estates therein.*"

"ARTICLE I.— *Of the tenure of real property.*"

[§ 1. Same as § 1 R. S.] *Original note.* "New in terms, but implied in 1 R. L. 380, § 2." [1]

[§ 2. Same as § 2 R. S.] *Original note.* "By the common law, lands held in trust, if they escheat to the king, are held by him free from the trust, (3 Cruise, 464.) The same doctrine would probably be applied to the people of this state. This severe rule has, in part, been remedied in England, by the act of 47 Geo. III, c. 29; and it is presumed that the legislature of this state, will be equally ready to amend the law in this particular." [2]

[§ 5. Same as § 5 R. S. except the words after "*incapacity*," which were added by the legislature.] *Original note.* "Guardianship in soccage, is of necessity abolished by the abolition of tenures, so that it seems indispensable to declare to whom the guardianship, when no testamentary or other guardian is appointed, shall belong. It has not been thought advisable to adopt the rule of the common law, that the guardianship shall belong to the next of kin, to whom the inheritance could not by possibility descend, not only as the expediency of this rule, in the present state of society, is extremely doubtful, but under the provisions of the revised statute of descents, it would rarely happen that such a relative could be found, or if found, the very remoteness of the propinquity would be a sufficient reason for excluding him from the guardianship." [3]

[§ 6. Same as § 6 R. S.] *Original note.* "The existence of a guardian in soccage, is recognised in § 20, Tit. 3, ch. 8, part 2, and it may be convenient to retain the name as a distinctive appellation."

Original note to § 3 *and* 4. "All lands within this State are declared to be allodial," etc.[4] The 3d and 4th sections of this Article, are proposed as

[1] Note to 1 R. S. 718, § 1, now § 10, art. 1, Const. p. 45, *supra*.

[2] Note to 1 R. S. 718, § 2, now § 68, "The Public Lands Law."

[3] Note to 1 R. S. 718, § 5, now in "The Domestic Relations Law," art. V, § 50.

[4] Note to 1 R. S. 718, §§ 3 and 4, now in the State Const. (Art. 1, §§ 11, 12, p. 45, *supra*.)

a substitute for the 2d, 3d, 4th, 5th and 6th sections of the act "*concerning tenures*," passed Feb. 20, 1787, which are in the following words:

"II. *And be it further enacted by the authority aforesaid*, That all *wardships*, *liveries*, *primer seisins* and *ousterlemains*, *values* and *forfeitures of marriage*, by reason of any tenure by *knights service*, and all mean rates, and all other gifts, grants and charges incident or arising for or by reason of *wardships*, *liveries*, *primer seisins* and *ousterlemains*, shall be, and hereby are declared to be taken away and discharged, from the thirtieth day of August, in the year of our Lord one thousand six hundred and sixty-four: And that all *fines for alienations*, *seizures and pardons for alienations*, tenure by *homage*, and all *charges* incident or arising for or by reason of *wardship*, *livery*, *primer seisin*, *ousterlemain* or tenure by *knights service*, *escuage*, and also *relief*, and *aid pur file marrier*, and *pur fair fitz chivalier*, and all other *charges* incident thereunto, shall be, and hereby are likewise declared to be taken away and discharged, from the said thirtieth day of August, in the year of our Lord one thousand six hundred and sixty-four; and that all tenures by *knights service*, and by *knights service in capite*, and by *soccage in capite*, and the fruits and consequents thereof happened, and which shall or may hereafter happen or arise thereupon or thereby, shall be and hereby are declared to be taken away and discharged, and forever abolished; any law, statute, custom or usage to the contrary thereof in any wise notwithstanding.

"'III. *And be it further enacted by the authority aforesaid*, That all tenures of any honors, manors, lands, tenements or hereditaments, or 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, at any time before the fourth day of July, in the year of our Lord one thousand seven hundred and seventy-six, are hereby declared to be turned into *free* and *common soccage*, to all intents and purposes, and shall be construed, adjudged and deemed to be *free* and *common soccage* from the time of the creation thereof, and forever thereafter, and that the same honors, manors, lands, tenements and hereditaments, shall forever hereafter stand and be discharged of all tenure by *homage*, *escuage*, *voyages royal* and *charges* for the same, *wardships* incident to tenure by *knights service*, and *values* and *forfeitures of marriage*, and all other *charges* incident to tenure by *knights service*, and of and from *relief*, *aid pur file marrier*, and *aid pur fair fitz chivalier;* any law, statute, usage or custom to the contrary in any wise notwithstanding.

"'IV. *And be it further enacted by the authority aforesaid*, That all conveyances and devices of any manors, lands, tenements or hereditaments, at any time heretofore made, shall be expounded to be of such effect, as if the same manors, lands, tenements and hereditaments had been then held, and continued to be holden in *free* and *common* soccage only; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding.

"'V. *Provided always*, *and be it further enacted by the authority aforesaid*, That this act, or any thing herein contained, shall not take away, nor be construed to take away or discharge, any rents certain, or other services incident or belonging to tenure in common soccage, due or to grow due to the people of this state, or any mean lord, or other private person, or the fealty or distresses incident thereunto.

"'VI. *And be it further enacted by the authority aforesaid*, That the tenure upon all gifts, grants and conveyances heretofore made, or hereafter to be made, of any manors, lands, tenements or hereditaments, of any estate of inheritance, by any letters patent under the great seal of this state, or in any other manner, by the people of this state, or by the commissioners of forfeitures, shall be and remain *allodial*, and not *feudal*, and shall forever hereafter be taken and adjudged to be and continue in free and pure *allodium* only; and shall be forever discharged of all *wardship*, *value* and *forfeiture of marriage*, *livery*, *primer seisin*, *ousterlemain*, *relief*, *aid pur file marrier*, *aid pur fair fitz chivalier*, *rents*, *renders*, *fealty* and all other *services* whatsoever; any law, statute, reservation, custom or usage to the contrary hereof in any wise notwithstanding.'

"These sections except the last, which was a new provision, were taken from the English act, '*for taking away the courts of wards and liveries, and tenures in capite, and by knights service*,' &c. (12 Charles II. chap. 24.)

"The day named in our act, (August 30, 1664,) is not the date of the original act, which was passed at a parliament that began on the 25th of April, 1660, and which declared that the military tenures should be deemed to be

abolished from the 24th of February, 1645. The day named in our act was the same on which the fort and town of New Amsterdam were surrendered by the Dutch governor Stuyvesant, to Col. Nicolls and the English forces, pursuant to the capitulation of the 27th of August, 1664.

"The legislature of 1787, were engaged in the delicate and difficult task of selecting such English statutes as were proper to be re-enacted in this state, preparatory to the general repeal of the remainder. It is probable that the provisions above quoted, so far as they relate to the ancient military tenures, were re-enacted merely from abundant caution; for it is difficult to perceive any necessity for the formal abolition of tenures and incidents of tenures, which never existed in this colony.

"A stranger to our history would be inclined to suppose, from a perusal of the act of 1787, that the military tenures existed in this colony, prior to the 30th of August, 1664. But it is quite certain that such was not the fact. Whilst the colony was under the Dutch governments, these tenures, and indeed all feudal tenures, were unknown. In the charter granted by the states general, in 1621, to the West India company, the latter, were empowered 'to enter into contracts and alliances with the princes and natives of the land,' and were required 'to advance the settlement and encourage the population of the territories they should acquire.' (1 Hazard's Collections, 121.)

"In 1629, the company established a series of privileges and exemptions, in favor of persons who should become settlers in the colony. They provided that any person who should plant a colony of fifty souls, should be deemed a *patroon;* should be entitled to select lands to a limited extent; and should have an absolute property therein, 'to be holden of the company, as an eternal inheritance, without its ever devolving again to the company.' They also granted to the *patroons* the liberty of disposing of their inheritances by testament.

"Under these general provisions the Dutch inhabitants appear to have held their lands entirely free from any feudal incident.

"By the second article of the capitulation of 1664, it was stipulated, that the people should still continue free denizens, and should enjoy 'their lands, houses and goods, wheresoever they are within the country, and dispose of them as they please.' Section 11 is as follows: 'The Dutch here shall enjoy their own customs concerning their inheritances.' The treaty of *Breda*, by which the British title to the colony was confirmed, contains no special provision bearing upon this subject.

"The first grant from Charles II. to the Duke of York, bears date the 12th of March, 1664. After describing the premises intended to be granted, the letters patent run as follows: 'Together with all the lands, islands, soil, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishing, hawking, hunting and fowling; and all other royalties, profits, commodities and hereditaments, to the said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances, and all our estate, right, title, interest, benefit and advantage, claim and demand, of, in, or to, the said lands or premises, or any part or parcel thereof: To have and to hold all and singular the said lands and premises, with their and every of their appurtenances hereby given and granted, or

herein before mentioned, to be given and granted, unto our said dearest brother James, Duke of York, his heirs and assigns forever, to be holden of us, our heirs and successors, as of our manor of East-Greenwich, in our county of Kent, *in free and common soccage, and not in capite by knight service*, yielding and rendering, and the said James, Duke of York, for himself and his heirs and assigns, doth warrant and promise to yield and render unto us, our heirs and successors, of and for the same, yearly and every year, forty beaver skins, when they shall be demanded, or within ninety days after such demand made.'

"The confirmatory letters patent granted to the Duke of York in 1674, have the same clause in the same words.

"Pursuant to these grants, the tenure of lands in the colony of New York, was always considered as of common soccage, and no trace can be found of any military tenure. In the act 'declaring what are the rights and privileges of their Majesties' subjects, residing within their province of New York,' passed in 1691, (which may be found in Bradford's edition of the colonial laws, p. 1,) it is expressly declared, that 'all the lands within the province shall be esteemed lands of freehold and inheritance, in free and common soccage, according to the tenor of East Greenwich, in their Majesties' realm of England.'

"This act was repealed by the crown in 1697, in consequence of objections of a political nature, to some of the matters contained in it; but the accuracy of the provision above cited, does not appear to have been controverted. This shows what was then understood to be the law of the colony on this point. The grants made by the colonial government, and the acts of the assembly passed anterior to the revolution, proceed on the same principle. It is also explicitly stated by the historian, Smith, that all lands are held of the crown by *soccage tenure*, as those of East Greenwich, at home, in the county of Kent.' (Smith's History, Albany ed. of 1814, p. 372.)

"The foregoing observations and references render it quite certain, that the military tenures and their incidents, were never in existence in this colony; and that their abolition in 1787, was quite unnecessary.

"In regard to the more burthensome incidents of soccage tenure, which are formally abolished by the act of 1787, the case stands on somewhat different ground. Prior to the act of Charles II. soccage tenures were subject to the following incidents: 1. Homage and fealty. 2. Rent and services certain. 3. *Aid for knighting the son, and marrying the eldest daughter.* 4. Relief. 5. *Primer seisin.* Wardship till 14, to the nearest relative to whom the inheritance of the infant cannot descend. 7. Marriages. 8. *Fines for alienation;* and, 9. Escheat.

"By the act of 16 Charles II. soccage tenures were freed from *aids, primer seisins, marriages, and fines for alienation. Reliefs* were retained by the English acts; but are enumerated in our act of 1787, (see § 2 and 3,) and are thus declared, with the other enumerated incidents, to have been taken away and discharged, from the 30th of August, 1660. If this part of the act is correct in point of fact, it would seem that the soccage tenure, as known in this colony, was not only modified agreeably to the act of 12 Charles II. but that it was even more liberal, in its exemptions from *reliefs*. With the single exception of *reliefs*, there can be no doubt, that under the grant to

the Duke of York, the soccage tenure in this colony must have stood on the same ground as in England after the act of 12 Charles II.; for the first grant to the Duke was four years after the passage of that act, and the soccage tenure of the 'manor of East-Greenwich' had already received all the modifications of that act.

"It is therefore proposed to omit the sections above quoted from the act of 1787, both as unnecessary in their original form, and as calculated to produce erroneous impressions, in regard to important historical facts. It is however deemed useful to declare the tenure by which lands shall hereafter be held in this state, both for the purposes of general information, and to remove a singular diversity which now exists in that part of our law. By the 6th section of the act of 1787, the tenure of all lands granted by the people of this state, is to be *allodial*, and not *feudal*. By previous sections, the feudal tenure of common soccage had been declared to be the tenure of all other lands. It is well known that the greater part of our lands is now held *allodially*, under titles derived from the people. The nature of these different modes of title, is widely different; and if the distinction should be retained, it may give rise to inconvenient and perplexing consequences.

"In the case of Cornell *vs.* Lamb, 2 Cowen, 652, it was decided that the common law right of distress incident to lands held in common soccage, was saved by the fifth section of the act of 1787; and that in all cases where the landlord is entitled to the reversion, and to a rent, he is authorized to distrain for such rent, without any authority for that purpose in the lease or contract. Justice Woodworth suggests, that independently of the 5th section, the right to distrain would remain upon every demise for a rent certain, where the reversionary interest was in the landlord; and that this right would not be impaired by the abolition of fealty, and all other services upon lands granted by the state. Chief Justice Savage excepts from this remark, lands held *allodially* by grant from the state; and it is apprehended with great reason. It is also extremely doubtful whether those lands are subject to guardianship in soccage, or to escheat. Indeed there would be no ground for supposing them liable to either of these incidents of tenure, were it not for the general terms used in some other statutes.

"Deeming it important that all lands in this state should be held upon an uniform tenure; and still more so, that all lands should be subject to the rent and services which have heretofore obtained among our citizens, and the rights annexed thereto by the common law; the Revisers, in § 3, have made all lands allodial, and in § 4, have expressly subjected them to those incidents of the soccage tenure."

"ARTICLE II.— *Of the persons capable of holding and conveying lands.*"[1]

§ 9, *adopted with some modification. Original note.* "The 8th section of the act to naturalize and to prevent the avoidance of titles in certain cases, 3d vol. of Greenleaf's ed. of laws, p. 280, confirms all subsisting titles derived from aliens, and vested in any persons who were at that time inhabitants of the state, and subsequent laws containing similar provisions have from

[1] Revisers' notes to that part of I of The Real Prop. Law, pp. 55 to the R. S. now embraced in article 79, *supra*.

time to time been passed. No objection is perceived to a general and prospective provision of the same character."[1]

[§ 10 R. S.] *Original note.* "Conformable to the first part of § 1 of the act concerning tenures, (1 R. L. 70.) The residue of the original section, saving the rights of chief lords, has been omitted as unnecessary. It was taken from the first and second chapters of the statute *quia emptores*, 18 Edward I. To elude the restraints imposed by the feudal law upon the alienation of the fief, the practice of *sub-infeudation* was often resorted to, which, by dividing the fief into many parts, served to render the inferior tenant independent of the chief lord, and indirectly to effect a transfer of the fief itself. This practice was restrained by Magna Charta, ch. 32, which provides 'that no freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands, the lord of the fee may have the service due to him which belongeth to the fee.' But as that provision was not sufficiently general, the statute of *quia emptores* extended it still farther. There seems to have been no necessity for the re-enactment of this statute in this state; the state of things which gave rise to it having never existed in the colony of New-York, and the rights of lessors and their grantees against lessees and the assignees of lessees being perfectly secured by the act '*to enable grantees of reversions to take advantage of the conditions to be performed by lessees.*' 1 R. L. 363."[2]

[§ 11, 12, R. S.] *Original note.* "See Goodell *vs.* Jackson, 20 Johns. 693."[3]

[§ 19 R. S.] *Original note.* "The 2d section of act of 1802, allows mortgages to be taken; but it is defective in omitting the right of a mortgagee to purchase, which is supplied by the latter part of the above section."[4]

"TITLE II.— *Of the nature and qualities of estates in real property, and the alienation thereof.*"[5]

"ARTICLE I.— *Of the creation and division of estates.*"

[6][§ 2, 3, 4. Same as enacted.] *Original note to* § 4. "At common law, where an estate is conveyed or devised to A, and if he die without issue or without heirs of his body, or without heirs where the limitation over is to an heir, then to B in fee, A takes an estate tail, on which the limitation to B is valid as a remainder; and if the entail be not barred, the fee will vest in B, or his heirs, in case of the failure of the issue of A, at any distance of time. By the operation of our statute respecting entails, the estate of A is converted into a fee simple absolute, and thus the remainder to B and his heirs is entirely defeated. Such is obviously the necessary effect of giving to the first taker a fee simple absolute, and would also be the result of the well known rule, that a fee cannot be limited upon a fee, even by way of

[1] Note to 1 R. S. 719, § 9, *supra*, p. 74.

[2] Note to 1 R. S. 719, § 10, *supra*, p. 60.

[3] Now § 15, art. I, Const., *supra*, p. 45.

[4] Note to 1 R. S. 721, § 19; *supra*, p. 65.

[5] Notes to that part of the R. S. now embraced in article II of The Real Prop. Law, pp. 80 to 229, *supra*.

[6] Note to 1 R. S. 722, §§ 2, 3 and 4, now §§ 21, 22, The Real Prop. Law, pp. 93, 115, *supra*.

use or executory devise, unless upon a contingency that must happen within a life or lives in being, and twenty-one years thereafter. It is conceived, however, that the object of the legislature in abolishing entails, may be effected, without sacrificing (as certainly they are now sacrificed) the rights of the persons entitled in remainder. The object of the legislature was to destroy perpetuities, in other words, to prevent the fee from being rendered inalienable beyond a certain period; and this object is completely attained, if, without defeating the remainder, we confine it to vest within the period allowed by law in other cases; in doing this, we violate no rule of public policy, and we comply, we may be assured, with the intention of the person creating the estate.

"In most cases, it is expressed, that the limitation over shall take effect on the event of the first taker's 'dying without issue, or without leaving issue;' and in these cases, it is believed that the meaning which the law affixes to the terms, viz. a failure of issue, at any period however remote, even after the death of the first taker, is very opposite to that of the party by whom they are employed.

"It has often been remarked by judges in England and in this country, that it is not probable that testators are aware of the technical construction given by the courts to the words 'dying without issue;' and that they undoubtedly intend by them, a dying without issue, *living at the death* of the person named, which is supposed to be the obvious and natural meaning of the expressions.

"It is true that Chancellor Kent, in Anderson *v.* Jackson (16 Johns. 400), suggests, that 'this notion has been borrowed by one judge from another, without much reflection, or examination as to its truth;' and he gives it as his opinion, that the legal interpretation of the phrase accords with the popular understanding of its signification. The Revisers, however, are strongly inclined to the general opinion above stated.

"To them, it seems hardly credible that a person not conversant with the technical rules of law, would ever dream of the construction which those rules have affixed to the phrase. If this is so, then it follows, that the law of this state, as it now stands, gives to the first devisee, in cases of this sort, an absolute estate, contrary to the intention of the grantor or testator.

"It may be asked, even where the limitation over is plainly expectant on an estate tail, as where an estate is given to A and the issue of his body, and on the determination of such estate, then to B and his heirs, why should it be thought necessary to defeat entirely the remainder over? What reason can be given why the intentions of the party creating the estate should not be carried into effect, so far as they may be executed, without violating the rules of law? Those intentions evidently were,

"1. That the first taker should not have the power to dispose of the estate, so as to destroy the remainder; and,

"2. That in the event of his dying without descendants then living, competent to take, the remainder should vest; for this is plainly comprehended in the general intention, that the remainder should vest, upon the failure of issue, at any period, however remote. Now these intentions are clearly legal, and by giving them effect, we certainly execute, *pro tanto*, the wishes

of the party creating the estate, and secure it to those who were the direct objects of his bounty. We do that, which we are certain the party himself would have declared, in terms, should be done, had he been acquainted with the rules of law forbidding a larger exercise of his discretion.

"The tendency of the sections that we have proposed, to prevent litigation, may be fairly stated as an additional argument in favor of their adoption. Nearly every case that has arisen in our own courts, in relation to executory devises, and other contingent limitations, has turned on the question, whether the first taker took an estate tail, or in other words, whether the remainder were dependent on an indefinite failure of issue. (1 John. R. 440; 10 do. 12; ib. 19; 11 do. 337; 16 do. 382; 18 do. 368; 20 do. 483.)

"In all these cases, the struggle of the judges to support the limitation over, by confining the failure of issue to the death of the first taker, is very manifest.

"It may be that this object is sometimes accomplished with some disregard of former authorities, and of maxims supposed to be established; but this is only a proof how strongly it was felt, that those maxims and authorities were repugnant to common sense, and foreign to the state of society and habits of thought that now prevail. If this be so, would it not be better that the obnoxious rules should be swept away at once, by direct legislative enactment, than permit them to be slowly undermined and subverted by the subtleties of judicial interpretations, at the expense, perhaps to the ruin, of a succession of suitors, and at the hazard of plunging the whole law on the subject into *endless uncertainty?*[1]

[§ 6. Same as enacted, except that the concluding words were altered by the legislature, from "*chattel interest*," to "*chattel real.*"] *Original note.* "In ch. 6 of the second part, as adopted by the legislature, estates during the life of a third person, are declared, in all cases, to be assets in the hands of the executors. Hence the necessity of the preceding section, (Part 2, ch. 6, title 3, art. 1, § 6.)"[2]

[§ 7. Same as enacted.] *Original note.* "See note at end of Article."[3]

[§ 8. Same as enacted.] *Original note.* "Cruise's Digest, ch. 1, title 16, § 1."[4]

[§ 9, 10. Same as enacted.] *Original note.* "See note at end of Article."[5]

[§ 11, 12. Same as enacted.] *Original note to* § 12. "2 Bl. Com. Christ. ed. p. 175."[6]

[§ 13, 14. Same as enacted.] *Original note to* § 14. "See note on this and following sections, to 22, inclusive."[7]

[1] Note to 1 R. S. 722, §§ 2, 3 and 4, now §§ 21, 22, The Real Prop. Law pp. 93, 115, *supra.*

[2] Note to 1 R. S. 722, § 6, now § 24, The Real Prop. Law, *supra*, p. 119.

[3] Note to 1 R. S. 722, § 7, now § 25, The Real Prop. Law, p. 120, *supra.*

[4] 1 R. S. 723, § 8, *supra*, p. 120.

[5] 1 R. S. 723, §§ 9, 10, *supra*, pp. 121, 123.

[6] 1 R. S. 723, § 12, *supra*, p. 129.

[7] 1 R. S. 723, § 14, *supra*, p. 151. The following note reported at the end of the original article of the Revised Statutes on Estates, is very explanatory of the entire reform of the law as now embodied in The Real Prop. Law, article II.

Original notes to the Article. "The provision in relation to expectant estates, contained in this Article, are the result of much and attentive consideration, aided by a diligent examination of elementary writers and adjudged cases. They are submitted by the Revisers in the confident belief that their adoption will extricate this branch of the law from the perplexity and obscurity in which it is now involved, and render a system simple, uniform and intelligible, which, in its present state, is various, complicated and abstruse.

"It will be seen by those, who are familiar with the difficult learning on this subject, that the change which the Revisers recommend, is effected, not so much by the introduction of new principles, as by the extension of rules, already admitted, but partial in their application, to all classes of expectant estates, created by the act of the party. The interests of society require that the power of the owner to fetter the alienation and suspend the ownership of an estate by future limitations, should be confined within certain limits; but where these limits are not exceeded, it would seem reasonable that the intentions of the party should always be carried into effect, whether declared by deed or devise, by a feoffment at common law, or a conveyance operating under the statute of uses.

"Such, however, is far from being the present state of the law. There are at present three classes of estates in expectancy, created by the act of the party, as distinguished from reversions, which arise by operation of law, namely, remainders, springing and secondary uses and executory devises, and each of these classes is governed by distinct and peculiar rules, both in regard to the creation of estates belonging to them and the means by which they may be defeated or destroyed. These rules are in a great measure arbitrary and technical, and in the language of Blackstone, 'It were endless to attempt to enter into the particular subtelties and refinements into which, in the course of centuries, they have been spun out and subdivided.' The consequence is, that it rarely happens that the validity of a future limitation can be determined by reference to the actual intent of the party, or by any consideration of the nature and policy of the limitation itself, but it depends almost exclusively on the formal character of the instrument in which the limitation is contained, or the technical force of the language in which it is expressed.

"So great indeed is the multitude of rules on this subject, and so nice and difficult of apprehension the distinctions on which they rest, that to draw a will or family settlement, containing future limitations, is justly esteemed in England, one of the most arduous and responsible duties, which the most learned in the profession can be called to perform. No man in that country can be a good conveyancer, who is not also a profound lawyer. Hence have arisen the evils of which the nation is now complaining, and which their wisest statesmen are seeking to redress; the complexity of their titles, the great hazard and expense of alienation, and the frequent and ruinous litigation in which estates are involved.

"It is true, that in this state, these evils are not yet extensively felt, but we may be sure they will not fail to display themselves, as property advances in value, capital is accumulated, and the rich become anxious to secure their possessions to a distant posterity. The remedy seems to the Revisers obvi-

vious and effectual. It is to abolish all technical rules and distinctions, having no relation to the essential nature of property and the means of its beneficial enjoyment, but which derived from the feudal system, rest solely upon feudal reasons; to define with precision the limits within which the power of alienation may be suspended by the creation of contingent estates, and to reduce all expectant estates substantially to the same class, and apply to them the same rules whether created by deed or devise. These are the general views by which the Revisers have been governed, and the object and effect of particular provisions, as calculated to attain these views, will be best explained in notes to the respective sections.

[1] "§ 10. In conformity to the plan of the Revisers, and with a view to subsequent provisions, the definition in this section is so framed, as to comprehend every species of expectant estates created by the act of the party. Remainders, strictly so called, future uses, and executory devises. The words 'by lapse of time or otherwise,' are necessary to provide for contingent limitations, operating to defeat or abridge the prior estate, and the other variations from the ordinary definition of a remainder, are introduced to embrace estates *in futuro*, as they are technically termed.

"At common law, owing to the necessity of an immediate livery of seisin, a freehold estate could not be created to commence in possession at a future day, unless as a remainder. (2 Black. Com. 166.)

"In modern times, however, this rule is in effect abolished, since an estate *in futuro* may be created by devise or by any conveyance operating under the statute of uses. The reasons upon which the original rule was founded, being no longer applicable, it is proposed to abolish it altogether. As future estates cannot, under the following sections of this Article, create a suspension of ownership, for a longer period than remainders, no rules of public policy are violated by their permission. In truth, they are in effect, though not by verbal definition, remainders, commencing in possession on the determination of the *intermediate* estate not granted or devised. A provision similar to the above, will be found in the statutes of Virginia, vol. 1, p. 369, § 28."

[2] "[§ 14, 15, 16, 17, 18, 19, 20, 21, 22, § 14 to 21 R. S.] Notwithstanding the abolition of estates, tail, our law allows certain executory dispositions of land and the profits of land, by which the former may be rendered inalienable, and the latter may be made to accumulate, for a life or lives in being, and twenty-one years thereafter. This limit is derived from the English law, and was originally adopted by the English judges from analogy to settlements by entail. A settlement on a parent for life, with remainder to his eldest son in tail, and any number of remainders over for life and in tail, could be barred by the son's suffering a recovery as soon as he came of age. Not to give a greater perpetuity to a disposition by executory devise, than the possible (and from the exigencies of society, even in that country, the general) limits of an entail, the courts held that no executory devise could be good, unless it must necessarily take effect within a life or lives in being, or twenty-one years thereafter.

[1] 1 R. S. 723, § 10, *supra*, p. 123.
[2] 1 R. S. 723, §§ 14 to 17, and 1 R. S. 724, §§ 18 to 21, *supra*, pp. 151, 177, 180, 183, 185, 188.

"When our legislature abolished entails, they left the common law in regard to executory limitations, unaltered; so that all we have gained by abolishing entails, is, that we have avoided the necessity of levying a fine or suffering a recovery to bar the estate tail. Indeed land may be rendered inalienable for a longer period by springing use, or executory devise, than by an entail. In the settlement of an estate tail, like that above mentioned, the life estate depends upon a single life, but in these executory dispositions, as the lives are not necessarily required to take any interest in the estate, or to be in any way connected with it, any number may be introduced, at the pleasure of the party, and for the mere purpose of protracting the period of alienation. In England this has often been done. In one case, twenty-eight persons (all of whom except seven, were strangers, taking no interest in the land), were inserted for the purpose of securing the longest possible term. It is obvious that the chance of finding, out of so great a number a very long life, is much greater than in the case of the entail. Again: The term of twenty-one years in the case of the settlement by entail, only occurs during the actual infancy of the party entitled in remainder. In the case of the executory devise, &c., it is added to the life or lives in being, as an absolute term, and there may be cases where, after the expiration of the twenty-one years, the real infancy of the party may be added to the former term, thus rendering the land inalienable, except in special cases for twenty-one years longer.

"In the case of the will of Peter Thelusson, the testator availed himself of the executory devise, to secure the accumulation of his personal estate, and the rents and profits of his realty, to such an extent, that the British parliament passed an act (40 Geo. III, c. 98), '*to restrain all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estates shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited.*'

"This act has not been re-enacted in this state; but in the preceding sections, the Revisers have proposed some new regulations on this subject, which will considerably abridge the present power of rendering real estate inalienable; and in a subsequent section, they have restrained the accumulation of profits within still narrower limits than are now allowed in England. The difference between the preceding sections and the existing law, consists in the following particulars:

"1. Alienation cannot be protracted by means of mere nominees unconnected with the estate, beyond the period of two lives.

"2. No more than two successive estates for life can be created.

"3. The period of twenty-one years, after a life or lives in being, is no longer allowed as an absolute term; but the rule is restored to its original object, by being confined to the case of *actual infancy*, which is directly provided for by rendering the disposition defeasible, and allowing another to be substituted during that period.

"It is presumed that no argument need be advanced in favor of restricting, at least to the extent here proposed, the power of creating perpetuities. It is perhaps a more doubtful question, whether the genius of our government, and the state of our society, do not require that the right of suspending alienation should be still further reduced.

"It is proper to observe that these sections agree in some respects with the propositions contained in the recent work of Mr. Humphreys on the law of real property in England.

"It may be useful to illustrate by examples, the effect of § 16, as its meaning may not be immediately obvious. Suppose an estate devised *to A for life and upon his death, to his issue then living; but in case such issue shall die under the age of twenty-one years*, or *in case such issue shall die under the age of twenty-one years and without lawful issue, then to B in fee.* Here, in both cases, the remainder to B would be valid as embraced by the terms of the section; but if the devise were *to A for life, and after his death to B for the term of twenty-one years; and upon the expiration of such term, to the eldest male descendant of A then living, and if there be no such male descendant then living, to C in fee.* Here the period of twenty-one years being an absolute term, wholly unconnected with the infancy of any person entitled, both the term and all the remainders dependent on it would be void; and on the determination of the life estate, the fee would descend to the heirs of the testator. To prevent a possible difficulty in the minds of those to whom the subject is not familiar, we may also add, that an estate is never inalienable, unless there is a contingent remainder, and the contingency has not yet occurred. Where the remainder is vested, as where the lands are given to A for life, remainder to B (a person then in being) in fee, there is no suspense of the power of alienation; for the remainderman and the owner of the prior estate, by uniting, may always convey the whole estate. This is the meaning of the rule of law prohibiting perpetuities, and is the effect of the definition in § 14."

[1] "[§ 23 R. S.] The reasons of the provisions in this section are fully explained in the note to § 3 and 4. With respect to estates tail by implication, the effect of the provision is already attained by those sections; but it is still necessary as a distinct enactment, in order to embrace limitations of chattel interests, and those cases in which the remainder is limited on the death of a person to whom no estate is given."

[2] "[§ 24 R. S.] This section is indispensably necessary to produce that uniformity in the law, which it is the object of the Revisers to attain. By the strict rules of the common law, and for reasons purely technical, no remainder can be limited on a life estate, in a term of years. Thus if a man possessed of a term, say of 100 years, grant it to A for life, and if he shall die during the term, then the residue of the term to B, A has an absolute interest, and the remainder to B is utterly void. The maxims of the common law also prohibit the creation of a contingent remainder of freehold, on a term of years, and the limitation of a fee upon a fee, on a contingency defeating the prior estate. Thus if an estate be granted to A and his heirs, but if he die without issue living at his death, then to B as a remainder, the limitation is void, as repugnant to the fee already given. No such repugnancy, however, is supposed to exist, if the same limitation is contained in a will, in precisely the same words; for although as a remainder, it is void, as an executory devise, it is unexceptionable and valid.

[1] Refers to 1 R. S. 724, § 23, *supra*, p. 191.

[2] Refers to 1 R. S. 724, § 24, *supra*, p. 192.

'None indeed of the restrictions which we have mentioned, except the second, which extends also to limitations of uses, are applicable to secondary uses and executory devises; so that in these cases, it is literally true that the validity, as we have before remarked, of a limitation, depends exclusively on the formal character of the instrument in which it is contained. 2 Blackstone's Com. (Christian's edition), p. 170, 173, 174. Fearne on Remainder, p. 423."

[1] "[§ 25 R. S.] This section embraces what are technically termed contingencies with a double aspect, but which more simply and with equal propriety may be termed alternate estates. As where an estate is given to A for life, and if he have any issue living at his death, then to such issue in fee; but if he die without such issue, then to B in fee. Here the remainders to the issue and to B are both contingent, but only one can take effect. It is obvious that these alternative dispositions, however numerous they may be, are free from objection, since as only one can vest, and by vesting, defeats all that are subsequent, the estate is not rendered inalienable for a longer period than if a single limitation only had been originally created. 1 L. Raymond, 203. 2 Black. Rep. 777."

[2] "[§ 26 R. S.] It is a maxim that a contingency upon which a remainder is limited, must be a common possibility, or in other words, a contingency that may reasonably be expected to happen; for if it involve a possibility upon a possibility, or in the language of Mr. Fearne, 'require the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it,' it is considered too remote and is utterly void. This purely metaphysical distinction, worthy only of the schoolmen with whom it originated, the Revisers propose to abolish. It has no conceivable use but to produce litigation on the utterly unimportant question, whether a particular contingency is to be considered near or remote, a single or double possibility, a question which a man of common sense would almost be ashamed to argue, yet on the determination of which the fortunes of his clients may depend. If a remainder does not restrain the alienation of the estate beyond the period allowed by law, but if it take effect at all, must happen within the limits prescribed, of what consequence is it, or can it be, whether the contingency on which it is limited be near or remote? probable or improbable? Fearne on Rem. 378. 2 Coke's Rep. 51, b. Cruise's Dig. tit. 16, ch. 2, § 4 to 8."

[3] "[§ 27 R. S.] A remainder, properly so called, cannot be limited on a contingency, which, should it happen, will defeat the prior estate, before the period of its natural termination; in fewer words, it cannot be limited on a condition subsequent. This rule, it seems, is a consequence of the common law *maxim*, that none but the grantor or his heirs can take advantage of the breach of a condition, so that it is only by their entry that the conditional estate can be defeated. That entry, if made, defeats

[1] Refers to 1 R. S. 724, § 25, *supra*, p. 195.

[2] Refers to 1 R. S. 724, § 26, *supra*, p. 196.

[3] Refers to 1 R. S. 725, § 27, *supra*, p. 198.

the livery made on the creation of the original estate, and therefore of course defeats all subsequent estates dependent on the same livery — the remainder and the precedent estate fall together. Thus if an estate be granted by deed to A, who is then a widow, for life, upon condition that if she afterwards marry it shall belong to B, the limitation to B is nugatory; for although A marries, her estate still continues, unless the heir of the grantor chose to avoid it by his re-entry, and then the remainder to B is also annulled. But if the estate was not expressed to be for life, if the grant had been to her during her widowhood, and in case of her marriage to B, this would have been a valid remainder, and the marriage of the widow would have entitled B to the immediate possession of the lands; for in such case it seems the estate to the widow is not an estate upon condition, but a limitation, or a condition not in deed, but in law. Thus it is that the rights of the remainderman are made to depend on a distinction as purely verbal as it is possible to conceive, for whichever form of expression is used, the estate of the widow is obviously meant to be precisely the same. It is meant in both cases, that she shall enjoy the lands so long as she remains a widow, and no longer, and that when she marries they shall belong to B.

"This rule, however, that a remainder limited on a condition subsequent, is void, is not applicable to devises; for in a devise, although strict words of condition are used, yet if there is a remainder over, they are always construed as creating not a condition, but a conditional limitation, so that when the condition is broken or performed, as the case may be, the remainder commences in possession, and the person entitled under it has an immediate right to the estate. The reason of this distinction we are told is, that a different construction would defeat the intent of the testator, and prevent the remainder from taking effect, since if it were a condition it would descend to the heir-at-law, whose entry would destroy the whole estate. This reasoning, it must be admitted, is sound and conclusive, and because it is so, we are desirous to apply it to deeds as well as wills.

"It deserves to be remarked, that one of the few inaccuracies to be found in Blackstone, occurs on the subject of this note. He states it as a general rule, that where a remainder is limited on a conditional estate, the condition, for the sake of preserving the remainder, is always construed as a limitation; but the only case he cites in support of this position, arose upon wills. In respect to conveyances at common law, the contrary doctrine is clearly established. Fearne on Rem., p. 3, 363, 391 to 3, 409, 10, and cases there cited. 2 Black. Com., 155, 6."

[1] "[§ 28 R. S.] This section is introduced to abolish a technical rule, commonly described by lawyers as the rule 'in Shelly's case.' The terms of this rule are, 'That when the ancestor by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited mediately or immediately to his heirs, or the heirs of his body, that the words heirs, &c. are always words of limitation of the estate, and not words of purchase.' (Shelly's case, 1 Rep. 9.) In plain terms, the ancestor takes the whole estate, and the heirs if they take at all, can take only by

[1] Refers to 1 R. S. 725, § 28, *supra*, p. 201.

descent, contrary, it is admitted to the natural meaning of the words and the clear intent of the grantor. That we may judge of the propriety of retaining this rule, it is proper to attend to the reasons given for its introduction. We are told that if the heirs were to take as purchasers, these consequences would follow:

'1. That the lord would be deprived of the wardship and marriage of the heir:

"2. That the remainder being contingent, the fee would be in abeyance during the life of the ancestor:

"3. That as a necessary consequence of the abeyance of the fee, its alienation during the continuance of the life estate would be suspended.

"The first of these reasons is plainly not applicable in this state, where the feudal incidents of wardship and marriage do not exist, and as we have already shown, never have existed; and of the second and third reasons, it may be remarked, that if valid, they prove that contingent remainders, secondary uses, and executory devises ought never to have been allowed, and should at once be abolished; for the necessary effect of every species of contingent limitation, whether to the 'heirs' of the first taker, or to strangers, is to place the fee in abeyance and suspend its alienation until the contingency happens.

"As affording a striking illustration of the mischiefs of the rule in Shelly's case, we refer to the celebrated case of Perrin v. Blake, which turned entirely on its meaning and application. The question, in every stage of the controversy, was admitted to be, whether the undisputed intentions of the testator, or this technical rule of construction, were to prevail. The suit (upon the issue of which depended the validity of a large jointure to a widow) commenced in the island of Jamaica, where the estate was situated, in the year 1746. It was thence transferred to the courts in England, and after passing through them all, reached the house of Lords, on a writ of error, and finally, in the year 1777, (the cause, we are told, being then ready for a hearing,) was ended by a compromise between the parties, leaving the law in the same uncertainty as if it had never arisen. On this state of facts, Mr. Hargrave remarks with much simplicity: 'It seems particular, that under any circumstances, a lady should not be able to know whether her jointure was good or not, for upwards of thirty years; and that at last the business should have no decision, but terminate in a compromise.' The legislature, it is presumed, will be anxious to make such provisions as to prevent the occurrence of such *particularities* hereafter.

"Whatever reasons may have existed for the original adoption of the rule in Shelly's[1] case, a few observations will show, that it ought now to be regarded as purely arbitrary and technical. Nor can any other motive for preserving it be stated, except that it may remain as one of the subjects on which the ingenuity of the bar is to be exercised at the expense of suitors. The rule does not apply unless the word 'heirs' is used, although the terms actually employed are identical in meaning. Thus if the grant be to the father for life, remainder to the issue of his body, the remainder is good, and the father has a life estate only; but substitute 'heirs' for issue, you

[1] The name of Shelley is misspelled Shelly, throughout the Revisers' notes.

give him a fee. Again; the estate of the ancestor must be a freehold, for if the limitation to the heirs be on a term of years, it is valid. Thus if the estate be given to the father for one hundred years, if he should so long live, and upon his death to his heirs, the heirs take as purchasers, and it is out of the power of the father to affect their rights. Yet it is obvious that the interest of the father is in fact an estate for life, and that the term of years is only introduced to evade the operation of the rule. In short the application of the rule, with the aid of a tolerably skillful conveyancer, may always be evaded; and its only practical operation is to defeat the intentions of those who are without sufficient advice and ignorant of the force of technical language.

"The principles by which the Revisers have been governed, in proposing the alterations contained in this chapter, and indeed throughout the revision, may be very briefly stated. If a rule of law is just and wise in itself, apply it universally, as far as the reasons upon which it is founded extend, and in no instance permit it to be evaded; if it is irrational and fanciful, or the reasons upon which it is rested have become obsolete, abolish it at once. By adhering to these principles, we are well persuaded that the noblest of moral sciences may be redeemed from the complexity and mystery in which it is now involved; an immense mass of useless litigation be swept away, and an intelligent people, instead of complaining of the laws by which their rights are determined, as capricious, unintelligible or unjust, be led to confess their wisdom, and to rejoice in their mild and beneficent sway. (Cruise's Dig. Tit. Rule in Shelly's case; Fearne on Rem. 110 to 270; Hargrave's Tracts, 489; 4 Bur. 2,579.)"

[1] "[§ 30 R. S.] The case of posthumous children is provided for in the statute of descents; but the statute of 10 and 11 William III, c. 16, (Evans' Collec. of Statutes, vol. 1, p. 230,) entitling posthumous children to take by remainder, by a singular omission, has not been re-enacted in this state. Before the passage of this statute, it had frequently been determined in the English courts, that a contingent remainder to a son, to take effect on the death of the father, became void by the death of the father, before the birth of the son entitled. And it is at least doubtful whether such is not at present the law in this state, where the limitation is by deed. (3 John. C. 18.)"

[2] "[§ 31 R. S.] This section may be thought superfluous as expressing only the necessary consequence of a fair interpretation of the provisions of this article, considered in connexion with the chapter of descent; but it is deemed expedient to guard against possible misconstructions, by declaring explicitly the effect of the birth of a posthumous child in the case supposed."

[1] "[§ 32 R. S.] The object of this section is to extend to every species of future limitation, the rule that is now well established, in relation to an executory devise, namely, that it cannot be barred or prevented from taking

[1] Refers to 1 R. S. 725, § 30, *supra*, p. 204.

[2] Refers to 1 R. S. 725, § 31, *supra*, p. 204.

[3] Refers to 1 R. S. 725, § 32, *supra*, p. 207.

effect by any mode whatever. If it is consistent with public policy that the owners of lands should be permitted to restrain their alienation, by the creation of future contingent estates, it seems reasonable that they should be protected in the exercise of the power thus given, and that the law should not suffer their intentions to be frustrated by any fraud or device whatever. Where a future limitation is called an executory devise, it receives full protection from the law, yet no reason is perceived why the intentions of a party creating a future estate, ought not to be held equally sacred, whatever may be the technical name of the estate so created. The truth is, that the whole doctrine of the law in respect to the means by which contingent remainders may be destroyed, is strictly feudal. As the ingenuity of lawyers has long since invented an effectual mode of evading it, it answers no other purpose, at the present day, but to render titles more complicated, and to increase the expense and difficulties of alienation. It is a maxim of the common law, that the contingent remainder must vest either during the continuance of the preceding estate, or upon the very instant of its determination. Consequently every determination of the preceding estate, before the happening of the contingency, destroys the remainder. Thus if a tenant for life, with a contingent remainder to his children, make a feoffment, levy a fine, suffer a recovery, surrender to the person ultimately entitled to the inheritance, procure a release, or unite the inheritance to his own estate, the remainder is destroyed, and the rights of the issue, the principal objects of the bounty of the person creating the estate, completely sacrificed. To prevent these inconveniences and guard against the frauds of the tenant for life, trustees to preserve contingent remainders have been introduced, in whom the estate vests, in case of the alienation or forfeiture of the first taker, and who retain it until the contingency happens, on which the rights of the persons in remainder depend. The necessity and success of the remedy are a confession of the mischiefs of the doctrine which it avoids, but unfortunately it is a source in itself, of new evils, by rendering the title more complex, enabling the trustees by fraud to divest the estate, and compelling a frequent resort to the court of chancery for direction and relief.

"The legitimate purpose of this invention, the protection of the interests of the persons entitled in remainder, will be effectually answered by placing all contingent estates on the same footing as executory devises, and the end is thus attained in the most simple and direct manner, without the necessity of present expense, or the hazard of future litigation.

"Another most important advantage to which we have not yet adverted, will result from reducing all expectant estates substantially to the same class. We shall prevent all future litigation on the purely technical question, to which class or denomination any particular limitation is to be referred. It is a well known rule, that no expectant estate, even if created by will, or a conveyance to uses, is to be construed as an executory devise or secondary use, if it be so limited, as to be capable of taking effect as a remainder, and some of the most difficult and abstruse cases to be found in the reports, have turned exclusively on the application of this rule. If the distinctions which create the necessity and difficulty of applying this rule, are of no practical value, if they have no existence in the intention of par-

ties, and are not required by any considerations of public good, it will scarcely, we imagine, be thought necessary to preserve them merely for the sake of the litigation to which they give rise."

[1] "[§ 33 R. S.] A few words will show the propriety of the exceptions contained in this section. The meaning of the rule, which we are desirous to extend to all contingent estates, that an executory devise cannot be barred, is, that it shall not be prevented from taking effect, according to the intentions of the party creating the estate. It is therefore not applicable, where the power of defeating that estate is expressly reserved, or given, or where it is a necessary consequence of the nature of the contingency, on which the limitation depends. As where a remainder is limited on an estate for life, in a term of years, with a power to the tenant for life, to sell or devise — by the execution of the power, the remainder is destroyed; yet it is well settled, that both the power and the limitation are valid: so where an estate is devised to A and his heirs; and if he or they refuse, within a certain time, to assume the name of the testator, then to B, in fee. Here A, by complying with the condition annexed to his estate, defeats the executory devise; but he does not bar it, in the sense of the rule; for he does not violate, but fulfils, the intent of the testator."

[2] "[§ 34 R. S.] We have before stated, that by the strict rules of the common law, a contingent remainder must vest, either during the continuance of the precedent estate, or on the instant of its determination; consequently, if the prior estate ceases before the contingency happens, the remainder is gone. Thus, if an estate be given to A for life, remainder to the heirs of B, if A die, during the life of B, as there is no person then competent to take, since there can be no heirs of one then living, the remainder is destroyed. To prevent this inconvenience is one of the purposes for which trustees, to preserve contingent remainders, have been introduced. Our objections to this device, we have already stated. We will now add, that we believe the position to be universally true, that where a rule of law is found by experience to be inconvenient or unjust, its direct abolition is preferable to its circuitous evasion, not only because a needless complexity is thus avoided, but because the means of evasion are always attended with expense, and productive of litigation. The rule that we are now considering is either sound in principle and salutary in operation, or it is not: if it is then it ought to be enforced, and an estate to trustees, in order to prevent it from attaching, should be annulled, as a *fraud upon the law*. If it is not, (and that it has no present foundation in reason or good sense is admitted by all,) surely we ought not to retain an inconvenient rule, merely because the ingenuity of lawyers has provided a mode by which its application may be eluded, and its mischiefs prevented."

[3] "[§§ 37, 38, 39 R. S.] The English statutes for restraining trusts, and directions for the accumulation of profits, to which we have before referred;

[1] Refers to 1 R. S. 725, § 33, *supra*, p. 207.

[2] Refers to 1 R. S. 725, § 34, *supra*, p. 209.

[3] Refers to 1 R. S. 726, §§ 37, 38, 39, *supra*, pp. 216, 221.

(§ 39 and 40 Geo. III. ch. 98; Evans' Collection, v. 1, p. 245,) prohibit accumulation for any longer time than,

"1. During the life of the grantor and twenty-one years thereafter, where the direction for the accumulation is by deed, and where it is by will, twenty-one years from the death of the testator; or

"2. During the minority of any person or persons, who shall be living or conceived at the death of the grantor or testator directing the accumulation; or,

"3. During the minority of any person or persons, who, under the deed or will directing the accumulation, would, if then of full age, be entitled to such rents and profits.

"It is to the period last indicated, that the Revisers proposed to confine the power of accumulation, conceiving that this restriction furnishes the most effectual means of guarding against the abuses, to which directions of this nature are admitted to be liable, and believing that it embraces the only case in which the purpose of the accumulation is such as ought to be sanctioned, namely: for the benefit of infants entitled to the next eventual estate. The British statute further declares, 'that the rent, &c., of property so directed to be accumulated, so long as the same shall be directed to be accumulated contrary to the provisions of the act, shall go to and be received by such person as would have been entitled thereto, if such accumulation had not been directed.' Thus, in plain terms, (as it seems to us,) avoiding the accumulation not entirely, but only during the excess of a term beyond the period before limited; and this we understand to be the construction which the statute has received.

"The propriety of permitting the rents and profits to be applied, under the direction of the chancellor, to the support and education of infants, who, if of full age, would be entitled to them, we presume will not be doubted. This provision will effectually prevent such an unnatural abuse of power, as was practised by Mr. Thelluson, in the will which occasioned the passage of the British act. This gentleman, that he might gratify his death-bed vanity with the conviction that an enormous estate would be secured to his distant posterity, left his immediate descendants in a state of comparative destitution, consoling them by the remark, 'that if prudent and industrious,' they might, as he had done, acquire estates for themselves. The British statute contains an exception of provisions made for the payment of debts, and the raising of portions. Should this exception be deemed expedient, the Revisers recommend the following section, which embraces it in a qualified form:

[1] "§ 41. The preceding section shall not be construed to extend to any trust or direction, in any grant or devise, for accumulating the rents and profits of lands for the payment of debts, or for raising a portion for any child or descendant of the grantor or testator; but no such trust or direction shall be valid, for any longer period than twenty-one years from the death of the grantor or testator."

"[§ 40 R. S.] This section is adopted substantially from the work of Mr. Humphreys, to which we have before referred. His reasons for it are

[1] Refers to a section in the Revisers' draft omitted by the Legislature.

Cf. Becker v. Becker, 13 App. Div. 342.

thus given: 'A distinction, refined, but substantial, subsists under our law, between estates vested, but defeasable — as a limitation to the first son of A, but if he shall die under the age of twenty-one, then to his second son — and a contingent estate as a limitation to such a son of A, as shall first or alone attain the age of twenty-one. In the latter case, nothing vests, and consequently the rents are undisposed of, and belong as such to the donor and his heirs, in the interium; yet there is no doubt but the donor, were this distinction explained to him, would in the latter case as well as in the former, give the accruing rents to the infant donee.' (Humphreys on Real Property, p. 260.) A still stronger reason for adopting the section, is furnished by § 35 of this Article, which prevents a future estate from being defeated by the determination of the precedent estate before the happening of the contingency, on which the remainder is limited. If that section be adopted and the present omitted, the rents and profits during the interval between the determination of the prior, and the vesting of the contingent estate, would go to the heirs, contrary to the very plain intention of the person creating the estate. As the law now is, the rents, &c. may be, and generally are, preserved to the remainderman, by the intervention of trustees. But to dispense with the necessity of creating such trustees, is one of the benefits we propose to attain."

'ARTICLE II.— *Of uses and trusts.*" [1]

[2] [1 R. S. 728, § 55, except in sub. 3, the words "*or either*," inserted by the legislature, in lieu of "*or support only*," in the report. The section as enacted, was afterwards amended by the act of the 20th of April, 1830 (reported by the Revisers), by striking out the words "*education and support, or either*," and substituting the word "*use*," in lieu thereof.] *Original note to the amendment proposed in* 1830. "The word '*use*' includes education and support, and each of them. It will also include other purposes, which ought to be provided for."

[3] *Original notes to this Article.* "The modified abolition of uses and trusts, which is proposed in this Article, is doubtless an extensive, and may perhaps be viewed by some, as an alarming innovation. The Revisers will therefore be pardoned for saying, that their opinions on this subject, the slow result of much examination and reflection, have settled in the conviction, that every plan to reform and simplify the law of real property, which shall not contain substantially the change now recommended, will be found imperfect, and in a great measure ineffectual.

"That some reform in this branch of the law is necessary, will be denied by few, who are sufficiently familiar with the system as it now exists, and have considered with any care, its actual and undeniable defects. In

[1] The following notes on Uses & Trusts refer to the sections of the Revised Statutes now recodified in article III of The Real Prop. Law, *supra*, pp. 229–309.

[2] Refers to 1 R. S. 728, § 55, *supra*, p. 249.

[3] Refer to article II, part II, R. S. on Uses & Trusts. This is a most valuable dissertation by the original draftsmen on the entire scheme of reform.

England, the necessity of such a reform was confessed, during the last session of its parliament, by the leading statesmen of every party; and in consequence of the success of Mr. Brougham's motion, founded on his celebrated speech, commissioners have been appointed, to whom, with other subjects, the trust of inquiring into the state of the laws of real property, and reporting suitable changes and improvements, has been specially committed.

"The subject is too large to admit of a full discussion within the limits of a note; but its importance demands that we should attempt some explanation of the reasons which have produced the conviction that we have avowed, and led to the amendments that we have proposed.

"It is justly remarked by Mr. Cruise, in the preface to his admirable digest, that 'the law of real property is the most extensive and abstruse branch of English jurisprudence.' That law has undergone many salutary changes in this state; yet the observation of Mr. Cruise is still true, even when applied to the system as adopted and modified by ourselves. Such indeed are its extent and intricacy, that even in the legal profession, it is very imperfectly understood by any, who have not made it an object of peculiar study and attention; and so remote are its principles and maxims from ordinary apprehension, that to the mass of the community, they seem to be shrouded in impenetrable mystery. It is surely needless to add, that in the same proportion as the law is complex and obscure, is litigation frequent, expensive and uncertain. Ignorance of the law is the parent of controversy; and that ignorance must always continue, whilst the avenues to knowledge are difficult to all, and to most inaccessible. Under such circumstances, it is plainly a duty to inquire into the source of these evils, the means of their removal, or the necessity of their continuance. If the defects of the system spring unavoidably from the nature of the subject which it is framed to regulate, we must submit to their continuance; but if they are accidental and factitious, we ought diligently to see, and firmly to apply, the necessary remedies.

"The first inquiry, therefore, is, considering the nature of the subject, is there any necessity that the laws of real property should be, in a peculiar degree, extensive and abstruse?

"If we direct our attention to the laws of other nations and countries, we shall find, perhaps to our surprise, that so far as they relate to real property, they are in a measure free from the objections to which our own system is liable. In the civil law, the regulations concerning the enjoyment, alienation and transmission of real estate, comparatively speaking, are neither numerous, nor difficult to be understood, and in the Code Napoleon, they form a very small and perfectly intelligible portion of that immortal work. It is not extravagant to say, that the French law of real estate, may be sufficiently understood by a few days of diligent study.

"If we look to the objects which laws in relation to real property are meant to attain, they do not seem to present any intrinsic difficulties, that should prevent us from framing a simple and intelligible system. The owner is to be protected in the enjoyment of his property; his power of disposition is to be defined; the transmission of his estate to his descendants or relatives, is to be regulated; its mode of alienation is to be prescribed; its liability to the claims of creditors must be secured, and to purchasers,

the means of investigating the ownership must be afforded. The proper rules on these various subjects would seem derivable, from a few principles of clear and general utility, level to the comprehension of all whose rights are to be affected by their application. We have no difficulty in believing, that every man of common sense may be enabled, as an owner of real property, to know the extent of his rights, and the mode of their exercise; and as a purchaser, to judge, with some assurance, of the safety of the title he is desirous to acquire.

"It appears a necessary conclusion, from these remarks, that if our law of real estate is voluminous and obscure, in a particular degree, it is to peculiar causes that these defects are owing, and this conclusion is amply justified, when we advert to the history of this law, and the character of its provisions.

"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 affinity 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 truth of these observations is illustrated in a striking manner, by the history and progress of the law of uses and trusts.

"The severe burthens and numerous restrictions which the feudal law imposed on real property, are generally known. It was a system that could flourish only in a barbarous age, and under a despotic government.

"It consulted solely the interests of the monarch, and a landed aristocracy; and to maintain their power, the real owners and cultivators of the soil were to be held in military bondage. If a nation was to advance at all in civilization and freedom, it was quite impossible such a system could be perpetuated, and it was to relieve those who were groaning under its oppression, yet had not the means or power of procuring its direct repeal, that uses were first invented.

"An use, (as uses existed previous to the statute of uses,) may be defined a confidence reposed in the owner of lands, that he would permit another person to enjoy the possession, receive the profits and direct the disposition.

"It was a device by which, whilst the formal title remained in one, the whole beneficial interest was vested in another.

"The success of this invention was, for a long time, doubtful. At an early day, the courts of common law held that uses were invalid, in other words, that the beneficial owner had no estate or right whatever, but that the absolute property discharged from any trust, was vested in the person having the legal title. The court of chancery, however, was more indulgent. The powers of that court were at that day administered by churchmen, and the interests of the church in evading the statutes of mortmain, required that uses should be favored.

"By the aid of chancery, therefore, the legal owner was compelled to permit the person entitled to the use, to enjoy the possession and profits, and was obliged to execute such conveyances as he might direct. The distinction between legal and equitable estates was thus introduced, and uses, notwithstanding the constant opposition of the courts of law, became firmly established.

"The advantages of uses, as thus established, in mitigating the evils of the feudal system, were very great. The equitable estate was not liable to forfeiture for treason or felony, nor subject to the feudal burthens of wardship, marriage, &c. &c. The power of disposition in the equitable owner was greatly enlarged, and the feudal restraints on alienation, to a considerable extent, eluded. The equitable owner, although the statute of wills was not yet in force, was even enabled to pass his property by devise, since his trustee was always compelled to execute such conveyances as he directed, whether to take effect during his life, or after his death.

'On the other hand, uses were attended with many inconveniences, and led to great abuses. They tended to defraud creditors who had no remedy against the equitable estate, and purchasers, whose conveyances or leases from the equitable owner, the trustee could always avoid. They enabled the trustee, by conveying, or submitting to a disseisin, and by other means, to defeat the rights of the beneficial owner; and a frequent resort to equity became necessary, to compel him to perform the trust. And, in our judgment, above all, by separating the legal and equitable estate, and introducing two classes of rights over the same lands, governed by different rules, and subject to different jurisdictions they rendered titles perplexed and obscure, and multiplied litigation.

"To remedy these and other alleged inconveniences, various statutes of partial operation were passed, previous to the statute 27 H. VIII, ch. 10, from which our statute of uses was borrowed.

"The last statute did not contemplate a partial reform, but was meant to reach the evils in its whole extent, by abolishing the distinction between the title and the use, and converting, in all cases, the interest of the beneficial owner into a legal estate.

"This, which it is admitted by all was the principal intent of the legislature, was, however, entirely defeated by the narrow construction of the statute, which the courts of law unfortunately adopted. The statute declared, in substance, that whenever one person is seised to the use of another, the person so entitled to the use, should also be entitled to the possession and legal estate; and the judges, adhering to the letter, and overlooking the spirit of the law, decided, that where successive uses are contained in a conveyance, it is the first use only, which, in technical lan-

guage, is executed by the statute. Thus, a grant to A, to the use of B, to the use of C, was held to vest the legal estate by force of the statute in B, whilst C retained the beneficial ownership, in the same manner as if the statute had never been passed.

"In such cases, therefore, the whole effect of the law was to change, not the estate, but the trustee.

"The consequences of this rigid construction are generally known and still exist. Uses, under the name of trusts, were immediately revived and extended, and that separation of legal and equitable estates, which it was the main object of the legislature to prevent, was perpetuated.

"It must not, however, be supposed that the statute of uses was entirely inoperative. It was, in fact, attended with important and durable consequences on the law of real estate. The statute did not abolish existing uses, nor prohibit conveyances to uses in future. It only declared that both existing and future uses, as they arose should become legal estates; and the effects of thus permitting the creation of uses, were,

"1. As every deed capable of raising an 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 seisin, which, at common law, was indispensable.

"2. The new modifications of property, which the increasing wants of society demanded, but which the genius of the feudal law forbade, were preserved by retaining uses, to which they owed exclusively their origin.

"It must therefore be admitted, that the statute of uses, although not productive of all the benefits intended, has been, to a considerable extent, salutary in its operation; but to retain these advantages, it is not at all necessary that uses should themselves be retained.

"To uses, even as they now exist, there are strong, and as they seem to us, unanswerable objections:

"1. They render conveyances far more complex, verbose and expensive, than is at all requisite, and they perpetuate in deeds, the use of a technical language, which, although intelligible to lawyers, is to the rest of the community a mysterious jargon.

"2. Where a conveyance to uses contains limitations intended to take effect at a future day, they may be entirely defeated by what is technically called a disturbance of the seisin, in other words, by a forfeiture or change of the estate of the person seised to the use.

"3. It is frequently very difficult to determine, whether the uses in a conveyance are so created as to be executed by the statute, and whether a particular limitation is to take effect as an executed use, as an estate at common law, or as a trust. These difficulties are, and must continue, whilst uses are preserved, a constant source of litigation.

"It is to remove these serious inconveniences, (and others not of trifling import might be added,) that the Revisers propose the entire abolition of uses, whilst by the new provisions which they have suggested, all the benefits admitted to flow from the present system, are retained and increased. By making a grant without the actual delivery of possession or livery of seisin, effectual to pass every estate and interest in lands, (as is proposed in a subsequent article,) the utility of conveyances deriving their effect from

the statute of uses, is superseded, and a cheap, intelligible and universal form of transferring titles is substituted in their place. The new modifications of property which uses have sanctioned, are preserved by repealing the rules of the common law, by which they were prohibited, and permitting every estate to be created by grant, which can be created by devise. And this is the effect of the provisions in relation to expectant estates, contained in the first Article of this Title.

"It only remains to speak of trust, as they now exist by law, and the changes in relation to them, which the Revisers propose. There are three classes of trusts, each requiring to be noticed.

"1. Where the trustee has only a naked and formal title, and the whole beneficial interest or *right in equity to the possession and profits, is vested in those for whose benefit the trust is created.*

"2. Where the trustee is clothed with some actual power of disposition or management, which cannot be properly exercised, without giving him the legal estate and actual possession.

"3. Trusts arising or resulting by implication of law.

"As to the first class, or formal trusts, it is plainly needless to retain them. They separate the legal and equitable estate, for no purpose that the law ought to sanction. They answer no end whatever, but to facilitate fraud; to render titles more complicated, and to increase the business of the court of chancery. They are, in truth, *precisely what uses were before the statute of uses, and are liable to many of the same objections.* Formal trusts, we therefore propose to abolish, by converting those which now exist into legal estates, and prohibiting their creation in future. This is substantially to carry the statute of uses into effect, according to its original intention.

"The second class, or active trusts, as a late writer, (Mr. Humphreys,) has properly termed them, are recognized in every system of law, and their utility, under proper restrictions, is undeniable. They seem, indeed, indispensable to the proper enjoyment and management of property. The Revisers, therefore, propose to retain them, only limiting their continuance, (for reasons stated in a subsequent note,) and defining the purposes for which they may be created.

"As to implied trusts, they cannot be abolished, as their existence is necessary to the prevention of fraud. An important change is however proposed, in preventing a secret resulting trust from being created by the act of the party claiming its benefit. This change, (which is recommended also by other reasons,) is indispensable, if the other parts of the plan are adopted; since otherwise, the prohibition to create formal trusts in future, would be readily evaded, and they would continue, in substance, to exist, and in their worst form.

"The Revisers will not conceal that they attach much importance to the provisions of this Chapter, and feel a serious anxiety that they may be adopted by the legislature. That anxiety they would fain hope, does not arise from any selfish motives, but springs from the sincere belief, that these provisions, if adopted, will sweep away an immense mass of useless refinements and distinctions; will relieve the law of real property, to a great extent, from its abstruseness and uncertainty, and render it, as a system, intelligible and consistent: that the security of creditors and pur-

chasers will be increased; the investigation of titles much facilitated; the means of alienation rendered far more simple and less expensive; and finally, that numerous sources of vexatious litigations, will be perpetually closed."

[1] "[§ 46 R. S.] It seems proper to confirm all uses already executed as legal estates, in order to prevent the possible construction that they are included in the general abolition of uses."

[2] "[§ 47 R. S.] This section will convert *all formal trusts* into legal estates in the beneficial owner, and thus effectuate the original intent of the statute of uses. The term 'assignment,' is introduced that there may be no doubt of the intention of the legislature to include the transfer of chattel interest. It has been frequently decided, that the assignment of an existing term for years is not reached by the present statute of uses, nor has any writer attempted to explain the reason of this singular omission. Its effect is this. If a term of 500 years is granted to A, *to the use of B*, by force of the statute B takes a legal estate; but if B, the moment he has received the grant, assigns his whole interest to D, *to the use of C*, the use in C is not executed, so that the legal estate vests in D, and although C has the whole actual interest, it is in equity only that his rights are acknowledged. Thus by the creation of long terms, and their immediate assignment, the provisions of the present statute, to all practical purposes, may be completely evaded. We add an extract from Mr. Brougham's late speech on the state of the law, from a natural desire to confirm our own views by the authority of the most distinguished statesman and eminent lawyer that England now possesses.

" 'I would restore the statute of uses (says Mr. B.) to what it was clearly intended to be. Our ancestors made that law, by which, if land was given to A, for the use of B, the latter was deemed the legal owner; the use being executed in him just as if A did not exist. It was justly observed by lord Hardwicke, that all the pains taken by this famous law, ended in adding three words to a conveyance. This has been said by conveyancers to be a severe remark, but it is perfectly correct, for the courts of equity invented secondary uses of trusts, by holding with the courts of law, that the statute did not apply to lands given to A to the use of B, in trust for C; therefore the whole provision is evaded by making the gift to the use of B in trust for C, and those three words send the whole matter into chancery, contrary to the plain intent of the statute. Can there be any reason whatever for not making all such estates legal at once, and restoring them to the jurisdiction of the common law, by recognizing as the owner, the person to whom the estate in reality is given, and passing over him who is a mere nominal party?' (Brougham's speech on the present state of the law, Phil. ed. p. 66, 67.)"

[3] "[§ 49. The section to which the note refers, only partially adopted in § 49 R. S.] To effect the entire abolition of uses and formal trusts their future creation must be prevented, so that this section is indispensable, if

[1] Refers to 1 R. S. 727, § 46, *supra*, p. 230.

[2] Refers to 1 R. S. 727, § 47, *supra*, p. 236.

[3] Refers to a section partly adopted; 1 R. S. 728, § 49, *supra*, p. 241.

the views of the Revisers are embraced by the legislature. Why indeed should uses and trusts be continued for the mere purpose of converting them into legal estates as soon as they arise? unless it is thought desirable that conveyances should continue complex and obscure, and difficult questions of title be perpetuated. To prevent a possible inconvenience, the operation of the section is suspended for a year, so that during that period uses, &c., as they are created, will be changed into legal estates, as under the present statute of uses. An additional guard is provided in a subsequent article of alienation by deed, in which it is declared that every deed of bargain and sale, (the conveyance almost universally used,) shall be construed as a grant, and the bargainee be deemed an alienee within the meaning of this section; so that the estate will be preserved even in cases where the present form of conveyance shall continue to be used. As the law now is, the interest of the grantee in a deed of bargain and sale, is an *use*, and the effect of the deed in passing the legal estate, is founded on the statute of uses."

[1] "[§§ 51, 52, 53 R. S.] A principal reason for the adoption of § 52, has been stated in the preliminary note, that without it the prohibition of formal trusts might be rendered nugatory. There are other reasons that seem equally imperative. Why should a man purchasing lands for his *own benefit*, take the conveyance in the name of another? Can his motives be other than fraudulent? or if this secret mode of acquiring title be permitted, it is not to purposes of fraud, that will be abused? If a resulting trust of this description be an executed use; and that it is so, has been decided by our supreme court, then the person paying the consideration, even where the fact of such payment is not stated in the deed, acquires the legal estate, upon the strength of which alone he could recover the possession and avoid any conveyances of the nominal grantee. Under such circumstances, no purchaser would be safe, and the whole policy of the law requiring conveyances to be recorded, would be defeated. The utility of the provisions in § 53 and 54, seems too obvious to require any remarks.

[2] "[§ 55 R. S.] As the creation of trusts is always in a greater or less degree the source of inconvenience and expense, by embarrassing the title, and requiring the frequent aid of a court of equity, it is desirable that express trusts should be limited as far as possible, and the purposes for which they may be created, strictly defined The object of the Revisers in this section is to allow the creation of express trusts, in those cases and in those cases only where the purposes of the trust require that the legal estate should pass to the trustees. An assignment for the benefit of creditors, would in most cases be entirely defeated, if the title were to remain in the debtor, and where the trust is to receive the rents and profits of lands, and to apply them to the education of a minor, the separate use of a married woman, or the support of a lunatic or spendthrift, (the general objects of trust of this description,) the utility of vesting the title and possession in the trustees, is sufficiently apparent. After much reflection, the Revis-

[1] Refers to 1 R. S. 752, §§ 51, 52, 53, *supra*, p. 254.

[2] Refers to 1 R. S. 728, § 55, now § 76, The Real Prop. Law. *Vide supra*, p. 249.

ers have not been able to satisfy themselves that there are any cases not enumerated in this section, in which, in order to secure the execution of the trust, it is necessary that the title or possession should vest in the trustees. Where no such necessity exists, (as where the trust is to convey, or to make partitions, &c.,) it is obvious that without giving any estate to the trustees, the trust may as well be executed as a power. And that trusts of this kind may not be entirely defeated, it is provided in § 59, that they shall take effect in the manner suggested.

"Should it be thought desirable by the legislature, that preferences amongst creditors in future be abolished, the object, so far as relates to real property, may be attained by an amendment of this section.

"To the first subdivision of the section, add the words 'generally and without preference to any particular creditor or class of creditors;' the Revisers have thought it their duty to make this suggestion, but they wish not to be understood as expressing any opinion as to the propriety of its adoption."

[1] "[§ 58 R. S.] There is an evident distinction between a trust to sell, created by deed, and a similar trust created by devise. In the first case, as we have before remarked, it is necessary that the trustees should take the estate, or the trust itself might be defeated; but in the latter, no such necessity exists, and by construing the trust as a power, the interests of those for whose benefit it is created, are as effectually secured, as if the legal estate passed to the trustees. On the death of the testator the power attaches immediately on the land, and no subsequent disposition can be made, nor incumbrances created, by which its execution can be defeated.

"There are other reasons, however, which have weighed principally with the revisers in recommending this section; under the present rules of law, the construction of a will containing an authority to executors to sell, is a matter of great difficulty; and the question whether the trust is to be construed as a naked authority, or as a power coupled with an estate or interest in the lands, has been a frequent source of litigation. Thus according to Lord Coke, if a man devise that his executors 'shall sell his lands, they have a bare authority and no interest; but if he devise his lands to be sold by his executors, they take the legal estate.' It is true Mr. Hargrave in his note on the passage speaks of this distinction as curious and overstrained, yet there seems a decisive weight of authority in its favor. We would abolish this and similar distinctions, not merely as curious and overstrained, but as entirely useless, unless to propagate law suits.

"In a subsequent article 'of powers,' we have provided that no injury shall result to the persons interested in trusts of this description, from considering them merely as powers, by declaring that they shall survive, and in other respects be subject in their execution to the same rules as express trusts.

"As an additional authority in support of our views, we add the recommendation of Lord Coke himself, who says, 'it is better for a testator to give to his executors an authority, than an estate, unless his meaning be they should take the profits of his lands in the mean time.' Coke Litt., 113, a. & Har. & But. note; Sugden on Powers, 140; 6 John. Rep., 92.")

[1] Refers to 1 R. S. 729, § 58, *supra*, p. 269.

[1] [§ 64, 65 R. S.] The effect of § 64, will be in a great measure to abolish secret trusts, the common instrument of fraud, by making it the interest of the parties in all cases, that the trust should be incorporated in the conveyance; and by § 65, the rights of those entitled to the execution of the trust, are effectually protected. Where the trust is expressed in the deed to the trustees, it is just that purchasers should be presumed to have knowledge of the trust.

"To abolish secret trusts entirely, by requiring in all cases, the trust to be incorporated in the deed, does not seem advisable. It can only be effected by rendering void the conveyance or the trust. By the first mode, purchasers and creditors of the trustees would be defrauded; by the second, the trustees would acquire an absolute estate to the prejudices of innocent persons interested in the trust."

[2] "[§ 66 R. S.] The injustice of the existing rule which in most cases requires purchasers and other persons dealing with trustees to look to the application of the moneys paid, at the hazard of losing the estate, or being compelled to make a second payment, is very apparent, and has been frequently admitted, by judges who felt themselves constrained to obey the rule itself. That it ought to be abolished, we think will hardly be doubted. Mr. Humphreys' late work on real property, contains a similar proposition, and we have much pleasure in subjoining his remarks. 'This proposition is introduced to correct a vicious result from the rule that 'in equity the trust is the land;' arguing from this, it is held, that whoever purchases from or otherwise deals with the trustee, must (unless in a few impracticable cases, as where the trust is for payment of debts generally) see that the produce of the trust fund goes to the *cestui que trust*, or beneficial owner; thus treating as nothing, the confidence reposed in the trustee. The inconvenience of the rule and its constant frustration of the proposed object, has occasioned the introduction into the generality of trust assurances, of a special clause, that the receipts of the trustees shall be discharges to purchasers and others. But that must be a bad rule against which the very parties provide, who are meant to be protected by it; sometimes equity struggles against its own rule by new distinctions, which in their turn generate new litigation.' (Humphreys on Real Property, p. 305.)

"We add an example of the distinction to which Mr. Humphreys alludes:

"If lands be devised to executors, to be sold in trust for certain persons named, the purchaser is bound by the rule; but if the direction be, that the trustees pay or distribute the purchase moneys to the same persons, or invest the same for their benefit, the rule, it is held does not apply. In plain terms, its application depends on a verbal distinction. It is to the work of Mr. Humphreys, from which our quotation is taken, that Mr. Brougham alludes, in his celebrated speech. After speaking of the exertions of Sir Samuel Romilly and Sir James Mackintosh, for the reform of the criminal law, he adds: 'I am sure an almost equal debt of gratitude has been incurred, on the part of the law of real property, to the honest, patient and luminous discussion which it has received from one of the first

[1] Refers to 1 R. S. 730, §§ 64, 65, pp. 282, 283, *supra*.

[2] Refers to 1 R. S. 730, § 66, *supra*, p. 294.

conveyancers and lawyers this country could ever boast of. Those members of the house that are conversant with our profession, will easily understand that I can only allude to Mr. Humphreys' (Brougham's Speech, p. 4). Although differing from many of the views of Mr. Humphreys, and by no means inclined to adopt the language, in which he has expressed his proposed enactments, we cheerfully acknowledge, that in the preparation of this chapter, we have derived most important aid from his valuable work."

[1] "[§ 68 R. S.] As every trust is founded on a personal confidence reposed in the trustee, it ought naturally, and by the very intention of the party, to cease with the life of the trustee. No reason, it seems to us, can be assigned, why it should pass to his representatives, persons probably unknown to the party creating the trust, and in many cases, very unfit to execute his wishes. In addition to this, there are very serious inconveniences attending the transmission of trusts. It is frequently difficult to determine in whom the trust estate has vested, whether it has passed under a general or residuary devise, (for the estate of the trustee is devisable,) or has descended to heirs. In other cases, the person to whom the estate has passed, cannot be easily discovered, or is absent from the country, or labors under some legal incapacity; and then the alienation of the estate, or execution of the trust by other means, may be suspended for years, until the necessary inquiries are made; or at great expense, a suit in chancery has been instituted, and the proper decree obtained."

"The remaining sections do not seem to require any particular observations. They enlarge, in some respects, the powers of the chancellor; but the propriety of the enlargement it is thought will not be doubted."

"ARTICLE III.—*Of powers.*"[2]

Original notes to this Article. "If the first and second Articles of this Title are adopted, a new regulation of powers in relation to lands, becomes indispensable, since it is from the statute of uses that such powers, as they are now constituted, derive their efficacy. We regard it as one of the chief benefits to result from the abolition of uses, that it affords an opportunity of placing the doctrine of powers on rational grounds, by bringing them into harmony with the general system of our laws, and adapting them to the state of our society, and the policy of our institutions.

"The law of powers, as all who have attempted to master it, will readily admit, is probably the most intricate labyrinth in all our jurisprudence. Few, in the course of their studies, have been called to enter it, who have not found it difficult to grope their way in its numerous and winding passages. In plain language, it abounds pre-eminently in useless distinctions and refinements, difficult to be understood, and difficult to be applied, by which a subject, in its own nature free from embarrassment, is exceedingly

[1] Refers to 1 R. S. 730, § 68, *supra*, p. 299.

[2] The following notes refer to article III, part II, of the Revised Statutes, regulating "Powers." That article is now incorporated in article IV of The Real Prop. Law, pp. 310–402, *supra*, The dissertation of the Revisers on this subject is the basis of all future knowledge on Powers, and of the highest importance to the profession.

perplexed and darkened. We encounter this darkness at the very threshold of our inquiries, as the division or classification of powers, (which appears in the beginning of every elementary work on the subject,) seems industriously framed to confound all intelligence of their meaning and utility.

"Nor is it merely 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, as will appear in the course of our remarks, it affords the ready means of evading the most salutary provisions of our statutes. 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 present division of powers, is into powers: 1. Appendant or appurtenant. 2. Collateral or in gross. 3. Simply collateral.

"These cabalistic terms, we are aware, must sound like an unknown tongue, to unpractised ears; but our objection is not to the strange phraseology in which this division is expressed, but to the principle on which it is founded. To understand this, the terms must be explained. Powers appendant and in gross, agree in the circumstance that they are both vested in a person having an estate in the lands over which the power is to be exercised. The distinction between them is this: The power is said to be appendant, when it enables the party to create an estate which must attach, in whole or in part, on his own interest. As where a power is given to a tenant for life, to make leases in possession: every lease he executes must, to some extent, take effect out of his own estate. A power is in gross, when it does not attach on the interest of the party, but enables him to create an estate independent of his own, as a power to a tenant for life, to dispose of the reversion. A power is simply collateral, when it is vested in a stranger having no estate or interest in the land.

"It is a striking error in this classification, that it overlooks entirely the nature and objects of the power itself, and regards solely the connexion between the party exercising the power, and the lands which it embraces. Yet it is obvious that the character, and consequently the construction and execution of the power, may be the same, whether it is vested in an owner or a stranger, or is to take effect out of a present or a future estate. Were this merely a logical mistake, it would scarcely deserve attention; but in fact, it has had an important influence on the law of powers, in all its branches. It is from this arbitrary classification, that rules equally arbitrary have been derived; rules which are first established at common law, and then by an ordinary process, evaded in chancery, through the medium of refinements, reaching circuitously that equity, which ought never to have been disregarded.

"We propose, therefore, an entirely new division of powers, not merely as expressed in terms which at once suggest the reason of their adoption, but because it rests on substantial and practical distinctions. In order to classify powers, we look to their extent, and to the objects which they are meant to attain, since it is from the differences that subsist between them in these respects, that the different rules by which they are governed, are and must be derived. The most important circumstance evidently is,

whether the power is to be exercised by the party for his own benefit, or the benefit of others, whether it is an interest or a trust; and it is to this distinction that the regulations we propose have a principal regard.

"Some further observations, however, are necessary, to justify our censures of the doctrines that now prevail, in relation to powers, and to evince the necessity of an alteration. They shall be briefly stated.

"1. As to the creation of powers: There are at present no limits; but the owner may separate from the title the whole or any portion of his own authority, in the disposition of his lands, and retain it to himself or vest it in another. Thus a man may convey his estate in fee, and by means of a power of revocation, continue in himself the absolute dominion, leaving only a naked title to the alienee. By this device, the lands are placed effectually beyond the reach both of his own creditors, and of the creditors of the grantee. As to the creditors of the grantee, it is plain they may always be defeated by an exercise of the power of revocation. And to his own creditors, they are equally without redress; for as he has no estate or interest in the lands, but a bare authority to dispose of them as he pleases, there is nothing on which their claims can attach. To treat a mere power as actual property, would be a plain violation of legal principles, and accordingly it is not considered as such, either in law or equity. There is indeed a single case in which the creditors may be relieved. If a man, having a general power of disposition, execute it in favor of a purchaser, not for a valuable consideration, and then die, the purchaser is considered in equity a trustee for the creditors; but as against the debtor in his lifetime, or if he die leaving the power unexecuted, as against the owners of the land, the creditors are without remedy. 'These distinctions,' Mr. Sugden says, 'may seem *refined*, but they are well established.' We confess that 'refined' does not seem to us the appropriate word.

"In England, we have the authority of Mr. Humphreys for saying, that powers are often used to defeat the legal rights of creditors, and that by recent statutes, (3 Geo. IV, c. 123; 6 do. c. 16,) a partial remedy has been applied to the evil. By these statutes, it is provided that a general power, vested in a bankrupt or insolvent, shall pass to his assignees, and be exercised by them, for the benefit of the creditors. With us, if English authorities are to be followed, the law remains as we have stated.

"That a change of the existing law is here not merely proper, but necessary, will be admitted by all; and it is probably needless to offer any remarks in favor of the regulations that we propose. In reason and good sense, there is no distinction between the absolute power of disposition and the absolute ownership; and to make such a distinction, to the injury of creditors, may be very consistent with technical rules, but is a flagrant breach of the plainest maxims of equity and justice. There is a moral obligation on every man, to apply his property to the payment of his debts and the law becomes an engine of fraud, when it permits this obligation to be evaded by a verbal distinction. It is an affront to common sense to say, that a man has no property in that which he may sell when he chooses, and dispose of the proceeds at his pleasure. We apprehend the legislature will have no difficulty in declaring, that so far as creditors and purchasers are concerned, the power of disposition shall be deemed equivalent to the

actual ownership. It may perhaps be doubted, whether a general power to devise, annexed to a previous estate, should be considered an absolute power of disposition; but there are obvious means, by which, with the aid of this power, the tenant for life or years may acquire, even in his lifetime, the entire dominion of the property.

"Again; we have deemed it very important to limit the authority of the owners, in the creation of beneficial powers. It appears to us, that in this country, it can hardly happen that such a power of disposition will be separated from the legal estate, for any purpose that the law ought to favor. This separation is always a source of inconvenience, by perplexing titles and restraining alienation, and it should therefore only be permitted, when it is clear that the utility outweighs the inconvenience. As to trust powers, they cannot, from their nature, be limited; and subject as they are, to the perpetual control of the chancellor, there is little danger of their abuse; but in respect to beneficial powers, we have not been able to discover that any practical good can result from their permission, except in the cases that we have specified. In other cases, the benefit intended by the power, may be better attained by an enlargement of the estate, or by means of a trust.

"2. As to the extinguishment of powers:

"The rules with respect to the extinction of powers appendant, are, in a great measure, free from objection. Such a power is destroyed by the alienation of the estate, and can never be exercised to the prejudice of any grantee or lessee from the party. The power is however held to be extinguished, upon technical grounds, even by the execution of a mortgage. Lord Mansfield, indeed, held that the power of a tenant for life to make leases, was not destroyed by a mortgage, and that such a construction of an instrument, intended merely as a security of a debt, would be contrary to the intention of all the parties; (Doug. 392;) but this decision of an illustrious judge, who never permitted his reason to be fettered by technical rules, has been reversed, and Mr. Sugden says, 'it is now clear, that a conveyance of the estate, even by way of mortgage, is an extinguishment of the power.' (Sugden on Powers, p. 57.) It is to guard against this inconvenience, that we have declared the effect of a mortgage; and instead of extinguishing the power, have given to the mortgagee the benefit of its exercise, as a part of his security. With respect to powers in gross, the rules in regard to their extinguishment, though technically sound, are, in their practical operation, singularly capricious and unjust. The terms are strong, but they will be fully justified. A power in gross, it will be recollected, enables a party to convey an estate, distinct from his own; and we select the case of a tenant for life, having a general power to dispose of the reversion in fee, or a power to devise it to particular persons. If the tenant convey the whole estate, including the fee, by bargain and sale, or other conveyance under the statute of uses, the power is not affected, but remains to be executed at his pleasure thereafter; but if he convey by feoffment, with livery of seisin, the power is destroyed. The grounds of this distinction, we are informed, are, that a bargain and sale is what is technically termed an innocent conveyance, and passes only the actual interest of the party; whereas a feoffment '*ransacks the whole estate*, and passes or extin-

guishes all rights, conditions or powers belonging to the land, as well as the land itself.' (Sugden, p. 64.) To the technical accuracy of this reasoning, there is probably no objection. Let us now look to its practical effects. A tenant for life, with a general power of disposition, sells the whole estate for a full consideration, and conveys to the purchaser a deed of bargain and sale. A life estate only passes, and the tenant, by virtue of his power, conveys the next day the remainder in fee to a third person. This person acquires a valid title, and the first purchaser, by means of an *innocent* conveyance, is effectually defrauded. Or, suppose the power to be a power to devise, and to devise only to particular persons; which is a plain trust. The tenant for life, by means of a feoffment, now *ransacks* the whole estate and extinguishes the power; and then the rights of the persons entitled to the trust are completely sacrificed. It is true, there are some cases in which powers have been considered as trusts in chancery, and executed as such, in case of their non-execution by the party; but no relief has ever been given, where the power was technically extinguished.

"A power simply collateral cannot be varied or extinguished at all, by any act of the party; and if these powers were merely trusts, the rule would be just; but it is obvious that a power simply collateral, may be also beneficial; for a power may be given to a stranger having no estate, to convey or charge lands for his own benefit; and yet, if he release this power for a valuable consideration, to the owner of the land, it would seem that the release is void. But although a simply collateral power cannot be barred, yet if it be vested in several, it is destroyed by the death of any one of them previous to its execution; and although accompanied with a trust, its execution by the survivors would be void, in direct contradiction to the rule, which prevails where the trustees have an estate in the lands.

"The great error, indeed, which pervades the established doctrine in relation to the distinguishment of powers is, that it disregards entirely the distinctions between beneficial and trust powers, and permits the trust to be extinguished, by the same means by which the interest is conveyed. The new regulations that we propose, are founded on the obvious maxim, that equity will never suffer a trust to be defeated by the death or misconduct of a trustee; and the defects of which we complain are remedied, and the law rendered uniform, by applying to trust powers, the rules that have already been declared, in relation to trust estates.

"3. As to the execution of powers: The subject is so extensive, that we shall select only a few prominent topics. Where, by the terms of the power, no mode of execution is prescribed, it may be executed by a simple note in writing, without signature (if in the hand writing of the party), and without witnesses, or acknowledgment, or proof, or even, as it seems established, delivery. Even where it is declared that the power shall be executed by will, it is not necessary that the will should be executed and attested as a will of real property, or that any of the provisions of the statute, in relation to such wills should be complied with.

"On the other hand, if any formalities, however useless, are prescribed, or any conditions, however trifling, annexed to the execution of the power, they must be literally observed, or the execution at law is wholly void. Thus, where it is required that the power shall be executed by a deed, under

the hand and seal of the party, to be executed in the presence of, and to be attested by two or more witnesses, although it is stated in the body of the deed that it was, in fact, executed with all the required formalities, and although it be signed and sealed by the party, and attested by the signatures of two witnesses; yet the execution is void, if the attestation clause contain only the words 'sealed and delivered in the presence of,' omitting the word 'signed.' (Sugden on Powers, 236.) So where a power is given to revoke a settlement upon the tender of a gold ring or a pair of gloves, of the price of 12d, the tender and the price must be proved, or the revocation will be a nullity. (Hardin v. Warner, Sir W. Jones' Rep. 134.)

"In the case referred to, which contained the condition we have mentioned, the great question appears to have been, whether the price of 12d was confined to the gloves, or extended to the ring also: a ring only having been tendered. (Sugden on Powers, 220.)

"The strictness of courts of law, in requiring a literal observance of the most trifling forms, is not more remarkable, than the power assumed by the court of chancery, of dispensing, in some cases, with the most necessary. Indeed, there is nothing more calculated to excite our surprise than the extraordinary jurisdiction which has been exercised by courts of equity, in supplying the defective execution of powers. Thus, if it is expressly declared that the power shall be executed by a will, signed and published in the presence of three witnesses, so as to be sufficient in law to pass real estate; terms showing not merely the intention, but the anxiety of the party, that the solemnities of the statute should be followed, yet they may all be safely disregarded if the devise is to a wife or a child. An actual owner devises his estate to one or more of his children in exclusion of the others, but the will is attested only by one witness, and the devise is void both in law and equity. The same person makes a similar devise with a similar defect in execution, by virtue of a power expressly enjoining an execution by will according to the statute, and the devise, though void at law, yet in spite of the intentions of the party granting the power, and of the legislature, as expressed in the statute of wills, by the *fiat* of the chancellor is rendered valid. (Sugden on Powers, 353, 361.) We confess this has appeared to us a stretch of power that cannot be justified, and which considerations of a supposed equity are hardly sufficient to palliate. If the court of chancery may do this, we may well inquire what are the limits of its authority? What may it not do?

"The present state of the law in relation to the execution of powers, leads us to attach a peculiar importance to the regulations that we have proposed on this subject. They rest on the principle, that the alienation of lands by means of a power should be governed by the same rules as their alienation by the legal owner; and that where the general solemnities of law are observed, other formalities, though enjoined by the party, may be considered as immaterial, and be safely disregarded. These rules will not only render the system of alienation consistent, but as it seems to us, will relieve the execution of powers from any serious embarrassment, and by avoiding the extreme of rigor to which courts of law have been carried, remove any necessity or pretext for the interference of equity.

"In conclusion we remark, that on the subject of powers, the legislature may act with entire safety. They will disturb nothing. Powers are almost unknown in this state, and their use to the extent in which they are now authorized by law, is hardly consistent with our habits of society and general modes of alienation. In England, it is true, powers are found in almost every conveyance or settlement, and they are there of admirable use in perpetuating estates in families, and securing the possessions and power of a landed aristocracy. It is not surprising, therefore, that powers should be favored in England; for the continuance of the landed property of the kingdom, in the hands of its aristocracy, is the basis upon which the monarchy itself may be said to rest; but with us, it should never be forgotten, that it is the partibility, the frequent division, and unchecked alienation of property, that are essential to the health and vigor of our republican institutions.

"It is worthy of notice, that this view of the subject seems *partially* to have occurred to Mr. Sugden himself, the author of the very elaborate treatise on powers; to which we have frequently referred. At the close of a late publication occasioned by Mr. Humphreys' work on real property, Mr. Sugden states that a few years since he received a letter from an American gentleman informing him that an edition of the treatise on powers would probably soon be required in this country, and then adds the significant remark, 'I regretted at the time that a new state should embarrass itself with our forms of conveyancing, springing out of the doctrine of uses.' (Sugden's letter to J. Humphreys, p. 56.)

[1] "[§ 98, 99 R. S.] It is believed that these are the only sections of which the object is not sufficiently explained in our general observations. They are intended to prevent the interference of equity, in correcting what are called *illusory* appointments — a jurisdiction very questionable in itself, and of which the limits are still uncertain. When a fund is directed to be distributed amongst several persons, in such sums or proportions as the trustee of the power may think proper, it has been decided that each person is entitled to a share, but at law the power is held to be well executed, if any share, however trifling, is allotted to each. A different rule, however, was established in equity. It was there decided, that each person was entitled to a substantial share; and that a distribution allotting a nominal sum to one or more of the objects of the trust, was illusory and void. 'In the meanwhile' (we copy the observations of Mr. Humphreys), 'the question soon arose, what was a substantial share? It was, however, more readily raised than answered, and finding the principle untenable, or at least the rule impracticable, but deeming it too late to abandon an established doctrine, courts of equity have re-measured their steps; and having decided on one occasion that a 190th share was unsubstantial, the actual rule appears to be that any gift short of that proportion (in one case a 122d part), is not illusory.' (Humphreys on Real Property, p. 96.) The propriety of this equitable interference, was strongly questioned on one occasion by Sir William Grant, then master of the rolls, who remarked in strong terms, that he found it impossible to understand how the question whether a power was

[1] Refers to 1 R. S. 734, §§ 98, 99, *supra*, p. 371.

well or ill executed could receive different determinations in different courts. (Butcher v. Butcher, 9 Ves. jun. 382.)

"It is believed by the Revisers that all the difficulties on this subject are avoided, and the intent of the party creating the power fulfilled, by making the discretion of the trustee extend to a selection of the objects, as well as to the amount of the shares; in other words, by giving him *directly* the power, which *indirectly* he may now exercise."

"ARTICLE IV.—*Of alienation by deed.*"[1]

[2] *Original note to* § 140. "By the common law as now modified and understood in this state, the doctrine of implied covenants stand as follows:

"1. A conveyance in fee does not, of itself, imply a covenant of title (2 Caines' Rep. 188), but the word *give*, in such a conveyance, implies a warranty, for the life of the grantor. (2 Caines, 195; 7 Johns. Rep., 258.)

"2. The words *grant* and *infeoff* import a warrant, in an estate for years, but not in an estate in fee. (2 Caines' Rep., 188.)

"3. An express covenant in the deed takes away all implied covenants. (11 Johns. Rep., 122.)

"The general practice in this state having been to take special covenants where the grantor intended to make himself liable for the validity of the title, it is apprehended that the doctrine of implied covenants frequently operates to the injury of grantors. Especially when it is considered that the distinctions taken in the books upon the effect of particular words, are so techninal and refined as to be wholly unintelligible to any except professional men. Indeed, the ablest lawyers have admitted, that they were not able to assign a very solid reason for the distinction between the force and effect of the words '*give*' and '*grant*,' but as they found it established, they have felt themselves bound to carry it into effect. (Kent, Ch. J., in 2 Caines, 195.) It is obvious that rules of this nature must be generally unknown to the great mass of our community. It is no answer to say that prudent persons about to execute a conveyance, will take the advice of counsel; for in this respect many of our most intelligent citizens are quite imprudent. The fact is notorious, that a great part of the deeds executed in this state, are prepared by persons who have no knowledge of the law. And there is every reason to believe that this practice will always continue to a very considerable extent.

"One of two things ought therefore to be done by the legislature — implied covenants should either be entirely abolished; or the cases in which they shall exist, and their consequences, should be enacted for general information. In the preceding section the Revisers have adopted the latter course, and the section adopts the views of those who think that every sale for a valuable consideration, ought to subject the grantor to a warranty of the title. This is the rule of the civil law, though contrary to the policy of the common law.

[1] The Revisers' notes to this article of part II of the Revised Statutes are still important. The article itself is now transferred to article VII of The Real Prop. Law, *supra*, pp. 477–543.

[2] The sections reported by the Revisers with this note were only partly adopted by the Legislature in 1 R. S. 738, § 140, *supra*, p. 500.

"The measure of damages above prescribed, is conformable to the law of this state, as settled in respect to express covenants of quiet enjoyment and general warranty. (See 4 Johns. Rep., 1; 3 Caines' Rep., 111; 5 Johns. Rep., 49; 7 Johns. Rep., 173; 9 Johns. Rep., 324; 13 Johns. Rep., 50.) This rule of damages makes no provision for improvements made by the grantee, and in that respect is liable to objection."

[1] [§ 139, R. S.] *Original note.* "The opinion has been advanced by our courts, that a mortgage when given to secure the payment of money, imports a covenant to pay the money, whether a special covenant be inserted, or a bond or other security be given, or not. This is supposed to be contrary to received and very natural opinions. It is therefore proposed to abrogate the rule."

[2] [§ 140 R. S. inserted by the legislature in conformity to one of the suggestions contained in the preceding note to § 140.]

[3] [§ 141 R. S.] *Original note.* "By lineal warranty is meant, the obligation imposed upon an heir by the warranty of his ancestor, to give to the warrantee upon his eviction, lands of equal value to those he has lost, out of the real assets descended to such heir, if he have such assets. Collateral warranty is where the land warranted could not have descended from the warranting ancestor, and yet the warranty debarred the heir from claiming the land and imposed on him the same obligation as a lineal warranty. 4th Cruise, 436, 437. Collateral warranties are abolished by § 26, 1 R. L., 525. As to lineal warranties, our statute rendering heirs and devisees liable for the obligations of their ancestor, is a better provision. And the subsequent sections, 181 and 182, provide for their operation as a bar to claims by heirs."

[4] [§ 143, 144, 145 R. S.] *Original note.* "The three last sections agree substantially with a section from the laws of Virginia, [v. 1, p. 368, § 20.] The section referred to was proposed by the Revisers of 1783, as a substitute for several English statutory provisions, which have been transcribed into our statute books, viz.: § 1, 2, and 7, of the act to prevent fraudulent alienations (1 R. L., 181, 183), and § 26, of the act for the amendment of the law (1 R. L., 525.) The effect of the last section now proposed, is to abrogate the statutory forfeiture given by § 1 of the act 1 R. L., 183, and the common law forfeitures consequent upon alienations, when made by feoffment or fine. Those forfeitures were founded on strict feudal principles, and are conceived to be not only inapplicable to our present state of society, but absolutely unjust. A feoffment at common law, of the whole estate, made by a tenant for life, was held to operate as a disseisin of the persons entitled in expectancy, and had the strange effect of passing an actual fee. Hence, in order to protect the interests of the remainderman and reversioner, it became necessary to give them the immediate right of entry, by declaring that the feoffment should work a forfeiture, since otherwise, by the continued possession of the feoffee, or his death

[1] Refers to 1 R. S. 738, § 139, *supra*, p. 496.

[2] Judge Edmonds' note to 1 R. S. 738, § 140.

[3] Refers to 1 R. S. 739, § 141, *supra*, p. 502.

[4] Refers to 1 R. S. 739, §§ 143, 144, 145, *supra*, pp. 491, 495.

whilst in possession, the expectant estate might have been entirely defeated or barred. No such necessity, however, will exist, when the conveyance by feoffment shall be abolished, and the only effect of a grant in fee, by the tenant for life, shall be to pass his own estate. By such a conveyance, the rights of the reversioner and remainderman will not be at all affected, and the only consequence of declaring that it shall work a forfeiture, will be to enable the tenant for life to defraud an innocent purchaser."

[1][§ 146 R. S.] *Original note.* "1 R. L., 525, § 25, intent more explicitly declared."

[2][§ 147 R. S.] *Original note.* "Conformable to § 8, 1 R. L., 173, with the exception of requiring one year's possession."

[3][§ 148 R. S., except that the clause after "*representatives*" was added by the legislature.] *Original note.* "It is proposed to abolish the law of maintenance and to qualify that of champerty, as declared in the statute 1 R. L., 172, so far as to permit mortgages of lands held adversely. The great objection to these laws has been, that a destitute claimant is often prevented by their operation from enforcing his rights; whereas if he were permitted to avail himself of the property, for the purpose of procuring professional assistance and defraying the unavoidable and often heavy expenses of a litigation, he would be placed more nearly on an equal footing with his antagonist, who happens to be in possession. Desirous to obviate this objection, so far as it is entitled to weight, but at the same time unwilling to propose the certain abolition of the present law, the Revisers have adopted a middle course, by allowing a claimant to mortgage lands held adversely. The prohibitions of the champerty act, so far as they are consistent with this modification, will be inserted in Part IV."

"TITLE III.— *Of estates in dower.*"[4]

[5][§ 1. Same as enacted.] *Original note.* "Conformable to 1 R. L., 56, § 1. An anomalous distinction has heretofore obtained between *dower* and *curtesy*. It has long since been established, that trust estates were subject to curtesy (1 Cruise, 486;) yet it is equally well settled that a widow is not dowable of such an estate. (1 Cruise, 488.) 'The first time this point appears to have been determined (says Cruise), was in 12 Car. II.; and though the doctrine has been followed by subsequent chancellors, yet they have always expressed their regret at being bound by such a precedent.' This distinction has been expressly abolished in some of our sister states, and though not noticed in the above section, is in effect abrogated by the provisions of the second Article of the preceding Title, abolishing trusts, except when created for active purposes."

[1] Refers to 1 R. S. 739, § 146, *supra*, p. 496.

[2] Refers to 1 R. S. 739, § 147, *supra*, p. 516.

[3] Refers to 1 R. S. 739, § 148, *supra*, p. 516.

[4] The notes of the Revisers to title III, part II, R. S. refer to their draft, afterwards title III of chapter 1, part II, R. S. "Of Estates in Dower." Title III, chapter 1, R. S. on Dower is now embodied in article V, The Real Prop. Law, *supra*, pp. 403–444.

[5] Refers to 1 R. S. 740, § 1, *supra*, p. 403.

[1] [§ 2. Same as enacted.] *Original note.* "New, but conformable to the decision of the supreme court, in 1 Cowen, p. 89, which was confirmed by the court for the correction of errors, in 5 Cowen, 713."

[2] [§ 3. Same as enacted.] *Original note.* "First clause declaratory of the existing law, 1 Inst., 31, b. 1. Cruise, Title 6, ch. 3, § 14; latter clause new."

[3] [§ 4. Same as enacted.] *Original note.* "By the existing law, a widow is entitled to her dower in lands mortgaged before marriage (15 J. Rep., 319), except as against the mortgagee."

[4] [§ 5. Same as enacted.] *Original note.* "Conformable to *Stow* and *Tifft*, 15 Johns. R., 458, in which the court were divided; and 5 Cowen, 316."

[5] [§ 6. Same as enacted.] *Original note.* "This is now the rule in chancery, when a sale is made under a decree, but not when a sale is made under a power of sale, though it is apparent that the equity is the same."

[6] [§ 7. Same as enacted, except that the words, "*unless his estate therein shall become absolute*," were altered by the legislature to "*unless he acquire an absolute estate therein.*"] *Original note.* "Conformable to the principles of the cases in 4 J. Rep. 41; 11 Ib. 534; 15 do. 319."

[7] "§ 8. [§ 8 R. S. *substituted by the legislature in lieu of the following, but see Title I, § 42, 48, chap. 8 of Part II.*] If a wife commit adultery, and the fact be established against her, either by a decree dissolving the marriage contract, or by proof in any action brought by her, to recover her dower, she shall be barred forever of all claim and right to dower of her husband's lands; unless it be shown that, after knowledge of such adultery, her husband was reconciled to her, and that he permitted her thereafter to dwell with him, in which case she shall be restored to her right of dower." *Original note.* "1 R. L. 58, § 7, and 2 R. L. 196, § 8. Language of the first varied so as to conform to the original intent of its makers."

[§ 9, 10, 11. Same as enacted.] *Original note.* "The three preceding sections are intended as a substitute for the whole of section 8 of the act 1 R. L. 58, except the last clause, giving a compensation in case of eviction. That section is a transcript of the statute, 27 Hen. VIII, ch. 10, § 6, and has always received a very strict construction. Conceiving that it would be attended with beneficial effects, to facilitate the barring of claims for dower, the Revisers have in the above sections extended the principle of the existing statute, so as to embrace any provision, whatever may be its nature, which is intended as a jointure. In this they have in truth but followed the existing law, for though jointures under the statute must in all points strictly conform to the provisions of the act, yet the courts of equity have introduced a new species of jointures which are equally effectual. The existing statute is defective in not pointing out the mode in which the

[1] Refers to 1 R. S. 740, § 2. *Cf. supra*, p. 74.

[2] Refers to 1 R. S. 740, § 3, *supra*, p. 411.

[3] Refers to 1 R. S. 740, § 4, *supra*, p. 412.

[4] Refers to 1 R. S. 740, § 5, *supra*, p. 413.

[5] Refers to 1 R. S. 741, § 6, *supra*, p. 415.

[6] Refers to 1 R. S. 741, § 7, *supra*, p. 416.

[7] Refers to 1 R. S. 741, § 8, *supra*, p. 417.

[8] Refers to 1 R. S. 741, §§ 9, 10, 11, *supra*, pp. 420, 423.

assent of the intended wife is to be manifested, and in providing no guards for the protection of infants, both which omissions are supplied by the above sections."

[1][Same as § 14 R. S. except that it was so altered by the legislature as to apply to last two sections.] *Original note.* "New. Some mode of evincing her election should be prescribed, and some time, within which it shall be made."

[2][§ 15 R. S.] *Original note.* "This is an alteration of the existing law, the statute which bars the wife guilty of adultery from dower, not extending to jointure. (Cruise, title 7, ch. 3, § 4.) It is conceived that the law should be the same in both cases."

[3][§ 17 R. S.] "§ 17. A widow may tarry in the chief house of her husband, forty days after his death, *unless her dower be sooner assigned her*, without being liable to any rent for the same, and in the mean time she shall have her reasonable sustenance out of the estate of her husband." *Original note.* "1 R. L. 56, § 1. Italics new and conformable to 7 Johns. Rep. 247, and to the republication of Magna Charter, 1 Hen. III."

[4][§ 18 R. S.] *Original note.* "1 R. L. p. 60, § 1, allows a widow her lifetime to prosecute for her dower. By the revised statute of limitations, a woman must demand every other estate in lands to which she may be entitled, within twenty years, subject to the exceptions contained in the preceding section. If it be an object in any case to quiet titles, to protect honest purchasers, and to excite to a vigilance equally beneficial to the claimant and to others, it is conceived that this case requires the necessary provisions to attain it, as much, if not more, than any other."

[5][§ 19, 20, 21 R. S.] *Original note to* § 20. "§ 2, 1 R. L. 57. The rule of damages given more explicitly according to the authorities; see Co. Litt. 32, 33; 2 J. Rep. 485. As the alienee of the heir may plead *tout temp prist*, and thereby throw upon the plaintiff the proof of a demand, it seems better to declare at once that the damages shall commence from such demand. This is also perfectly equitable, and becomes necessary by extending the action of ejectment to the recovery of dower, as in that action special pleading is not allowed, and without pleading it the defendant would be deprived of the benefit of such a defense, according to the present rules of pleading. The provision limiting the recovery to six years' rents and profits, is in analogy to the universal rule in all other cases. This rule is founded on great principles of public policy, for the protection of the actual cultivator of the soil, and is as applicable to the recovery of a dower claim, as to a recovery of any other estate in lands. The 20th section is conformable to existing law in all other cases, and has been adopted by the legislature in the Title concerning ejectment."

[1] 1 Refers to R. S. 742, § 14, *supra*, p. 431.

[2] Refers to 1 R. S. 742, § 15, *supra*, p. 434.

[3] Refers to 1 R. S. 742, § 17, as drafted but not adopted. *Supra*, p. 439.

[4] Refers to 1 R. S. 742, § 18, now § 1596, Code Civ. Proc.

[5] Refers to 1 R. S. 742, §§ 19, 20, and 1 R. S. 743, § 21, now §§ 1600, 1601, 1603, Code Civ. Proc.

[1] [§ 22 R. S.] *Original note.* "As the widow is limited by a previous section, in her recovery of damages from the time of demand of the alienee, it seems but just to permit her to recover of the heir."

[2] [§ 23 R. S.] *Original note.* "Co. Lit. 35, a. If the heir assign to the widow dower in satisfaction of her claim upon him, and upon the lands of the feoffees of her husband, it may be pleaded in bar by the heir; but the better opinion seems to be that it cannot be pleaded by the feoffee. This section is proposed to remedy this defect."

[3] [§ 24 R. S.] *Original note.* "The first part of the 5th section, and part of the 6th section of the same, consolidated and extended to the new summary applications, as they are within the same principle." [25 R. S.] 1 R. L. 368, § 17.

"TITLE IV.— *Of estates for years and at will, and the rights and duties of landlords and tenants.*" [4]

[5] [§ 1. Same as enacted.] *Original note.* "4th section of act of 1820, p. 178. Proviso omitted; it having been adopted as a general provision in ch. 7, part 2."

[6] § 5 *and* 6 *as reported; not enacted;* § 5 *and* 6 *R. S. substituted.*

Original note. "The law on this subject, is somewhat peculiar and anomalous. In 7 J. Rep., 205, and 18 do. 94, the supreme court held that possession being *prima facie* evidence of title, when it was connected with an equitable title, the party had an *interest* in lands within the statute of frauds; and that such interest was subject to sale under execution. But in 1 John. Ch. Rep., 52, the chancellor held that the vendor did not become seised to the use of the vendee, until the whole consideration money be paid; and that where a part only is paid, the vendee has a mere equity which cannot be reached by execution. This was sanctioned by the court of errors, in 17 J. Rep., 351. But notwithstanding, since these cases, the courts allow the interest of the vendee to be sold, and such sale to be conclusive upon him. In this state of the law, it is obvious that the interest of the vendee may be sacrificed without any or with very little benefit to the creditor, whose title is so precarious. At the same time great opportunity is afforded for fraudulent investments in a species of property which thus defies all legal or equitable jurisdiction. It is conceived the interest of the community will be promoted, by adopting the principle contained in the two preceding sections."

[7] § 9 *as reported; varied in* § 9 *R. S. Original note.* "Proviso to 1st section of act of 1820, p. 177, except the latter part as to notice, which is rendered necessary by the construction given by the supreme court in 4th Cowen, 350, that although the tenancy is determined by three months' notice to quit, yet a further notice of six months is necessary."

[1] Code Civ. Pro. §§ 1600, 1601, 1603.

[2] Id. *supra.*

[3] Id. *supra.*

[4] The notes of the Revisers on this title of the Revised Statutes are still important. The title itself is now embodied in article VI, The Real Prop. Law, pp. 445-476, *supra.*

[5] Refers to 1 R. S. 744, § 1, *supra*, p. 476.

[6] Refers to 1 R. S. 745, §§ 5, 6, now in Code.

[7] Refers to 1 R. S. 745, § 9, *supra*, p. 467.

[1] [§ 10, 11. Same as enacted, except the substitution in § 11, of "*one month's notice*" for *three*, as reported.] *Original note.* "21st section of same act, p. 446, and 8th section of act of 1820, p. 179, consolidated: the provision respecting bail omitted, as it would be required in the action.

[2] [§ 15, 16 R. S.]

Original note to § 12 *to* 15. "§ 12, 1 R. L., 437, provides that no goods, levied upon under an execution, shall be removed from demised premises, until the rent be paid, and authorizes the collection of the amount so paid, by virtue of the execution. It has given rise to much litigation, and is very liable to abuse. In practice, a claim to rent is a common resort to protect property from an execution. Presumptive evidence of such a claim and its amount, should be required as well to protect the creditor having an execution, as the defendant. For the latter is thus exposed to have his property sold upon a mere claim for rent, without any opportunity to contest it. A notice from the landlord is now required, to prevent a removal of the goods; 11 J. Rep. 185. If that notice is to amount to anything, it should be verified. It is not perceived why the goods may not be removed and sold, to satisfy the landlord's claim, instead of the circuitous mode of paying the claim first and selling the goods afterwards. By allowing a sale, the claim is satisfied; or the tenant is enabled to contest it. Thus the rights of all parties seem to be guarded, and collusion between a landlord and his tenant to defraud a creditor as well as collusion between a plaintiff and landlord to oppress a tenant, are prevented. The preceding four sections are proposed to attain these objects."

[3] [§ 17 R. S.] *Original note.* "This is just, to prevent an extortionate claim of the landlord."

[4] [§ 18 R. S.] *Original note.* "Conformable in part to the statute of 4 Geo. II, ch. 28, § 5, which has never been re-enacted in this state; and in part to the decisions of the supreme court, in 10 Johns. Rep., 91, and 2 Cowen, 656."

[5] *Original note to* § 21. [§ 19 R. S.] "1 R. L. 439, § 18, abbreviated and made more comprehensive."

[6] *Original note to* § 22, 23, 24. "The three last sections are new in form, but intended to include all the various provisions of the 'act to enable grantees of reversions to take advantage of the conditions to be performed by lessees.' 1st vol. R. L., p. 363."

"TITLE V.— *Miscellaneous provisions of a general nature.*"[7]

[8] [§ 3 R. S., as originally enacted. This section was afterwards amended on the suggestion of the Revisers, by act of 1830, chap. 320, § 11, by insert-

[1] Refers to 1 R. S. 745, §§ 10, 11, *supra*, pp. 470, 472.

[2] Refers to 1 R. S. 746, §§ 12, 13, 14, 15. Not re-enacted in The Real Prop. Law.

[3] Refers to 1 R. S. 746, § 17, not re-enacted in The Real Prop. Law.

[4] Refers to 1 R. S. 747, § 18, not re-enacted in The Real Prop. Law.

[5] Refers to 1 R. S. 747, § 21, *supra*, p. 450.

[6] Refers to 1 R. S. 747, §§ 22, 23, 24, *supra*, pp. 452, 453.

[7] Title V, chapter I, part II, R. S. is now embodied in article VII, The Real Prop. Law, *supra*, pp. 477–543.

[8] Refers to 1 R. S. 748, § 3, not re-enacted in The Real Prop. Law.

ing the words "*or of the register or assistant register of the court of chancery, where the jurisdiction shall belong to that court.*"

Original note to § as first proposed and enacted. "Some provision seems absolutely necessary, to protect persons purchasing from heirs. This section will be useful to purchasers, and is so guarded as to afford a reasonable time to the devisee to become acquainted with his rights." *Original note to amendment of* 1830. "See *post* § 12, in which provision is made for proving foreign wills, by commission from the court of chancery."

[1] [§ 4 R. S.]

Original note. "Where the testator or intestate has given a bond or other personal security for a mortgage debt, and probably in all cases where a mortgage is given to secure the payment of money, the personal estate, by the existing law, is the primary fund for the payment of the debt, and the heir or devisee may throw the charge upon the personal representatives. (See all the cases collected by Chancellor Kent, in Cumberland v. Codrington, 3 Johns. Ch. R., 229.) This rule of law is unknown to the generality of our citizens. The received opinion is, that the land is first liable for the debt; and it can hardly be doubted that the intentions of testators have frequently been defeated by the operation of the rule. It is therefore submitted, whether it ought not to be abrogated."

[2] *Original note to* § 1, 2, 3, R. S. "By the common law the word 'heirs' is indispensable in a deed, in order to convey an estate in fee. Even if land be given to a man forever, or to a man and his assigns forever, he takes but an estate for life, (2 Black. Com. 107.) 'This very great nicety about the insertion of the word 'heirs,' (says Sir Wm. Blackstone,) in order to vest a fee, is plainly a relic of the feudal strictness.' It may be added, that in most cases it defeats the intention of the parties, and in all cases is repugnant to the common understanding of mankind.

"When a person uninstructed in legal refinements disposes of property, if he intends to give but a limited or partial interest, he will always state it; the omission of such a qualification, is, of itself, the highest proof that he intended to give the whole. This is also the rule of law in reference to transfers of personal property; and so far as the courts could venture to go, with the common law rule staring them in the face, they have extended it to devises of real estate.

"Perceiving that to require the word 'heirs,' as essential to pass a fee, in wills would often defeat the intentions of testators, the courts at an early day, established the principle that a fee would pass in a will, either by words of inheritance or by words tantamount; but as there has been a constant struggle to give effect to this principle, without directly violating the feudal rule, which still governs in deeds, numerous distinctions have been introduced, which have given rise to much litigation and uncertainty.

"The rule in § 2 will remove this anomalous distinction, and place deeds and wills on the same footing.

[1] Refers to 1 R. S. 749, § 4, *supra*, p. 498.

[2] Refers to 1 R. S. 748, §§ 1, 2, 3, *supra*, p. 478. (§ 3 was not adopted by the Legislature as proposed by the Revisers, but the essence of the note is applicable to 1 R. S. 748, §§ 1, 2, *supra*, p. 478.)

"In recommending this alteration of the existing law, the Revisers have the sanction of the highest authorities. Chief Justice Reeve, of Connecticut, (Essay on terms, 'heirs,' &c. in his work on domestic relations,) Mr. Brougham (Speech in British House of Commons, on the state of the Law, p. 111,) and Mr. Humphreys (Observations on the Laws of Real Property, p. 236,) are among those who have denounced the existing rule, or recommended its alteration.

"In the state of Virginia, and in several other states, provisions similar to the above, have been enacted by the legislature.

"The object of § 3 is to make the intention of the parties, in all cases and in all courts, the paramount and governing rule of interpretation, thus extending to conveyances, the principle which now prevails universally, in relation to personal contracts, and which to a great extent, is adopted in equity, in the construction of wills, appointments under powers, and marriage articles. Were we not reconciled to it by a long habit of acquiescence, nothing would probably appear to our minds more strange and unreasonable, than that different and conflicting rules of interpretation should prevail in different courts, acting under the same system of laws, and deriving their authority from the same government; yet it is literally true, that the very same words which are understood in one sense, if contained in a deed, of which the construction properly belongs to a court of law, are declared to have a meaning directly opposite, if contained in an instrument, which it is the province of equity to interpret or execute. This can not be right. If with the view of attaining certainty in the construction of written instruments, it is just that the intent of parties should be made to yield to strict rules of construction, a discretionary power of relaxing those rules should never be given; for by admitting such a discretion, the whole policy of the law is defeated: on the other hand, if it is unreasonable and unjust, that the intent should be overruled and defeated by the application of technical rules, why should not a court of law, as well as of equity, dispense with their observance? Is their observance in such a case, less unreasonable and unjust in the one court, than in the other? Or is it that relief is to be denied in the one, merely that the party, at great expense, may be compelled to seek it in the other? For, in many cases, this is the necessary result of the present system.

"That this discrepancy in the rules of interpretation is a serious defect in our jurisprudence, has been admitted by many eminent writers, and there are obviously only two modes by which it can be remedied. We must either extend to every instrument concerning the title to lands, the same strict rules of construction, that now obtain in regard to conveyances, and enforce their observance in every court; or we must declare that in conveyances also, the construction shall follow the intent. By adopting the first mode, we shall undoubtedly prevent some litigation, and attain a greater certainty in the construction of written instruments; but to attain that certainty, we shall sacrifice the intention of parties, check alienation, defeat estates, favor injustice, and give impunity to fraud.

"CHAPTER II."[1]

"OF TITLE TO REAL PROPERTY BY DESCENT."

[§ 1. Same as enacted, except that sub. 3 was inserted by the legislature.]

Original note. "The term 'real estate,' is defined in the 21st section of this Chapter; and the above section, as thus interpreted, effects an important, and, it is believed, salutary change in the present law. Descents, under the present statute, are confined to cases where the ancestor died *seised* of the estate: so that where there is an adverse possession at the time of his death, or where the right of the ancestor is contingent or executory, the inheritance, instead of descending, according to the principles of the statute, to all the heirs equally, would pass, 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 fee 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 descendant of such son, in exclusion of all his other children. It is difficult to believe that such was the intent of the legislature by whom the statute was originally passed; but such is the construction which the courts are compelled to adopt, in consequence of the use of the technical term, '*seised*.' The object of the Revisers, is to substitute, throughout, the principles of the statute, for the rules of the common law; so that wherever, at common law, the eldest descendant or brother would take, all the children or brothers, &c. shall take, under the provisions of this chapter: and they are satisfied, that by making this alteration, the law will be conformed to the general sense of the community. The Revisers feel it their duty to state, that the change now proposed, (as well as some other valuable improvements,) was suggested to them by the late Mr. Emmet, in a written communication to the Revisers."

[2] [§ 2, 3, 4. Same as enacted.] *Original note to* § 4. "Residue of the 2d rule of the existing statute. It seems unnecessary to provide specially for the case of a descent to grand children and children of grand children, in unequal degrees, as is done in the existing statute. The general terms here adopted, are sufficient to reach all the cases that can occur, and to the remotest degree."

[3] [§ 5. Same as enacted, and published in the first edition, except that in addition to the words in the statute, the following words were also contained in the reported §, "*in which case it shall descend as if such intestate had survived his father.*" But by amendatory act of 1830, chap. 320, § 13, a new section was substituted on recommendation of Revisers.] *Original note to* § *as first proposed.* "If in addition to those incorporated in the text, any further alteration in the law of descents be admissible, it would seem that

[1] The original notes to chapter II, part II, R. S., are still very explanatory of the changes wrought by the statute of New York in the old common law of descents. The sections in chapter II, part II, R. S., are now re-enacted in article IX of The Real Prop. Law. pp. 608–660, *supra*.

[2] Refers to 1 R. S. 751, §§ 2, 3, 4, pp. 625, 627, *supra*.

[3] Refers to 1 R. S. 751, § 5, *supra*, p. 629.

none could be more just than to allow the mother of the intestate to take the estate for her life, where there is no father. Under the present statute there is no case in which the mother would be entitled to take, an omission which is supplied in the statutes of most of the other states in the union. Should the suggestion of this note be approved, the following words may be added to the above section: 'If the intestate leave no father, the inheritance shall descend to his mother during her life, and after her death, to the persons who would have been entitled as heirs, at the time of the death of the intestate, had there been no mother.' If this clause should be adopted, some modification of the other sections will be necessary." *Original note to new section proposed in* 1830. "Under the sixth section of this chapter, which was introduced during its passage through the legislature, an inheritance on the part of the father may descend to the mother in fee, in exclusion of the collateral relatives of the father, and under the twelfth section, an inheritance on the part of the mother in default of collateral relatives on her side, would go to the collateral relatives of the father, although he himself might then be living. It seems unreasonable that the mother should possess greater privileges than the father, and still more so, that a brother or sister of the father, should be entitled to take in preference to him. The amendment proposed, removes these incongruities, and renders the provisions of the statute reasonable and consistent."

[1] [§ 8, 9 R. S.] *Original note.* "It has been decided by the supreme court, (6 Johns. Rep. 322,) and the words of the statute seem plainly to demand that construction, that nephews or nieces, where there are no brothers or sisters, do not take equally, but only the shares of their respective parents, thus changing the rule that obtains as to lineal descendants, who, when of the same degree of consanguinity, always take in their own right in equal portions, and not by representation. It seems desirable that the statute should be rendered uniform in its provisions, and no reason is perceived why the rule applicable to lineal descendants, should not be extended to collaterals. This is one of the alterations effected by the three last sections; another is, that they extend the right to take by descent, to the issue of nephews and nieces. As the law now is, a grand nephew could not take at all under the statute."

[2] [§ 11 R. S. except that after the word "*descend*" the words "*to the mother in fee, if there be no mother then*," were stricken out by the legislature, they having, by § 6, R. S. made provision for the *mother*.] *Original note.* "The present statute does not regulate descents beyond the children of brothers and sisters, and leaves the common law to govern in all other cases, so that the eldest uncle and his issue take in preference to all others of equal degree. The two last sections are proposed to carry into effect the great principles of the statute throughout the nearest collateral branches, and to secure an equal distribution of the property to kindred of the same degree, and to them and their issue when of unequal degrees. The Revisers, however, doubt the expediency of carrying the rule of equal partibility beyond the limits now proposed, as the division of an estate

[1] Refers to 1 R. S. 752, §§ 8, 9, *supra*, p. 637.

[2] Refers to 1 R. S. 753, § 11, *supra*, p. 640.

amongst more remote relatives, on account of the multitude of shares, would render each portion so small that it would cease to be an object of any consideration. Those interested would have no adequate motive to assert their rights, and the whole estate would probably be intercepted by fraud from the heirs of the intestate. If the suggestion before made as to the mother, should be adopted, it would seem to be still more proper to provide for her, where there are no relatives of the father. In this case, therefore, the Revisers propose, by the words in italics, to give her the whole estate."

[1] [§ 15, 16 R. S.] *Original note to* § 12. "This section adopts the principle of the present law in reference to the kindred of the half blood, and extends that principle to the new cases introduced."

[2] [§ 18 R. S.] *Original note.* § 5 of the present act would seem to be confined to children of the intestate; but it was taken from the English act, 10 & 11 Will. III, ch. 16, which declared the right of posthumous children under a marriage settlement, and ought to receive a construction equally liberal. The terms of this section are conformable to a suggestion made by the Revisers in Chapter VI, of the second part, in regard to the distribution of the estates of intestates, which has been adopted by the legislature."

[3] [§ 28 R. S. as first enacted; but by sub. 25 of § 15 of the act of the 10th Dec. 1828, "Concerning the Revised Statutes," reported by the Revisers, the words, "*in the life time of*," originally reported and enacted, were directed to be omitted, and the word "*before*" substituted, and the § was so published.]

Original note to § 28: "To prevent doubt and avoid repetition."

[4] [§ 19 R. S.] *Original note.* "To avoid the repetition of the term *lawful*."

[5] [§ 20 R. S.] "The estate of a husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of this chapter; *nor shall the same affect any limitation of any estate by deed or will*." *Original note.* "4th section of present act. The saving clause in italics is new, but seems proper to be added. The general terms of the present law direct, that on the failure of descendants, the inheritance shall go to the collateral relatives; but it frequently happens, that where there are no issue of the intestate to take at his death, other persons are entitled under an executory devise, or other limitation. It seems full as necessary to save their rights, as the rights of tenants by the curtesy or in dower."

[6] [§ 21 R. S.] *Original note.* "So much of the latter part of the 4th section of the act concerning uses, 1 R. L., 74, as relates to this subject."

[7] [§ 22 R. S.] *Original note.* "This section is intended to change a very harsh rule of the existing law, by which a person not an alien himself, may sometimes be debarred from inheriting."

[1] Refers to 1 R. S. 753, §§ 15, 16, *supra*, pp. 645, 648.

[2] Refers to 1 R. S. 754, § 18, *supra*, p. 654.

[3] Judge Edmonds' note to 1 R. S. 755, § 28, *supra*, p. 609.

[4] Refers to 1 R. S. 754, § 19, *supra*, p. 642.

[5] Refers to 1 R. S. 754, § 20, *supra*, p. 609.

[6] Refers to 1 R. S. 754, § 21, *supra*, p. 609.

[7] Refers to 1 R. S. 754, § 22, *supra*, p. 653.

"CHAPTER III."[1]

"OF THE PROOF AND RECORDING OF CONVEYANCES OF REAL ESTATE, AND THE CANCELLING OF MORTGAGES."

Extract from original note to Chapter.

"The following chapter contains a revision of the several statutes, general and special, now in force relative to the acknowledgment, proof, and recording of deeds and mortgages, with such modifications as seemed necessary to give certainty and uniformity to the system."

* * * * * * * * * *

[2] [§ 1. Same as enacted.]

Original note. "Founded on 1 R. L., 362, 372. Laws of 1819, p. 269; 1821, p. 127; 1822, p. 261, 284; 1823, p. 412.

"The term '*conveyance*,' is defined in § 32; and as there defined, includes mortgages; the effect of which will be, to place deeds and mortgages on the same footing.

"The rules of priority as it respects deeds and mortgages, under the present statutes, are different, as has been decided by the supreme court, (19 Johns., 282,) and as the terms of the laws plainly show. A mortgage, *not recorded*, is absolutely void, as against a subsequent *bona fide* purchaser, although the mortgage may be subsequently recorded before the recording of the conveyance of the purchaser. But as between two deeds, in all cases, and between two mortgages, the time of recording is the only test of the rights of the parties. No reason can be perceived for a distinction between the cases; and whichever rule is the most just, should be applied equally to all. The recording of an instrument is a public act, which fixes the date of its delivery beyond all question; and by requiring that test in all cases, vigilance will be promoted, and the temptation to fraud by the concealment of deeds, will be removed.

"There is another distinction between deeds and mortgages, which this section will also abolish. The first mortgage, although first recorded, if not given in good faith and for a valuable consideration, is absolutely void as against any subsequent mortgagee or purchaser; so that the right of an assignee of such first mortgage, who had no notice of the fraud, would be postponed. But an innocent purchaser under a fraudulent *deed* first recorded, is entitled to a preference against any subsequent purchaser or mortgagee. It seems evident that an innocent assignee of a mortgage, is entitled to the same protection as an innocent purchaser."

[3] [§ 2. Same as enacted.] *Original note.* "This is according to the present practice, but perhaps not positive required by law."

[4] [§ 3. Same as enacted.] *Original note.* "The words '*and at the same time*,' new. The existing law deprives the party for whose benefit the deed shall

[1] The notes in this chapter refer to sections of chapter 3, part II, R. S., now re-enacted in article VIII, The Real Prop. Law, *supra*, pp. 544–607.

[2] Refers to 1 R. S. 756, § 1, *supra*, p. 549.

[3] Refers to 1 R. S. 756, § 2, *supra*, p. 591.

[4] Refers to 1 R. S. 756, § 3, *supra*, p. 597.

have been made, of the advantages 'given to *mortgages.*' The above section deprives him of all advantage from the *recording*, which seems to be only a just extension of the principle."

[1] [§ 4. Same as enacted. In this edition, sub. 3, added from act of 1829, chap. 222.] *Original note.* "This section embraces every officer now authorized by law to take the proof of deeds within the United States, and some more, viz.: District judges of the United States, the chancellor of the state, and the associate judges of the district of Columbia. The reason of each will be obvious. The words in italics, '*but no county judge, or commissioner of deeds for a county or city, shall take any such proof or acknowledgment out of the city or county for which he was appointed,*' are inserted to remove an existing doubt; vide 4th Cowen, 218, and in conformity to title 1, chap. 3, § 21, as to commissioners. The qualification to the second subdivision, is new, but seemed necessary. The intervention of officers of the United States and of other states, is also confined by the above section, to cases occurring out of this state."

[2] [§ 5, 6, 7. Same as enacted, except that the provisions relative to France and Russia, and to the making acknowledgment before the American Consul at London, were added by the act "concerning the Revised Statutes," reported by Revisers, and passed Dec. 10, 1828.] *Original note to section as first proposed.* "As to foreign ministers, laws of 1816, ch. 119, p. 118, extended in the above section to South America and to *charge des affairs*, who are perhaps not technically ministers, although they perform all the functions of the office.

"As to mayor of London, 3d section of act, 1st vol. R. L., p. 370; the other mayors, laws of 1817, p. 58, extended to all persons residing or being abroad."

Original note to amendments of December, 1828. "The three last propositions are recommended by gentlemen who are acquainted with the difficulties at present attending the proving of deeds, &c., in the countries specified. It is believed they will be a great relief to our citizens, as well as to our foreign ministers."

[3] [§ 12, *as reported; not enacted;* § 12 *R. S. substituted.*]

Original note. "Latter part of first section of same act. The first words in *italic* are in conformity to the decision of the supreme court, in 20 John., 480; where it was held, that the same objection might be made to the proof of a deed by an incompetent witness, as if he had been offered on the trial. A point of such importance should be explicitly declared in the statute. The words '*described in, and,*' supply a serious omission in the statute."

[4] [§ 13, 14. Same as enacted, except a transposition in § 13.] *Original note.* "Instances have occurred where the want of such a provision has been severely felt; it is taken from 7th section of the act for giving relief in cases of insolvency, 1st vol. laws, p. 463."

[1] Refers to 1 R. S. 756, § 4, *supra*, pp. 556, 563, 565.

[2] Refers to 1 R. S. 757, §§ 5, 6, 7, *supra*, pp. 567, 568.

[3] Refers to 1 R. S. 758, § 12, *supra*, p. 573.

[4] Refers to 1 R. S. 758, § 14, *supra*, p. 574.

[§ 15. Same as enacted, except the words "*where the same are known*," after "*residence*," in the report, omitted.] *Original note.* "1 R. L. 369, § 1; the part respecting residence of witnesses, new; deemed desirable in order to detect fraud or to sustain an honest deed."

[2][§ 16, 17. Same as enacted, the words in § 17, following "*thereby*," having been added by the legislature.] *Original note.* "5th section of same act, except that part which allows the proof to be contested. This is in conformity to the decision of the supreme court in 4th John. Rep., 161; 12th do., 469; 20th do., 480."

[3][§ 18. Same as enacted.] *Original note.* "The words 'not of the degree of counsellor at law in the supreme court,' introduced, to conform the statute to the decision of the supreme court, in 5 Cowen, 485."

[4][§§ 28, 29 R. S.] *Original note.* "1 R. L. 373, § 4. Varied so as to require the recording of the certificate of discharge. The practice of allowing a mortgage to be cancelled, without preserving the evidence on which it was done, is certainly dangerous, and is much complained of by clerks, who have no means provided by which they can show their authority."

[5][§ 34 R. S.] *Original note.* "Act of 1813, § 8, with the addition of a penalty upon the recording officers."

[6][§ 35 R. S.; except that the words "*malfeasance*" were substituted for "*misdemeanor*," and the words "*or in relation to the cancelling of a mortgage*," introduced by the legislature.] *Original note.* "Part of act of 1823, p. 413, so far as relates to damages, which repealed that part of the 9th section of the revised act of 1815. The part making any fraudulent practice a misdemeanor, is new, but probably only the existing common law; at all events, deemed salutary."

[7][§ 41 R. S.] *Original note.* "Assignments of mortgages will be included in the term 'conveyance,' as above defined; but the above qualification is proper in itself, and is agreeable to the opinion of the court of errors, in the case of James v. Morey, 2 Cowen's Reports."

[8][§ 42 R. S.] *Original note.* "Laws 1823, 413. 'Original leases in fee,' omitted, as leaving much room for fraud, where every other species of conveyance, even assignments of the same leases, or conveyances of part of the same lands, are required to be recorded."

[1] Refers to 1 R. S. 759, § 15, *supra*, p. 575.

[2] Refers to 1 R. S. 759, §§ 16, 17, now §§ 933, 935. Code Civ. Pro., *supra*, pp. 561, 562.

[3] Refers to 1 R. S. 759, § 18, *supra*, p. 582.

[4] Refers to 1 R. S. 761, §§ 28, 29, *supra*, p. 599.

[5] Refers to 1 R. S. 762, § 34, now § 134, Penal Code.

[6] Refers to 1 R. S. 762, § 35, *supra*, p. 607.

[7] Refers to 1 R. S. 763, § 41, *supra*, p. 601.

[8] Refers to 1 R. S. 763, § 43, *supra*, p. 546.

"CHAPTER VII."[1]

"OF FRAUDULENT CONVEYANCES, AND CONTRACTS RELATIVE TO REAL AND PERSONAL ESTATE."

Original preliminary note to Chapter. "The following chapter contains a revision of the act of the 26th of February, 1787, '*for the prevention of frauds*,' 1 R. L. 75. The provisions of this statute were transcribed chiefly from the English statutes *against fraudulent conveyances*, (3 Hen. VII, ch. 4; 13 Eliz. ch. 5, and 27 Eliz. ch. 4.) The seven last sections are from the celebrated statute '*for prevention of frauds and perjuries.*' (29 Charles II, ch. 3.) No alterations were made by the act of 1787, except in consolidating in one section (the 6th, 1 R. L. 77) the provisos in the 6th section of the 13th, and the 4th section of the 27th Eliz.

"The original statutes, and particularly the statute of frauds, have been in England fruitful sources of litigation. No branch of the law has led to so great a number of difficult questions, and upon none have the decisions been more contradictory upon minor points, or more fluctuating in their general principles. In our own books of reports, also, a very great proportion of the cases will be found to have arisen on the act of 1787.

"Notwithstanding the great number of adjudged cases, the true construction of many parts of the statutes is still unsettled. The decisions of our courts, upon that part of the act of 1787 which relates to *fraudulent conveyances*, have, of late years, considerably diverged from the course of construction adopted in England; and if the same remark cannot be made as to our decisions on the other branch of the statute, it may, at all events, be truly said, that there yet prevail many uncertainties and diversities of opinion, in regard to the effect of several of its provisions.

"The Revisers have, therefore, thought it impracticable and dangerous, to attempt to incorporate in the existing statute, the exposition which has been given by the courts to its various terms. And yet, they cannot hesitate to give it, as their deliberate opinion, that there are imperfections in this statute, which require to be remedied.

"The only course that can safely be adopted, seems to be that suggested by Lord Ellenborough, in the case of Doe v. Manning, (9 East, 59.) In that case, after holding that a voluntary conveyance is fraudulent, under the 27th of Eliz. as against a subsequent purchaser, even with notice, (a rule, by the way, which has been shaken, if not overturned, in the highest court of this state; see Verplanck v. Sterry, 12 Johns. 555), he remarks: 'Much property has no doubt been purchased, and many conveyances settled, upon the ground of its having been so repeatedly held, that a voluntary conveyance is fraudulent, as such, within the statute of 27th Eliz. And it is no new thing for the court to hold itself concluded in matters respecting real property, by former decisions upon questions, in respect to which, if it were *res integra* they would probably have come to very different conclusions. And if the adhering to such determination is likely to be attended

[1] The original notes to chapter VII, part II, R. S., are of great importance. The chapter itself is re-enacted in that "*omnium gatherum*" of Codes, article VII, The Real Prop. Law, *supra*, pp. 477, 543.

with inconveniences, it is a matter *fit to be remedied by the legislature, which is able to prevent the mischief in future, and to obviate all the inconvenient consequences which are likely to result from it, as to purchases already made.*'

"In accordance with these views, we have first given the act of 1787 verbatim, (except the enacting clauses, and except also that we have omitted sections 7 and 8, as belonging, if proper to be retained, to the third part of the revision, to be enacted by the legislature, if they shall think that the preferable course.) We have then proposed as a substitute for the present statute, a series of provisions, limited in their effect to future conveyances and contracts. In preparing these provisions, our great object has been to restore (in conformity to the general course of our own courts,) the salutary principles of the original statutes, with such modifications and improvements as have been suggested by experience, or as seem to be demanded by our state of society.

"If the substitute should be adopted by the legislature, some of the sections will more properly be referred to other chapters of the second part, so as to confine this chapter to provisions strictly applicable to *fraudulent* conveyances or contracts; but for the sake of presenting more distinctly our views as to the disposition to be made of the act of 1787, we have here given all the sections proposed to be substituted for it. If the substitute is adopted, it will still be proper to republish the present statute, with the Revised Laws; but in that case, we conceive it will be unnecessary to re-enact it."

[Here followed the act of the 26th of February, 1787, above referred to.]

"TITLE I.— *Of fraudulent conveyances and contracts relative to lands.*"

[1] [§ 1. Same as enacted.]

Original note. "Intended as a substitute for the 3d section of the present statute. The numeration of the different modes of alienation, and of the different interests in lands, is quite unnecessary, as they are all embraced in the terms 'conveyance' and 'lands,' as defined by the Revisers, in the last title of this chapter. 'Purchasers for a valuable consideration,' substituted for 'those who shall purchase for money or other *good* consideration,' as more definite, and in conformity to the settled construction of the statute, (2 Taunt. 69.) A person claiming under a voluntary conveyance, founded on a *good* consideration merely, as distinguished from a *valuable*, was never meant to be protected. That prior purchasers should be included in the statute, is rendered indispensable by the preference now given by our laws to registered over unregistered deeds."

[2] [§ 2. Same as enacted.]

Original note. "This section is intended to settle the question, whether a subsequent purchaser, with notice, can set aside a prior voluntary conveyance. Upon what grounds it was originally decided, that a subsequent purchaser, *with notice*, was entitled under the statute, to set aside a prior conveyance founded on a good consideration, such as love and natural affection, merely on the ground that it was voluntary, it is difficult to conceive.

[1] Refers to 2 R. S. 134, § 1, *supra*, p. 520.

[2] Refers to 2 R. S. 134, § 2, *supra*, p. 520.

Such a doctrine, it has been well remarked, enables a donor of lands, who repents of his donation, to do that circuitously, which the law would not permit him to do directly; and by the aid of a third person, to disappoint, at his pleasure, the object of his former bounty, (Evans' Collec. of Brit. Statutes, vol. 1, p. 368, note.) It would seem, however, from the later cases in England, that this doctrine is there firmly established; although several of their most distinguished judges have expressed their surprise and regret, that this exposition of the statute had ever prevailed, and have even intimated a wish that the legislature would interfere to correct the error, (9 East, 63; 4 Bos. & Pull. 332.) The supreme court, however, in this state, have, on all occasions where the question has come before them, shown a strong repugnance to follow the English cases, and have labored to restore a reasonable interpretation to the statute; and the Revisers are disposed to regard the decision of the court of errors, in Verplanck v. Sterry, (12 Johns. 536,) as fully justifying the section proposed, even on the ground of authority. It is certainly embraced in the reasoning of the only two members of the court who delivered opinions."

[1] [§ 3. Same as enacted, except that the word "*provision*" was substituted for "*condition*," as reported.] *Original note.* "5 § stat. meaning extracted, and useless terms rejected."

[2] [§ 4. Same as enacted.] *Original note.* "New, but supplying an important omission in the present statute, and plainly within its equity."

[3] [§ 5. Same as enacted.]

Original note. "This section conforms to the construction which the 5th section of the statute has always received, [Moor, 611; Twyne's case, 3 Coke's Rep. 82.] As the terms, however, of sections 3 and 4, like those of the present law, do not embrace cases of this description, it seems proper that the legislature should declare the rule by which they ought to be governed, instead of leaving the defect to be supplied by judicial interpretation."

[4] [§ 6. Same as enacted, except that the legislature substituted the words "*leases for a term not exceeding one year*," in lieu of "*leases not exceeding three years*," as reported.]

Original note. "This section is intended as a substitute for the 9th, 10th and a part of the 12th sections of the present statute. The first part of the 9th section is unnecessary, since persons taking possession of lands under a parol grant, or by livery and seisin, in cases where written conveyances are required, as they acquire no title, will of course be tenants at will. The provision has, however, been inserted by the Revisers in another chapter, to which, if proper to be declared at all, it properly belongs. The limitation also of the rent on leases for three years, is omitted, as in this country entirely useless, and making the validity of the lease depend on a fact in many cases difficult to be ascertained. The person making the lease, is surely a safe judge of the rent to be reserved. Powers relating to lands have been included, in conformity to the construction which the statute

[1] Refers to 2 R. S. 134, § 3, *supra*, p. 531.

[2] Refers to 2 R. S. 134, § 4, *supra*, p. 531.

[3] Refers to 2 R. S. 134, § 5, *supra*, p. 531.

[4] Refers to 2 R. S. 134, § 6, *supra*, p. 484.

has always received. By the 12th section declarations of trust must be signed by the party declaring them, but no reason is perceived why trusts may not be declared, as well as lands conveyed, by an agent acting under a power in writing."

[1] [§ 7. Same as enacted.] *Original note.* "Intended to express the substance of part of § 12, of § 13, and part of § 14, of the present act."

§ 8 *as reported; enacted with important variations* § 8 *R. S.*

Original note. "Founded on the 11th section of the present act. Under that section it has been held, among other things,

"1. That a letter or other writing, though written subsequently to the making of the agreement, is sufficient to take the case out of the statute. This has led to many refinements and distinctions. By omitting the words '*note or memorandum thereof*,' and requiring the contract to be reduced to writing, the language is made more precise, and the door closed to the introduction of similar exceptions.

"2. That the literal act of *signing* is not necessary, although the statute speaks of '*signing*.' After setting out with this principle, the courts found themselves perfectly at large, as to what should be considered a signing To prevent difficulties of this sort hereafter, the Revisers propose to require that these agreements shall be *subscribed*.

"3. That it is sufficient, as against the party sought to be charged, if the instrument be signed by him; and accordingly the courts of equity will decree a specific performance of an agreement to sell lands, against the person who holds the written engagement of the other party signed by him alone, though the latter may be wholly remediless. Many of the ablest judges in England and in this country, have regretted this rule of construction. (See the remarks of Chancellor Kent in 14 Johns. Rep. 489.) The Revisers have proposed in the above section, what seems to them a sound rule.

"4. That the *consideration* of the agreement be in writing. This has been followed in the above."

[2] [§ 9. Same as enacted, except that the words "*lawfully authorized*," were substituted by the legislature for "*authorized by writing*," as reported.] *Original note.* "Under the existing statute, it has finally been held that the agent need not be authorized by writing, 9 Ves. jr. 250; 1 Sch. & Lef. 31. The alteration it is supposed will be useful."

[1] Refers to 2 R. S. 135, § 7, *supra*, p. 484.

[2] Refers to 2 R. S. 135, § 9, *supra*, p. 514.

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